

# EXAM STRUCTURED ANSWER

## 1. Determine the Governing Law (Date of Death)

- The date of the deceased's death is the 'critical date' for determining which legislation applies:
  - **Died ON OR AFTER 1 January 2025:** Governed by the *Succession Act 2023 (SA)* (which consolidated the above acts).
    - *Death (Definition) Act 1983 (SA)* s. 2;
      - For the purposes of the law of this State, a person has died when there has occurred—
        - (a) irreversible cessation of all function of the brain of the person; or
        - (b) irreversible cessation of circulation of blood in the body of the person.
    - *Barrett v Coroner's Court of South Australia* [2010] SASFC 70 [52] (White J)
      - “This Act defines when a person, ie, a person who has previously had life, is to be taken to have died. There seems little logic in applying a law specifying when a person is to be regarded as being dead, which presupposes that the person was once alive.”
  - IF DEATH IS CONTESTED – CONTEXTUALITY
    - McPhail, Matthew Anthony [2002] SACorC 25 - at 4.2
      - *The preamble to the Death (Definition) Act announces that it is ‘An Act to provide a definition of death for the purposes of the law of South Australia’. In spite of that, and in spite of the name of the Act, it does not define ‘death’ in terms of what ‘death’ is.*
      - *Rather, it is couched in terms of when a person has died. In my view it is a distinction without a difference. Although this piece of legislation is expressed in language suggesting that its purpose is to delineate the time beyond which a person can be taken to have died, (no doubt with such purposes in mind as the lawful shutting down of life-support equipment and the lawful removal of organs for transplant), the reality is that the Act does define death in that it prescribes the two events that might together or separately constitute death, which is in essence the cessation of the life of a person.*

## 2. Validity of the Will (Formalities)

- You must determine if there is a validly executed will. Under s 8 of the Succession Act 2023 (formerly s 8 Wills Act), a will is valid if the following are met: **else view informal rules**
  - 2.1 Writing ✓
  - 2.2 Signed by the Testator ✓
  - 2.3 Presence of Two Witnesses (Minimum) ✓
  - 2.4 *Animus Testandi* (Intention) ✓
  - **2.5 Presumption of Regularity** (Ignore above if the will is regular on the face of it and apparently duly executed and attested, there is a presumption that the formal requirements have been duly complied with).
  - 2.6 Informal Will – Escape Hatch

### 2.1 Writing

- The law requires a degree of permanence to ensure the document can be proved in court.
  - **In Writing:** It must be a physical or digital document (though informal rules apply to the latter).
    - *Succession Act 2023* (SA) s. 8(a); *Wills Act 1936* (SA) s. 8
      - **Medium:** ‘Writing’ is not limited to paper and ink. It includes printing, lithography, photography, and other modes of representing or reproducing words in visible form.
        - *In the Estate of Slavinskyj (1988)* 53 SASR 221
          - ‘Document’ is expansive – Will with testamentary dispositions can be a will.
        - *Wesley v Wesley (1998)* 71 SASR 1
          - ‘Document’ does not need to be a formal piece of paper.
        - *Yazbek v Yazbek* [2012] NSWSC 594
          - Courts may accept electronic, non-paper documents as legally binding.
      - **Language:** A will does not have any requirements to be set in one specific language/hieroglyphics
      - **Foreign Wills:** If a migrant's will is valid in the migrant's old country, it will be granted probate in South Australia
        - *Succession Act 2023* (SA) s. 37

## 2.2 Signed by the Testator:

- The signature serves as a 'stamp of approval' by the person making the will.
  - *Succession Act 2023* (SA) s.8(b)(i); *Wills Act 1936* (SA) s.8(a)
    - **Signed by the Testator:** or by some other person in their presence and by their direction.
      - *In Male* [1934] VLR 318
        - *The mark had been made by the testator with the intention of authenticating as her will, therefore signed and would be admitted to probate.*
      - *In the Estate of Cook* [1960] 1 All ER 689
        - *The only test is whether what has been written by the testator was intended to authenticate the document.*
      - *Summerville v Walsh* NSWCA unreported 26.02.1998
        - *The testator may direct another to sign in their presence to sign their name or write the testator's name*
      - *Re (Trethewey) Burford* (2002) 4 VR 406
        - *In any event, the deceased had typed his name at the bottom of the document and, in the circumstances, that was the equivalent of his signature.*
    - **Form of Signature:** It does not need to be a full legal name. A mark (like an 'X'), a thumbprint, or even initials may suffice if intended to be a signature.
      - *In Male* [1934] VLR 318
        - *The mark had been made by the testator with the intention of authenticating as her will all that preceded it in the document, and the will was therefore signed and would be admitted to probate.*
      - *In Estate of Finn* [1935] All ER Rep 419
        - *Thumbmark is no worse than a cross but it's acceptable.*
    - **Acknowledgement:** If the testator has already signed the document before the witnesses arrive, they must acknowledge the signature in the presence of the witnesses.
      - *Succession Act 2023* (SA) s. 8(b)(ii)
      - *Couser v Couser* [1996] 1 WLR 1301
        - *A testator must 'acknowledge' their signature in the presence of two witnesses with 'visual contact'*

## 2.3 Presence of Two Witnesses (Minimum)

- Witnesses act as a safeguard against fraud and confirm the testator's capacity at the time of signing.
  - **Witnessed:** Signed by at least two witnesses present at the same time as the testator.
    - *Succession Act 2023 (SA) s.8(ii),(iii)(iv); Wills Act 1936 (SA) s.8(c),(d),(e)*
  - **Simultaneous Presence:** Both witnesses must be present at the same time when the testator signs or acknowledges the will.
    - *Couser v Couser [1996] 1 WLR 1301*
      - *'You cannot be a witness to an act that you are unconscious of; otherwise the thing might be done in a ball-room.'*
    - *Casson v Dade (1781) 28 ER 1010*
      - *"Constructive presence achieved if the testator and the witnesses are in a position that they are within each other's visual range, even if separated by structures (like windows)."*
    - *Shires v Glascock (1688) 91 ER 584*
      - **The 'Line of Sight' Test:** *Witnesses sign in the 'presence' of the testator, they must be in a position where the testator could have seen them sign if they had chosen to look.*
  - **'Attestation' Clause:** A clause stating that the witnesses saw the testator sign is standard practice – **NOT NECESSARY BUT HELPFUL.**
    - *Re Bladen [1952] VLR 82 (Sholl J).*
      - *A presumption of due execution of a will arises not only from the production of an apparently well executed document with a full attestation clause reciting compliance with the provisions*
    - *Re Estate of Westwood (dec'd) [2014] SASC 23, [24] (Gray J).*
      - *With an incomplete attestation clause, or with none, the courts have admitted such documents to probate on the basis of a presumption of due execution.*
  - **Who Can Witness:** Person(s) who can attest to the testator(s) signature.
    - Person of legal age, and capacity – However, Beneficiary might be seen as personal profiter
    - Capacity may be lost, but at the time the will was signed he/she was competent, the attestation is still valid
      - *Succession Act 2023 (SA) s. 12*
        - **EXCEPTION** – *Re Gibson [1949] P 434*
          - *Blind person cannot witness and attest to a will.*

## 2.4 *Animus Testandi* (Intention)

- The document must not just be in ‘writing;’ it must be intended to function as a will.
  - *Succession Act 2023* (SA) s.8(c); *Wills Act 1936* (SA) s.8(b)
    - **Testamentary Intent:** The testator must intend for this specific document to take effect only upon their death and to be revocable until that time.
      - *Succession Act 2023* (SA) s. 11(2)(a)-(b) – (MOVE TO *BANKS v GOODFELLOW* IF WILL WAS VALID)
        - (2)(a) a document expresses testamentary intentions of a deceased person; and
        - (2)(b) the deceased person intended the document to constitute their will
      - *Banks v Goodfellow* (1870) LR 5 QB 549
        - Understand the nature of the act (making a will) and its effects.
        - Understand the extent of the property they are disposing of.
        - Comprehend and appreciate the claims to which they ought to give effect (moral obligations to family).
      - **DIGITAL (ELECTRONIC/DVD/RECORDED/NON-TANGIBLE):**
        - *Wheatley v Peek* [2025] NSWCA 265;
          - *Digital Note on deceased’s Phone constituted a valid informal Will – Intent to create a will.*
        - *Alan Yazbek v Ghosn Yazbek & Anor* [2012] NSWSC 594
          - *Microsoft Word document contained clear testamentary language, was deliberately named ‘Will,’ and multiple circumstances indicated he intended it to function as his will.*
        - *Mellino v Wnuk* [2013] QSC 336
          - The Court recognised a video recording on a DVD as a valid Will.
        - *Estate of Leslie Wayne Quinn* [2019] QSC 99
          - *A video recorded on a smartphone shortly before the deceased’s death was accepted as a Will.*