Week 2 — Topic 2: Wills — Capacity & the Court's Jurisdiction

- weeks 2 to 5

Part 1: capacity to make a Will

Elements affecting a testator's ability to make a will:

- Age
- **Write:** minimum age for making a Will is 18 years: s.5 of the *Wills Act 1997* (Wills Act).
- **Exceptions:**
- **Marriage:** a person who is married but under the age of 18 years can make a Will: s.6 Wills Act.
- **Court authorisation:** Court can authorise the making of a Will by a person under the age of 18 years: s.20 Wills Act.
- e.g. Where a minor has inherited assets or a large damages award, but the rules of intestacy would make an inappropriate distribution of the minor's estate.
- Mental capacity
- it is essential for the ***validity*** of a Will that the Will maker has sufficient mental capacity to make a Will.
- the Will maker must possess testamentary capacity at the time they provide instructions for the Will **and** at the time they execute the Will.

The Test of testamentary capacity:

- the legal test for capacity - *Banks v Goodfellow* (1870) LR 5 QB 549 – noteworthy because it accepted that people can **regain** capacity
- **The testamentary capacity test requires a Will maker to** (from Banks v Goodfellow)
- Understand the nature and effect of making a Will;
- Understand the extent of the property of which they are disposing;
- Appreciate the claims to which they ought to give effect;
- Suffer from no disorder of the mind.

General principles:

- not necessary to show that the Will maker was capable of understanding each and every clause of the Will. Sufficient to prove that the Will maker understands that they are making a Will.
- it is not necessary to show that the Will maker recollected every item of property they possess. A general knowledge of their property is sufficient.
- 'appreciate the claims to which they ought to give effect' – it is necessary to look at the persons who are the 'natural objects of the Will maker's bounty', the persons who have a moral claim on the Will maker.
- the Will maker must have the ability to evaluate and to discriminate between the respective strengths of these claims.

Examples of instances where a testator may lack capacity:

- **Note: these factors will not automatically prevent a testator from having testamentary capacity, but they are good indicators for lack of capacity.**

- **drunkenness:** no presumption that a person who is a habitual drunkard lacks capacity to make a Will.
- **old age:** extreme old age and infirmity are not by themselves sufficient to establish lack of capacity.
- **contemplation of suicide:** does not necessarily indicate lack of capacity.
- **eccentricity or extreme views:** do not by themselves indicate lack of capacity.
- **depressive mental state:** does not necessarily indicate lack of capacity.
- **delusions:** do not necessarily prevent the Will maker from making a valid Will.
- **CASE: *Bull v Fulton* (1942) 66 CLR 295** – delusion of the Will maker had a direct bearing on the provisions of the Will – Will was therefore invalid

Lucid intervals

- where the Will maker is of unsound mind, it may still be possible to show that at the time the Will was made, it was made in a lucid interval.
- **CASE: *Kantor v Vosahlo*** [2004] VSCA 235 – the Will maker who suffered from dementia was found to have made the Will in a lucid interval (evidence from the solicitor regarding instructions given by the Will maker)

Human rights

- Forrest J in *Edwards v Edwards* [2009] VSC 190:
- freedom of decision extends to the ability to make a Will which … is an important human right
- [the ability to make a Will] is a fundamental common law right recognised by statute in the form of the *Wills Act*

Golden Rule:

- when a solicitor is instructed to prepare a Will for an aged Will maker, or for one who has been seriously ill, the solicitor should arrange for a medical practitioner to satisfy that practitioner as to the capacity and understanding of the Will maker and to make a contemporaneous record of the examination and findings: *Re Simpson* (1977) 121 SJ 234
- non-compliance does not mean the Will is invalid.
- not always necessary for a medical certificate to be obtained.
- the solicitor can apply the test alone.
- where capacity is an issue, the solicitor must take detailed file notes at the time of taking instructions **and** after a signing.
- *LIV Capacity Guidelines and Toolkit* (2020) – link in overview on unit page

Two points where the will maker must be of mental capacity:

- When signing will
- When giving instructions

Give evidence about your usual practice.

- Court will always look at the facts

- Testamentary intention

The Will maker must ***intend*** that the document is their last Will and testament.

- Knowledge and approval
- the Will maker must **know and approve of the contents** of their Will.
- not necessary to show that the Will maker understood the legal terminology.
- **burden of proof** lies with those propounding the Will to prove that the Will maker knew and approved the contents of the Will.
- presumption that the Will maker knew and approved the contents of the Will:
- if there is proof that the Will maker had testamentary capacity and that the Will was duly executed then, in the absence of suspicious circumstances, knowledge and approval will be presumed.

Reading over the Will

- previously, if the Will was read over to or by the Will maker before execution, then that was **conclusive evidence** of knowledge and approval.
- nowadays, reading over the Will is not conclusive of knowledge and approval, but gives rise to a very strong presumption.
- even if the Will maker is shown to have read over the Will, other evidence can still be accepted that they did not in fact know and approve of its contents.
- Suspicious circumstances
- presumption of knowledge and approval will **not** apply where there are suspicious circumstances surrounding the execution of the Will.

Will prepared by beneficiary

- the classic case of suspicious circumstances arises where the preparer of the Will also takes a substantial benefit under the Will.
- **CASE: *Wintle v Nye*** [1959] 1 All ER 552 – solicitor prepared Will and codicil appointing solicitor sole executor and sole residuary beneficiary, Will maker 'unversed in business'
- **CASE: *Re Proud*** (1922) 18 Tas LR 10 – all the circumstances should be examined, including the amount of the gift and the proportion that gift bears to the property disposed of as a whole. – **Proportion of the gift is important**
- **Isaacs J** in ***Nock v Austin*** (1918) 25 CLR 519 - a party taking a benefit and preparing the Will arouses suspicion and calls for the anxious and vigilant examination by the court, but the rule does not go further than requiring vigilance – this scenario does not operate by itself as an automatic disqualification.

The same principle (i.e. where there are suspicious circumstances, knowledge and approval of the contents of the Will will not be presumed) will also apply if:

- the benefit goes to a close family member of the Will drafter: *Thomas v Jones* [1928]; or
- instructions for the making of the Will are taken through an intermediary who will take a benefit, even though the intermediary takes no actual part in the preparation of the Will: Batten Singh v Amirchand [1948]

CASE: ***McKinnon v Voigt &*** Smits [1998] 3 VR 543 – sometimes the suspicious circumstances can occur after the making of the Will e.g. delay in producing the Will prepared by the son (Will named son as sole residuary beneficiary; son was witness)

CASE: ***Veall*** v Veall (2015) 46 VR 123 – circumstances giving rise to suspicions (e.g. specific gifts and residuary beneficiaries in last Will differed significantly from earlier Wills), knowledge and approval of the Will not established

Sometimes, one child comes in with the testator – this is usually a suspicious circumstance

CASE: ***McKay v Hearps*** [2021] TASSC 62 – although last Will differed significantly from earlier Wills, the events in the months preceding the last Will provided appropriate reasons for the Will maker to change the residuary beneficiary to the persons who cared for the Will maker in that period

Alternative position:

United Kingdom:

- held in *Re a Solicitor* [1975] QB 475 that a solicitor who takes a material benefit under a Will must:
- always advise the client Will maker to obtain independent advice before making the Will; **and**
- ensure that the advice is taken.
- if the Will maker fails to seek independent advice, the solicitor must forgo the benefit or be the subject of disciplinary proceedings.

Suspicious circumstances differ from undue influence and fraud:

- suspicious circumstances must not be confused with undue influence or fraud.
- the person who opposes a Will on the grounds of undue influence or fraud has the burden of proof to establish it the alleged undue influence or alleged fraud.
- the burden of proof is on the propounders of the Will to establish knowledge and approval from the outset.
- does not necessarily require a person opposing the Will to make specific allegations.
- strategies in litigation:
- probate:
- Court order stating who can run the show.
- He or she who has the control
- Litigation normally arises before probate has started.
- **There are probate caveats**
- **A caveat can be lodged regarding the suspicious circumstances.**
- H/r must be aware of these circumstances.

probate

Advertisement:

- Must put a notice on the supreme court website
- For 14 days

- Must advertise it on the supreme court website

When a grant has been made:

In deceased estates, the only people who can challenge are: child, spouse – if you are in that category then

- Undue influence

e.g. a beneficiary uses undue influence to secure a benefit under the Will.

e.g. a beneficiary under an existing Will uses undue influence to prevent the Will maker from altering the Will, or from making a new Will.

- if undue influence can be proved, the Will is **invalid** and cannot be admitted to probate.
- undue influence means **coercion**.
- distinction between persuasion and undue influence:
- legitimate influence, persuasion and pressure vs coercion which 'deprives the Will maker of free agency'.
- even though the influence may be bad, it is not undue influence unless coercion is established.

Sir James Hannen P in *Wingrove v Wingrove* (1885) LR 11:

'If a testator has only been persuaded or induced by considerations which you may condemn, really and truly, to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the Will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence.'

- not necessary to establish that actual violence has been used or even threatened: *Boyse v Rossborough* (1857) 6 HLC 2
- a weak and feeble Will maker may be coerced by constant importunity (persistence to the point of annoyance) and so fatigued as to give way to the constant pressure for the sake of peace of mind
- 'The degree and nature of pressure…..will vary according to the vulnerability and susceptibility of an individual testator': *Nicholson v Knaggs* [2009] VSC 64

No presumption of undue influence

- undue influence must be proved.

Onus of proof

onus of proof is on the person alleging undue influence.

- sole question is whether the will of the Will maker was overborne:
- '*What is needed for a claim of undue influence to be successful is evidence that the conduct of the person alleged to be exerting pressure was such that it amounted to coercion so that it overbore the free will of the testator*': Windeyer J in *Revie v Druitt* [2005] NSWSC 902
- in practice, undue influence is very difficult to prove.
- an unsuccessful application alleging undue influence will result in a costs order against the applicant, and there is a reluctance of the probate courts to find undue influence.
- Fraud

Must be raised

- relatively few reported cases in which fraud has been successfully pleaded.
- unlike undue influence, which coerces a Will maker into making a Will that they did not wish to make, fraud actually **misleads** a Will maker.
- **onus of proof** is on those alleging fraud.
- must be established that the fraudulent assertions had a direct effect on the making of the Will.
- e.g. false representations as to relationships.
- e.g. false assertions about the Will maker's assets.
- e.g. it may be alleged that the Will has been fabricated by another person.
- one case where the fraud occurred after the death of the Will maker: *DPP v Schroder* [2022] VCC 2071 and *Schroder v The King* [2024] VSCA 42 –Will maker and witnesses' signatures forged, and the 'witnesses' were convinced to swear a false affidavit stating they had witnessed the Will.
- Made forgeries
- Then convinced the witnesses to commit perjury

Part 2: Court's jurisdiction:

- in relation to inter vivos transactions, such as contracts, there is an equitable doctrine called rectification, which allows the court to correct a document if the document does not truly reflect the actual intentions of the parties.
- this doctrine of rectification does **not** apply to Wills.

The courts have power to correct the will.

The court's jurisdiction

- limited jurisdiction for a probate court to correct mistakes in Wills.
- the law relating to mistake in Wills at common law is confused and unwieldy, and in a number of cases the clear intentions of the Will makers have been defeated because of simple errors.
- the court has limited jurisdiction to ***omit*** words that have been mistakenly inserted into Wills.
- the court has no power to ***add*** words to a Will that were intended by the Will maker to be inserted but were left out by mistake.

Legislative provisions:

- Victorian provision provides as follows: s.31 Wills Act
- *s.31(1) The court may make an order to rectify a will to carry out the intentions of the testator, if the court is satisfied that the will does not carry out the testator's intentions because:*

(a) a clerical error was made; or

(b) the will does not give effect to the testator's instructions.

- the application must be made within 6 months from the date of the grant of probate (this time period can be extended by the court): s.31(2), s.31(3).

The old case law was that a court cannot add words, even if it was obvious.

CASE: *Public Trustee of Queensland v Smith* [2009] 1 Qd R 26: Atkinson J

The section permitting the court to rectify a Will required the court to engage in a four-stage process:

- Has a clerical error been made?
- Does the Will fail to give effect to the Will maker's instructions?
- If either or both of the above has occurred, has this caused the Will not to carry out the Will maker's intentions?
- If so, then the court may make an order to rectify the Will to carry out the Will maker's intentions.

Note: these applications are rare

- **Who usually bears the costs: The law firm who made the will.**
- **to determine the Will maker's intentions the court will consider:**
- **instructions given by the Will maker to the Will drafter**
- **evidence of the Will drafter**
- **evidence of any previous Wills**
- **any evidence of other persons as to the actual making of the Will e.g. 'the Will maker told me she had made a new Will which benefited X, Y and Z'.**
- **the instructions originally given by the Will maker are particularly important in the court's assessment of the Will maker's intentions.**
- **difficult for the court to apply the rectification power to home-made Wills.**

Mirror Wills:

Execution of wrong Wills

- spouses or de facto couples often make what are known as 'mirror Wills'. Their Wills are exactly the same in their outcomes:
- spouse / partner appointing each other as executor
- spouse / partner names the other spouse / partner as the sole / major beneficiary.
- scenario: husband and wife execute Wills at the same time, but the husband signs the wife's Will and the wife signs the husband's Will by mistake.
- what's the proper method for overcoming this problem:
- rectification power or the power to dispense with the formalities of a Will?
- the preferred approach is to admit to probate the Will prepared for the deceased but not signed by the deceased using the dispensing power.
- judicial dispensing power (informal Will provisions) will be looked at in Week 3.

s9 of the Will's act – court can declare that the will was not signed

Week 2 Seminar:

This case study illustrates aspects of best practice for solicitors who prepare Wills:

- take instructions from the Will maker alone.
- look for warning signs indicating a client may be subject to undue influence or lacking capacity?

- warning signs:
- dramatic changes to Will e.g. sudden change in beneficiary from close family member to recent acquaintance.
- make enquiries about previous Wills, including obtaining copies of previous Wills.
- the role of interpreters who accompany the Will maker.
- the need to take and retain detailed file notes, to assist in the event that a Will is challenged:
- notes of Will maker providing instructions
- notes of the signing meeting
- retaining Will file indefinitely.

Nicholson v Knaggs [2009] VSC 64

- long and complex case
- 34 trial days and 2 mediations
- evidence in chief at the trial was by way of affidavits and supplemented by short oral evidence
- costs of the dispute over $4 million
- estate worth approximately $16 million

Issues:

- lack of testamentary capacity
- undue influence
- failure to have knowledge of or approve contents of Will

Facts:

- Elsbeth Jean Dyke known as "Betty"
- died on 25 May 2004 aged 84
- last Will was made 12 January 2001 (2001 Will)
- probate of this Will was granted 11 October 2004
- Betty left a large estate:
- main asset of the estate was farm known as 'Sefton Grange' in Mount Martha on the Mornington Peninsula., sold for $15.1 million
- $877,804 invested in various accounts with NAB; together with household items, farming equipment, a car and other items valued together at $9,000
- Betty was an only child, who had never married, who had no children
- closest family living at the time of her death were her cousins.

2001 Will (the last Will):

- gave cash gifts of between $10,000 and $30,000 to a number of individuals (including some family members and other people who were meaningful in her life).

- left $10,000 to the Cat Protection Society.
- left $100,000 to the RSPCA.
- the remainder left to three couples who were neighbours living in the vicinity of her farm at Mount Martha.
- these people were: Tim Knaggs and his wife Denise Knaggs; Robert Allen and his wife Sandra Allen; and Gary Smith and his wife Diane Smith.
- each couple received $4,859,782 as a distribution from the estate.
- additionally, three years before her death, Betty gave $413,320 to each couple (was derived from the sale of other land she owned).

Previous Wills and codicils:

- Betty made a Will in **1999** which was of similar effect to the 2001 Will.
- Bety also made a Will in **1985**:
- the neighbours were to receive relatively modest gifts of money: Denise Knaggs was to receive $20,000; Gary and Dianne Smith were to receive $40,000; and Robert and Sandra Allen were to receive $20,000.
- in contrast to the 1999 and 2001 Wills, this left the bulk of her estate to a group of charities which provided care to animals and services to deaf and blind persons.
- there was no issue about the 1985 Will being valid.
- in both the 1999 Will and 2001 Will the total amount gifted to charities had been substantially reduced.
- significantly, the charities referred to in the 1985 Will which were to receive the residuary estate, disappeared from the 1999 and 2001 Wills, their place taken by the three groups of neighbours.

Changes to the executors:

- 1985 Will: trustee company National Trustees Executors & Agency Company of Australia Ltd
- 1999 Will: Betty's accountant, otherwise the solicitor who prepared the Will was appointed as substitute executor
- March 2000 codicil: Tim Knaggs, Robert Allen and Gary Smith (the male neighbours)
- December 2000 codicil and 2001 Will: solicitor who prepared the 2001 Will (Brian Kollias) plus Tim Knaggs, Robert Allen and Gary Smith.

Health and welfare:

- Betty suffered from two major disabilities that increased in severity as she aged.
- acute and constant pain caused by curvature of the spine.
- later developed dementia.
- Betty needed the support of caregivers and received support from her neighbours: Denise Knaggs; Robert and Sandra Allen; Gary and Diane Smith - Betty called these people her "friends".
- when she made the 1999 and 2001 Wills, Betty was frail, vulnerable and anxious.
- Betty became increasingly vulnerable to the influence of those she thought offered her the ability to remain at home in her old age and to allow her to care for her beloved animals.