TOPIC 1: WILLS

PRELIMINARIES

DEFINITION

Will= wishes to occur on death, dispose of property and operate as a declaration of intention

IMPORTANT POINTS

- Where a person dies leaving a will appointing an executor, the executor must apply for probate.
- Armed with the grant of probate, the executor can then collect in the deceased's estate and distribute it according to the terms of the will.
- Where there is a will but no executor the grant is called "letters of administration with the Will annexed", and the Probate Court must appoint a person to carry out the provisions of the will, known as an administrator.
- Where there is no will (the deceased dies intestate) again an administrator must be appointed, is granted "letters of administration" and must distribute the estate among the family according to a statutory scheme

WILLS VS OTHER ARRANGEMENTS

Trusts inter vivos

- This is **not testamentary** if the beneficiary gets an interest during the maker's lifetime, even if they only receive possession after the maker dies.
- The maker's death only changes the beneficiary's interest from a future interest into a present interest.
- **Example:** ***Re Armstrong.***

Joint ownership

- This is **not testamentary** because the other joint owner receives their interest when the property is transferred into joint names, not when the first owner dies.
- When one joint owner dies, the survivor becomes sole owner through the **right of survivorship**, not under a will.
- **Example:** ***Russell v Scott.***

Covenants

- A covenant is **not testamentary** if the person is legally bound during their lifetime to transfer money or property after death.
- However, if the person does not intend to be bound until death, the arrangement is testamentary.
- **Examples:** ***Beyer v Beyer*****;** ***Bird v Perpetual Executors & Trustees*****;** ***Gillett v Holt.***

Donationes mortis causa

- This is a gift made because the donor is contemplating death, intended to take effect on death, but completed by delivery before death.
- It is revocable until death and requires more than just knowing death is inevitable; the donor must be contemplating death from a specific cause, such as illness, old age or danger.
- **Examples:** ***Watts v Public Trustee*****;** ***Sen v Headley*****;** ***Public Trustee v Bussell.***

MAKING A VALID WILL

Formalities of a Valid Will

In order to make a valid will, the testator must satisfy the requisite requirements provided for under the Act. The testator must have:

a) capacity
b) *animus testandi* AND
c) satisfy the formal requirements.

STEP 1: CAPACITY

Capacity Test

In order for the will to be "valid," the testator must have capacity. This includes:

a) whether the testator is of the eligible age to make a will AND
b) whether they have the requisite mental capacity.

Is The Person an Infant (Under 18)?

A minor cannot make, alter or revoke a will, pursuant to s **5(1)** of the Succession Act 2023 (SA). On the facts, ___ is under the age of 18, which meets the **s 3** definition of 'minor.'

Exception to Minor Rule

1. Nonetheless, **per s5(2)** a minor who is or has been married may make, alter, or revoke a will. On the facts ___ was married, hence ___ they meet the eligible age to make a will.

2. Nonetheless, per **s5(3)** a minor may make a will in contemplation of marriage (and may alter or revoke such a will) but the will is of no effect unless the contemplated marriage is solemnised. On the facts the contemplated marriage with ___ was/ was not solemnised as evidenced by ____. Hence, ___ meets/does not meet the eligible age to make a will.

Note: Subsections (2) and (3) of s 5 will be relevant only to a person between 16 and 18 who obtains special permission from a judge or magistrate under **s 12** of the *Marriage Act* to marry a person who is at least 18 on the ground that "the circumstances of the case are so exceptional and unusual as to justify" special permission.

Is the person between 16 and 18 and has special permission to marry?

Despite **s 5** excluding minors from making/altering/revoking a will, **s 6** enables any minor (or any person acting on a minor's behalf) to apply to the Court for an order authorising the minor to:

- make a will in terms approved by the Court →**s 6(1)(a)**
- alter a will in terms approved by the Court →**s 6(1)(b)**
- revoke a will in terms approved by the Court → **s 6(1)(c)**

However, the court must be satisfied on the three conditions under **s 6(4).** This includes:

- the minor understands the nature and effect of the proposed will or alteration or revocation of the will; AND →**s 6(4)(a)**
- the proposed will or alteration or revocation of the will accurately reflects the intentions of the minor; AND →**s 6(4)(b)**
- it is reasonable in all the circumstances that the order should be made. →**s 6(4)(c)**

Case Example

→ Application of M (2000) 50 NSWLR 401:

- 17-year-old who had never known his father and had only intermittent contact with his mother had been cared for by his grandparents and later his aunt.
- Inherited considerable assets under his grandmothers will and decided that he would leave a legacy to his mother and the residue to his cousins with whom he had been raised.
- Leave was granted for a minor to make a will in these terms

Do They Have Mental Capacity?

In order for ___ to meet the mental capacity test, they must be of "sound mind, memory and understanding" →***Banks v Goodfellow.*** This requires the following:

1. An ability to understand the nature of making a will and the effect of doing so;
2. An ability to understand the extent of property being disposed of;
3. An ability to comprehend and appreciate the claims to which the testator ought to give effect; and
   - Capable of appreciating the ordinary claims of spouse, children and other beneficiaries
4. No insane delusion must have influenced a departure from giving effect to such claims

Ability to Comprehend & Appreciate (3)

- The court confirmed in ***Kerr v Badran*** that a testator only needs a general understanding of the nature and value of their property. They do not need to understand every minor item (e.g., bank account, or specific stock)
- Mental capacity to comprehend and evaluate the claims of those who might naturally expect a share of the estate (e.g., spouses, children) is enough.

Insane Delusion (4)

- A testator is found to lack mental capacity if they have an insane delusion (no rational person would believe in) and affects the testamentary document itself.

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CASE	FACTS	OUTCOME
O'Connell v Shortland	• Testator made a will 3 days before dying of cancer. • Medical evidence proved a build-up of drugs may have led to **paranoid delusions**.	Court ruled that paranoid delusions caused by meds by itself fell far short of a doubt substantial enough to defeat the grant of probate. Will, **valid**.
Banks v Goodfellow	• Testator had **periodic delusions**, believing that a man who died was still alive. • Daughter argued this was insane delusion and his will should be invalid.	Court held the will was **valid**, general insane delusion is not sufficient for mental incapacity as it did not directly affect the will itself.
Bull v Futon	• The testator executed 26 wills. • 20 were prepared by her nephews, solicitors. • Had the **insane delusion** that her signatures on documents prepared by her nephews were fake despite evidence presented to her.	Court held the will was **invalid**, as the delusions had a direct bearing on provisions of the will.

If There Is Mental Incapacity?

As there is a likely mental incapacity on the facts, **s 7** allows for an application to the Supreme Court for a will to be made on behalf of a person who lacks testamentary capacity. Where a will or a new will is considered necessary to avoid a person's property being distributed contrary to his or her presumed intentions. In doing so the court must be satisfied under section **s 7(4)** that:

- the person lacks testamentary capacity; AND →**7(4)(a)**
- the proposed will, alteration or revocation would accurately reflect the likely intentions of the person; AND →**7(4)(b)**
- it is reasonable that the order should be made. →**7(4)(c)**

Considerations To Grant an Order → **s 7(5)**

a) The Court must consider evidence of the person's wishes
b) Whether they may regain testamentary capacity
c) Terms made in a previous will
d) The interests of beneficiaries or potential claimants
   a. beneficiaries from previous wills
   b. people entitled to receive part of the estate if they were to die intestate
   c. people entitled to receive part of the estate
   d. person who cared for or provided emotional support to the person

e) Possible charitable gifts
f) The likely size of the estate
g) And any other relevant matter.

Moreover, the principles in ***re D(J) Affirmed in Monger v Taylor*** are relevant to the Court's assessment of the person's likely intentions under **s 7(4)(b)**. The Court should consider the actual person, not a hypothetical reasonable person, and should ask what they would likely have done if they were experiencing a brief lucid interval, had full knowledge of their circumstances, and were receiving competent legal advice. Their past affections, relationships, dislikes, and values may be relevant, provided they are not irrational or beyond reason.

CASE	OUTCOME
Re Fletcher; ex parte Papaleo	Application **refused** for the alteration of the will after her death due to **insufficient evidence of the testator's likely intentions.**
Hill v Hill and Cat Protection Society of Victoria	**Approval** given to alter the testator's will after her death to **reflect** her **likely intentions**.

If mental incapacity only affects part of the will

- In ***Estate of Bohrmann*** , the courts held that if mental incapacity only affects part of the will that part may be severed.
    - However, NSW SC declined to follow this in ***→Woodhead v Perpetual Trustee***

STEP 2: ANIMUS TESTANDI (INTENTION TO MAKE A TESTAMENT OR WILL)

General Test

In order to determine whether ____ intended on making the testament/ will, intention must be understoof from the acts of the testator. On the facts, ___ intended to:

- Make a disposition of property to take effect on their death
- Knew of the contents and approved
- Approved it as a will

CASE	FACTS	OUTCOME
Nichols v Nichols	• The deceased was joking with solicitor friends about lawyers using too many words. • To mock them, he wrote a very short document disposing property to his children in effect • He said it was as close to a will as he would ever get.	• The Court found he was **not seriously trying to make a will**. • Because there was **no real intention** for the document to operate as a will, it was not valid

Have there been any factors that compromise the free will of the testator?

Fraud

Per ***Robertson v Smith***, if a beneficiary has practised a fraud on the testator to influence a disposition in his or her favour, the disposition is invalid. On the facts ___ has practiced fraud by ___, making him sole beneficiary/ a beneficiary.

- E.g., In ***Robertson,*** Wife of the will's proponent convinced the testator to take out life insurance and execute a will in which her and her husband were sole beneficiaries, while planning to poison him.

Undue Influence

Per ***Wingrove v Wingrove***, where the will of the testator is coerced into doing what do not desire to do, there is no intention because of undue influence. Onus of proof is on the person alleging undue influence. On the facts, ___ coerced the testator by:

- Confinement or violence (grossest from) → ***Wingrove v Wingrove***
- Merely talking to ___ at certain stage of illness and pressing something on them, causing their brain fatigue and inducing them to do anything, for peace → ***Wingrove v Wingrove***

- Applying very little pressure was sufficient to bring about the desired result, as testator was in their last days or hours of life and had become so weak and feeble → ***Wingrove v Wingrove***

Have there been suspicious circumstances?

Has a solicitor or other person who has prepared a will taken a benefit under it?

- The onus is on such a person to establish knowledge and approval by the testator and the court takes a very strict view that it must be "vigilant and jealous" in scrutinising all circumstances.

CASE	FACTS	OUTCOME
Wintle v Nye	• **Solicitor**, **drafted** a **will** for an elderly client • Was named as the **principal beneficiary**, receiving the substantial residue of her estate.	• Court approved, that because the will was simply "read over" to the testator, she knew and approved of its contents • Nonetheless, House of Lords ruled that **merely reading over a will is not always enough to establish** that a **testator** fully **understood** and approved its contents
Roos v Karpenkow	• 9 suspicious circumstances but **strong evidence** proved otherwise	• SASC was satisfied the **testator knew and approved** the contents of her will

Has there been a mistake?

On the facts, ___ made an honest mistake, as they mentioned ___ but forgot to mention ___, this is evidence of clear intention to ___, hence it needs to be rectified under **s 22(1).**

- Application to rectify will must be made within 6 months of grant of probate or letters of administration → **s 22(2)**

CASE	FACTS	OUTCOME
Wesley v Wesley	• Testator named his nephews and nieces except one. • **Clear** his **intention** was to spread the estate equally.	• Will was **rectified** to include "other nieces and nephews".
Mortensen v State of NSW	• "**Rectification** is available for mistakes, **not for lack of vision or perception of knowledge**" • Discretion is restrained to only altering or correcting the words of a will **in a way that directly executes** the testator's specifically **proven intention**.	
Goods of Boehm	• Established that while courts have the authority to delete (omit) words mistakenly inserted into a will, they **generally** have **no power to add or alter words** or rewrite provisions to fix a drafting	

STEP 3: EXCLUSION FROM PROBATE OF OFFENSIVE WORDS

Per ***Estate of Adler*** the Court of Probate has the jurisdiction to exclude words from a will if they are deemed "offensive." This includes:

- Words in the opinion libellous and gratuitously offensive? →***Estate of Adler***
- Words that are "scandalous, offensive and defamatory"? →***Sir Joshiaj Symon***
- Words that are blasphemous? →***Edgar Whitelaw***
    - E.g., "I commit my soul to hell" was blasphemous at the time. Unsure on use now.

STEP 4: FORMAL REQUIREMENTS

For the will to be considered valid, it must satisfy the **s8** formal requirements.

Writing

Per **s8(a)** the will needs to be in writing. **s4** of the Acts Interpretation Act states that "writing includes any visible form in which words may be reproduced or represented." On the facts the will is handwriting/ printing/ typing/ photocopying/computer file, satisfying this requirement.

- The writing need not be on any conventional surface:
  - In ***Re Trethewey*** a computer file containing a will was admitted to probate (Can be digital).
  - In the ***Estate of Slavinskyj*** a will written on the wall of a home was admitted to probate.
- Tape recording or video (NOT WRITING)

Signature

Per **s8(b)(i)** the will must include a signature. On the facts, the will contains ____:

- The testator's initials or mark
  - In ***Re Male*** a mark appearing to be an initial letter of the testator's name was taken to be a valid signature.
- A stamped name
- A thumb print
- s 8(b)(i) says, the testator may direct another to sign in their presence the testator's name
  - No objection that the testator's hand is guided by another as long as the testator is aware of what they are doing **→*Summerville v Walsh***

The testator intended to authenticate the document. ***In the Estate of Cook***, words to the effect of "your loving mother" was held to be a signature.

Position of Signature

Per **s 8(c)** the testator may sign anywhere on the will if it appears, "on the face of the will or otherwise, that the testator intended by their signature to give effect to the will."

Attestation (Witnesses)

Signature in Front of 2 Witnesses:

On the facts, the signature has been made in the presence of 2 or more witnesses at the same time, per s **8(b)(ii).** Further, each witness attested and signed the will per **s 8(b)(iii)**, made or acknowledged in the presence of the testator but not necessarily in the presence of each other **(s8(b)(iv)).**

Who can be a Witness?

- Per **s 12** the will is not invalidated by reason of incompetence of witnesses (incompetence for them to give evidence) (unless ***Re Gibson***)
- Per **s 13** a will is not invalid by reason that a witness, or their spouse, is a beneficiary
- Per **ss 14 and 15** it clear that either a creditor or an executor may be a witness

CASE	FACTS/ OUTCOME
Re Gramp	• Acknowledgement may be by mute acquiescence in another's reference to the will
Goods of Davies	• Acknowledgement may be merely by gesture
Re Gibson	• Invalid attestation as the **witness was blind**
Shires v Glascok	• Valid attestation where a witness signing in an adjoining room with a broken window which the testator might have seen through if he had looked
Casson v Dade	• Valid attestation where the testator sitting in her carriage outside the office might have seen through the window if she had looked

Norton v Bazett	• Invalid attestation where the witnesses signed in an **adjoining room** from the testator; however, from where he was sitting, he **could not see through the open door**
Couser v Couser	• First witness signed and then went to make coffee at the other end of the room whilst the second witness signed, held to be valid attestation as she may have seen if she turned around

The Presumption of Regularity

Presumption of regularity

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, in the absence of proof to the contrary.

Alterations

Alterations

Per **s16** any change made to a will **after it has been signed** is usually **not valid** unless the change is properly signed and witnessed like a will in accordance with **s 8**, and the original wording can no longer be seen or understood because of the alteration, the alteration may have effect.

How to validly alter a will?

Per **s 16(2)** the change is valid if the testator and witnesses sign near the alteration, such as:

- In the margin near the change;
- Opposite the change;
- Near a note explaining the change; or
- At the end of the will where the change is referred to.

Validity of a Will Where it Fails To Comply With s 8 Requirements:

As the document fails to comply with **s8** requirements for a valid will, **s 11** allows for an application to be made to admit to probate. The Court needs to be "satisfied" that the deceased intended the document to constitute their will. This extends to documents that came into existence inside or outside the State (**s 11(4)**).

CASE	FACTS/ OUTCOME
Estate of Graham	A document signed by the testator was then taken next door where two neighbours **signed as witnesses without the testator present**. The document was admitted to probate as her intended will
Estate of Radziszewski	A testator who was very ill in hospital **attempted to sign** his will but could only make a few marks before dying. It was held that the **absence of witness's signatures** could be saved by s 11(2)
Estate of Standley	The altered will was admitted to probate because the **informal alteration** was **accepted** as reflecting the deceased's testamentary intention.
Estate of Hodge	The court held that a booklet issued by a firm of funeral directors stating "This is my will and whatever I leave behind is the property of my daughter" with a testator's signature satisfied s 11(2), despite the testator's deliberate **refusal to observe the formality of witnessing**
Estate of Williams	A will that was attested to by two witnesses but **failed to be signed** by the testator was taken to satisfy 11(2)
Estate of Vauk	An **unsigned draft** will which the deceased had never seen was admitted to probate
Ryan v Kazacos	A **suicide note** leaving property to the deceased's girlfriend was admitted to probate
Estate of Dezsery	A sealed envelope containing an **unsigned note** in the **deceased's handwriting** giving **directions** for the **disposal** of part of her **estate** was admitted under s 11(2)

Estate of (Gwilym) Williams	The **memory** of the deceased's **fiancée** regarding the **contents of the deceased's will** was admitted under s 11(2)
Estate of Torr	A **handwritten list of personal items with names** beside them was accepted as expressing the deceased's testamentary intentions, even though it was not formally executed as a will.
Estate of Mead	An **executor** co-took **instructions** from the deceased for a new will and sent the prepared will to the deceased.

REVOKING A WILL

A will can be revoked in one of eight ways, four by operation of law, the other four by voluntary act pursuant to section 17(1) of the Act. **s17(2)** provides that if there is an alteration to a testator's circumstances, this will not result in a presumption that the will be revoked.

BY OPERATION OF THE LAW

By Order Under ss 6 or 7 Succession Act

Will of minor authorised by court

Per **s 6(1)(c)** a court may make an order authorising a minor to revoke a will, if they are satisfied that the minor understands the nature and effect of the proposed revocation, the proposed revocation accurately reflects the minor's intentions and is reasonable in all the circumstances that the order be made (**s 6(4)**).

Will of person lacking testamentary capacity authorised by court

Per **s7(1)(b)** a court may make an order authorising the revocation of a will on behalf of a person who lacks testamentary capacity, if they are satisfied that the person lacks testamentary capacity, that the proposed revocation would accurately reflect the person's likely intentions, and that it is reasonable in all the circumstances that the order be made (**s 7(4)**), refer to **s 7(5)** for considerations when making order.

By The Subsequent Marriage/Registered Relationship of The Testator

Subsequent marriage/registered relationship of the testator

Per **s18** a will may be revoked to protect the spouse and children who presumably would be better off even if the deceased dies intestate than with a will made before marriage.

Exceptions:

- A will made in exercise of a power of appointment when the property thereby appointed would not in default of appointment pass to the testator's estate → **s 18(2)**
    - If the spouse and children would not stand to benefit in default of the appointment there is no point in making the marriage revoke it
- A will expressed to be made in contemplation of marriage → **s 18(3)**
    - The will must be expressed to be in contemplation of a particular marriage
        - ***Re Hamilton*** →where the will just said "should I marry…" this was revoked
        - ***Re Chase*** →where the will said "I bequeath two-thirds of my estate to Miss Valarie GoreYeo my fiancée" the marriage did not revoke the will
        - In the case of ambiguity extrinsic evidence is admissible →***Will of Foss***

By The Subsequent Divorce/End of Registered Relationship of The Testator

Per **s 19**, any disposition in a will in favour of a divorced spouse is revoked, in the absence of a contrary intention.

- Exception:
    - Does not affect a disposition made in accordance with a contract between the testator and a former spouse → **s 19(2)(a)**

BY VOLUNTARY ACT

Express

Voluntary revocation

- By a later will → **s 17(1)(c)**
- By some writing that declares an intention to revoke the will and is executed in the way this Act requires a will to be executed →**s 17(1)(d).**
- By the testator, or by some person in the testator's presence and at the testator's direction → **s 17(1)(e)**
  i. burning, tearing or otherwise destroying the will or the part of the will with the intention of revoking it
  ii. writing on the will or the part of the will or dealing with the will in such a manner that the Court is satisfied from the state of the will that the testator intended to revoke it

Implied

Inconsistent Wills

- Where there is no express revocation, a will may still be revoked if it was implied by prior inconsistent wills. Onus is on individual seeking to revoke earlier will to establish an inconsistency.
  - The two wills are read together to determine inconsistency.
  - If the later will is wholly inconsistent with the earlier, the earlier is entirely revoked.
    - Revoked only as to the parts that are inconsistent, in which case both wills are admitted to probate (comes down to intention)

Voluntary destruction

Per **s 17(1)(e)(i)** voluntary destruction of a will may lead to revocation, as long as there was intention
→***Cheese v Lovejoy***

Destruction

- Physical act of burning, tearing or otherwise destroying
- Must be done by the testator or by some person in the testator's presence and by the testator's direction
- Need not be total destruction
  - e.g., tearing through once is sufficient or just tearing off the signature
- The act must be complete (what the testator intended for the purpose)
  - I.e., if the testator intends to burn it but merely scorches it a bit or begins to tear but then desists →not enough
  - Cancelling the will by crossing it with pen is not enough for s 17(1)(e)(i) (but remember this might satisfy s 11(3))

CASE	FACTS/ OUTCOME
Doe v Perkes	• Where the testator was stopped during the act of destroying his will, it was held that this was an **invalid revocation** as he was **stopped before he could carry out** what he intended
Re Everest	• Where only **part of the will was destroyed** the court held that only this **part was intended to be revoked** and **probate** was granted for the **remaining part** of the will that was left untouched

Intention

- The act of destruction must be done with the intention of revoking the will