Succession Law Notes

Contents

Topic 1: Wills

Lectures:

Part 1

- Definition of a will:
  - the sum of what a person wishes to occur on death.
  - the document or documents in which those wishes are expressed, and in practice the term "will" is reserved for the main such document and subsidiary documents are usually referred to as "codicils".
  - Encyclopaedic Australian Legal Dictionary definition:
    - *"A written declaration providing for disposition of property to take effect on the maker's death. A will may appoint an executor: to administer the testator's estate; to discharge liabilities; and to distribute the property as directed to the beneficiaries. Where a testator executes several testamentary instruments with codicils varying or revoking provisions of an earlier will, the will comprises the aggregate of the testamentary intentions expressed in the unrevoked documents: Douglas-Menzies v Umphelby [1908] AC 224 ."*
  - Things to be noted:
    - it must dispose of property
    - it operates only as a declaration of intention
    - it takes effect only on death
  - Terms to be understood:
    - 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 (see topic "Intestacy").
- Distinguishing a Will from other arrangements:
  - Trusts *intervivos* containing limitations to take effect after maker's death.
    - If X transfers property to a trustee for X herself for X's life and after X's death to transfer the property to Y, the death of X will have a bearing on Y's interest as it will convert it from an interest by way of vested remainder to an interest in possession. But because an interest has been created in Y during X's lifetime the arrangement is not testamentary.
      - *Re Armstrong*
  - Transfer of property into joint ownership
    - If X transfers property to herself and Y as joint owners and predeceases Y, Y becomes the sole owner on X's death by way of the operation of the principle of survivorship. The transfer to joint ownership is not testamentary as a joint owner acquires his or her interest at the time of transfer and the effect of X's death is said merely to free the property from the control of its owners.
      - *Russell v Scott*
      - Joint tenants – automatically goes to the other person; doesn't matter what the will says.
      - Tenants in common – you can stipulate the share and that share is distributed as part of the estate of the deceased person.
  - Covenants

        - If X makes a binding covenant during her lifetime to pay money or transfer property to Y after her death it is not testamentary; but if there is no intention to be bound until death then it is.
            - *Beyer v Beyer*
    - Donationes mortis causa
        - A gift made in contemplation of death, intended to take effect on death, but completed by delivery at the time of the gift. As it is conditional on death, it is revocable until then.
        - The gift must in contemplation of death, although not necessarily in expectation of death and the donor must be contemplating death from some specific cause, such as illness, extreme old age or embarking on a dangerous enterprise – mere recognition of the inevitability of death is not enough.
            - For example, *Watts v Public Trustee* (1949) 50 SR (NSW) 130.
- Making a will:
    - Capacity:
        - Infancy:
            - Section 5(1) – minor cannot make will unless (2) married or (3) in contemplating marriage.
            - Section 6 enables any minor to apply to the Court for an order authorising the minor to make or alter a will in terms approved by the Court.
                - Generally invoked when inheriting property. *Application of M.*
        - Mental Capacity:
            - The traditional phrase used to describe testamentary capacity is "sound mind, memory and understanding". The classic test was put forward by Cockburn CJ in *Banks v Goodfellow* (1970) LR 5 QB 549, 565:
                - "It is essential to the exercise of testamentary power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he out to give effect; and with, a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or shall prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have made."
            - **So there are four requirements: EXAM**
                - An ability to understand the nature of making a will and the effect of doing so
                - An ability to understand the extent of property being disposed of
                - An ability to comprehend and appreciate the claims to which the testator ought to give effect
                - No insane delusion must have influenced a departure from giving effect to such claims.
            - Compare *Banks v Goodfellow* with *Bull v Fulton*
            - Section 7 of the Wills Act was added to allow for an application to the Supreme Court for a will to be made on behalf of a person who lacks testamentary capacity.
                - The power is not intended to allow the Court to review the reasonableness of earlier wills by a person then having capacity on the ground that the person now lacks capacity – rather it is to be exercised where a will or new will is considered necessary to avoid a person's property being distributed contrary to his or her presumed intensions.
                - A case on the equivalent English provision is In *re D(J)* [1982] Ch 237 where at 243-4 the Vice Chancellor laid down some guidelines. It is to be assumed that the

patient is having a brief lucid interval at the time the will is approved and during this interval has a full knowledge of the past and a full realisation that as soon as the will is executed he or she will relapse into the actual mental state, and is being advised by competent lawyers. The actual (and not a hypothetical) patient is to be considered and so strong antipathies or deep affections held before losing capacity must be taken into account, but not if they are beyond reason.

- These guidelines were applied by the SC of Victoria in *Monger v Taylor* (2000) VSC 304 (unreported) (2 August 2000).

- Animus Testandi: questions intention, not capacity.
  - Factors comprising free will:
    - (a) fraud – if a beneficiary has practised a fraud on the testator to influence a disposition in his or her favour, the disposition is invalid. EG, *Robertson v Smith* [1998] 4 VR 165
    - (b) undue influence – the law is summed up by the judge in *Wingrove v Wingrove* (1886) 11 PD 81:
      - "it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word…To be undue influence in the eye of the law there must be – to sum it up in a word – coercion…The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something on him may so fatigue the brain, that the sick person may be induced, for quietness' sake to do anything. This would equally be coercion, though not actual violence".
    - The onus is on the person alleging undue influence – there is never a presumption of undue influence arising from a relationship of dependency (again, unlike contracts or gifts) for the reason that relationships of dependency are just those which would naturally give rise to provision by a testator.
  - Suspicious circumstances:
    - The presumption from due execution that the testator knew and approved of the contents does not arise where there are suspicious circumstances. The most common suspicious circumstance is where a solicitor or other person who has prepared a will takes a (substantial) benefit under it. The onus is on such a person to establish knowledge and approval by the testator and a court takes a very strict view – it must be "vigilant and jealous" in scrutinising all circumstances.
      - *Wintle v Nye*.
  - Mistake:
    - Section 25AA(1) confers a general power of rectification on the Court, in terms wider than most other jurisdictions (equivalent provision in NSW is equally wide). (2) Extensions ok.
      - Often when something in will that testator allegedly didn't intend for there to be in the will. *Wesley v Wesley*.

- Next lecture:
  - Exclusion from probate of offensive words;
  - Formal Requirements and Wills Act s 12(2);
  - Privileged wills;
  - Duty of Care owed to Beneficiary.

Part 2

- Exclusion from probate of offensive words:
    - The Court of Probate has the jurisdiction to exclude words from a will if they are "offensive". The law is discussed in In the *Estate of Adler* (1989) 155 LSJS 53 where Legoe J omitted from probate words in the will which were in the opinion libellous and gratuitously offensive.
    - The judge referred to a number of cases including Edgar Whitelaw 1890 SASC (unreported) where the words omitted were "I commit my soul to Hell" which were no doubt considered blasphemous at the time, and Sir Joshiah Symon 1934 SASA (unreported) whose belief in speaking his mind led to words in his will "scandalous, offensive and defamatory" being omitted from probate.
- Formal requirements:
    - Set out in the Wills Act s 8
        - 3.4.1 Writing
        - 3.4.2 Signature
        - 3.4.3 Position of signature
        - 3.4.4 Attestation
        - 3.4.5 The presumption of regularity
        - 3.4.6 Alterations
    - Writing:
        - According to the *Acts Interpretation Act 1915* (SA) s4 "writing includes any visible form in which words may be reproduced or represented". So handwriting, printing, typing or photocopying are included but not tape recording or video.
        - In *Re Trethewey* (2002) 4 VR 406 a computer file containing a will was admitted to probate. The writing need not be on any conventional surface.
        - See In the *Estate of Slavinskyj* (1988) 53 SASR 221
    - Signature:
        - Includes the testator's initials or mark, or stamped name, or even a thumb print – the only test is whether what has been written by the testator was intended to authenticate the document.
            - See *In Male* [1934] VLR 318 and *In the Estate of Cook* [1960] 1 All ER 689
            - It is no objection that the testator's hand is guided by another as long as the testator is aware of what he or she is doing; or, as s8(a) says, the testator may direct another to sing in his or her presence – that other can sign his or her own name or write the testator's.
                - See *Summerville v Walsh* NSWCA 26 February 1998 (noted 72 ALJ 356)
        - Position of signature:
            - Before 1994 the testator had to sign "at the foot or end of the will". Now the testator may sign anywhere on the will as long as it appears, "on the face of the will or otherwise that the testator intended by the signature to give effect to the will" - s8(b).
            - See *Wood v Smith* [1993] Ch 90
    - Attestation: means acknowledgment
        - The testator must sign, or where he or she has already signed, acknowledge his or her signature in the presence of two or more witnesses present at the same time – s8(c)
        - The witnesses must attest and sign the will – s 8(d) ("attestation is the act of witnessing the fact that the testator's signature was made or acknowledged in their presence) – but no form of attestation is necessary, that is, there need be no clause, just signatures.
            - (an attestation clause is, however, conventionally used in a professionally drafted will, usually taking the form "Signed by the said testator as and for her last will and testament in the presence of us both present at the same time who at her request in her presence have hereunto subscribed our names as witnesses" or words to that effect).

        - The witnesses signature includes initials or a mark and they may sign anywhere on the will (it is not even essential that they both sign at the same place).
        - The signatures of the witnesses must be made or acknowledged in the presence of the testator (but not necessarily in the presence of each other – s8(e)).
            - "Presence" connotes both the physical aspect of "sight-line" (the witnesses must both either see, or be in a position where they have the opportunity of seeing, the testator sign or acknowledge) and the aspect of "awareness" of what is going on.
            - So both witnesses must be present when the testator signs or acknowledges (both saw or had the opportunity to see the testator sign or acknowledge) and the testator must be present when each witness signs or acknowledges (the testator saw or had the opportunity to see each witness sign or acknowledge).
        - See:
            - *Shires v Glascok* (1688) 91 ER 584
            - *Casson v Dade* (1781) 28 ER 1010
            - *Couser v Couser* [1996] 1 WLR 1301
            - *Norton v Bazett* (1856) 164 ER 569
        - *Wills Act 1936* (SA):
            - 16—Will not void by incompetency of witness
            - 17—Gifts to an attesting witness
            - 18—Creditor attesting to be admitted a witness
            - 19—Executor to be admitted a witness
    - The 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:
        - Section 24 provides that alterations must be executed in accordance with s8 to be valid.
            - **24—No alteration in a will has any effect unless executed as a will**
        - The effect of obliterations is slightly different in that the criterion is success – s24 says "except so far as the words or effect of the will before such alteration are not apparent".
            - Words underneath an attempted obliteration are "apparent" if they can be read by looking at the will itself (including holding up to the light).
            - But if they can only be read by mechanical means, for example, removing strips of paper pasted over the words, then they are not "apparent".
                - Not apparent if something needs to be done to identify what the alteration is.
- Section 12 – Validity of will:
    - Cases:
        - In the *Estate of Graham* (1978) 20 SASR 198
        - In the Estate of Radziszewski (1982) 29 SASR 256
        - *In the Estate of Standley* (1982) 29 SASR 490
    - The above cases tend to show that any defect in witnessing can be cured by s12(2), however all were apparently either through oversight or difficulty in obtaining witnesses.
        - In In the *Estate of Hodge* (1986) 40 SASR 398
    - Now we come to more serious defects.
        - In the *Estate of Williams* (1984) 36 SASR 423.
        - In In the *Estate of Vaulk* (1986) 41 SASR 242
        - *Ryan v Kazacos* (2001) 159 FLR 452.

        - In the *Estate of Dezsery* (1990) 158 LSJS 184
        - *Estate of (Gwilym) Williams* (1989) 152 LSJS 71
        - In the *Estate of Torr* (2005) 91 SASR 17
        - In the *Estate of Mead* SASC No 6547 of 1998 (unreported) (13 February 1998)
    - Section 12(2):
        - The relevant time for determining testamentary intention under s12(2) is the time of writing or the time of partial compliance with formalities – a subsequent change of mind has no effect unless it qualifies under the Act as an effective revocation - *Hatsatouris v Hatsatouris* [2001] NSWSC 147 (unreported) (30 March 2001).
        - S12(4) overcomes any doubt that the section applies to a document created outside SA but propounded for probate here.
        - It should be noted that s12(2) does not render s8 irrelevant. If s8 has not been complied with there is the need for a special application and, in any contested case, a Supreme Court hearing, involving time and expense.
            - Rule 64 was made in 1998 (pursuant to s12(5)) authorising the Registrar of Probates to deal with applications under s12(2) in all uncontested cases, although the Registrar may refer any question to the Court if doubts or difficulties arise.
            - S12(2) has since been copied in some form in all Australian jurisdictions (and in England)
- Privileged wills:
    - Section 11 – will of person in active service:
        - "nuncupative" means oral, although obviously there must be a witness; "active service" means directly involved in operations in a war which is or has been in progress or is imminent. This provision, formerly of some importance, almost never arises nowadays and is not examinable.
- Duty of care owed to beneficiary:
    - A solicitor given instructions to draw up a will owes a duty to the intended beneficiaries to act with due expedition and care – such a beneficiary reasonably foreseeably deprived as a result of the breach of this duty has an action of damages in tort of negligence.
    - Duty of care to beneficiaries is limited.
        - *See Hill v Van* Erp (1997) 142 ALR 687
        - See *Robert Badenach & Anor V Roger Wayne Calvert* [2016]
- Revoking and reviving wills:
    - Revocation:
        - By the subsequent marriage of the testator – Wills Act s20
            - The reason is 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.
        - There are two 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 – s20(1).
            - a will expressed to be made in contemplation of marriage – s20(2)
                - *See Re Hamilton* [1941] VLR 60 and *Re Chase* [1951] VLR 477
                - In the case of ambiguity extrinsic evidence is admissible. See In the *Will of Foss* [1973] 1 NSWLR 180 and *Layer v Burns Philp Trustee Co Ltd* (1986) 6 NSWLR 60
        - By the subsequent divorce of the testator – Wills Act s20A
            - So any disposition in a will in favour of a spouse is revoked upon divorce in the absence of a contrary intention but this does not affect a disposition made in accordance with a contract between the testator and a former spouse – s20A(2)(a)
    - Voluntary act: s 22

- Voluntary revocation: s 22(b) and (c)
    - Express:
        - In the *Estate of Crawford* (2004) 990 SASA 119
        - S22(c) makes it clear that for a writing to operate as a revocation it need not be a will itself (it need not be susceptible to probate) – it is sufficient that it merely revokes prior wills without containing any dispositions as long as it is executed like a will.
        - S12(3) makes the equivalent dispensation for a document expressing an intention to revoke a will but not properly executed as s12(2) makes for informal wills.
    - Implied:
        - Even where there is no express revocation a will operates to revoke all prior inconsistent wills by implication. The two wills are read together to determine inconsistency.
        - The onus is on those seeking to impugn the earlier will to establish inconsistency, that is, that the two wills cannot stand together, and if there is some doubt as to whether the later was intended to revoke the earlier, then both are admitted to probate and any inconsistency is resolved as a matter of construction.
- Voluntary destruction: s 22(d)
    - The two requirements in s22(d) are destruction and intention. Both must be present. See *Cheese v Lovejoy* (1877) LR 2 PD 251
        - Destruction
            - There must be the physical act of burning, tearing or otherwise destroying. See *Doe v Perkes* (1820) 106 ER 740
            - The words "or otherwise destroying" are construed *ejusdem generis* with burning and tearing so there must be some violence to the paper – cancelling the will by crossing it with ben is not enough for s22(d) (but remember this might satisfy s12(3)).
            - The act of destruction must be done by the testator or by some person in the testator's presence and by the testator's direction.
            - Part only may be destroyed. See In re Everest [1975] 2 WLR 333
        - Intention
            - The act of destruction must be done with the intention of revoking the will. So an insane person tearing up a will does not thereby revoke it. See *Young v Cleary* NSW SC No 100149 of 1996 (unreported) (21 October 1997)
            - In the *Estate of Simkin* [1950] VLR 341
            - A will which has been traced to the possession of the testator and cannot be found at the testator's death is presumed to have been destroyed by the testator with an intention to revoke. But this presumption of fact is not a strong one and is rebuttable by evidence showing that it is more probable that the will was not destroyed with an intention to revoke it. See *McCauley v McCauley* (1910) 10 CLR 434 and *In the Estate of (Gwylim) Williams*

- Revival: section 25
    - There must be an intention to revive. This is no difficulty with re-execution but if the reviving instrument is another document then this intention must appear expressly (words such as revive, confirm or ratify) or impliedly from the document.

- The question arises whether s12(2) can be invoked to save an attempted revival which has not been executed in accordance with the formalities of s8. According to In the *Estate of Lynch* (1985) 39 SASR 131 it can.
    - See *Trickey v Davies* (1994) 34 NSWLR 529.

Readings:

Wills

Definitions and Terms

- Will: the sum of what a person wishes to occur on death.
    - In a legal sense, the document or documents in which those wishes are expressed.
        - The main document a 'will', subsidiary documents, 'codicils'.
        - where a testator executes several testamentary instruments with codicils varying or revoking provisions of an earlier will, the will comprises the aggregate of the testamentary intentions expressed in the unrevoked documents: *Douglas-Menzies v Umphelby*.
- Where there is no will:
    - The deceased dies intestate – administrator must be appointed, is granted letters of administration, and must distribute the estate among the family according to a statutory scheme (see intestacy topic).
- Probate: a court order – legal recognition of the executor's authority to deal with the deceased's property.
    - Court of Probate is the Supreme Court.
    - Where the grant is contentious (there is an issue as to formal validity in terms of proper execution or testamentary capacity, or as to which among several was the law) the grant is made only after a Court hearing.
    - Armed with the grant of probate, the executor can collect in the deceased's estate and distribute it according to the terms of the will.
        - Can apply to the Court with questions of interpretation.
        - Court acts as a court of construction – a different capacity to that of probate.
    - Will becomes a public document once probate is granted.
    - Probate not necessary for small estates which comprise no real property, shares or bank accounts with sums exceeding $10 000.
- Operation:
    - Two chief functions are to dispose of property and appoint an executor.
    - Only operates as a declaration of intention.
        - Does not restrict the testator's (person making the will) power to dispose of their property in their lifetime; and a will is always revocable, even if it is stated to be irrevocable, and even if there is a contract not to revoke it.
            - However, there may be a suit for breach of contract against the estate, although never an injunction restraining the revoking of a will.
    - Takes effect only on death (beneficiaries receive no interest until then).
        - A will is said to be ambulatory: capable of dealing with property acquired after it was made.
- Distinguishing a Will from other arrangements:
    - A will is intended to have no operation until the maker's death – an arrangement whose operation is not conditional on the maker's death is not testamentary.
    - Trusts *intervivos* containing limitations to take effect after maker's death:
        - If X transfers property to a trustee for X herself for X's life and after X's death to transfer the property to Y, the death of X will have a bearing on Y's interest as it will convert it from an interest by way of vested remainder to an interest in possession.
            - But because an interest has been created in Y during X's lifetime the arrangement is not testamentary.
        - In *Re Armstrong* [1960] VR 202 the deceased deposited two sums of 1500 pounds each with a bank, informing the manager that he wished to create a fund for the benefit of his two sons and

that he wished to have the income from the deposits but his sons were to have the principal accounts after his death.

- It was argued that because it was clear that the deceased did not contemplate that his sons would enjoy the principal sums until after his death, what the deceased had in mind was a testamentary gift of the accounts which failed for non-compliance with the formalities of the Wills Act.
- The sons' contention, however that the deceased had established a trust of the accounts was accepted by the court – the gift was therefore not testamentary.

- Transfer of property into joint ownership:
  - If X transfers property to herself and Y as joint owners and predeceases Y, Y becomes the sole owner on X's death by way of the operation of the principle of survivorship.
    - The transfer to joint ownership is not testamentary as a joint owner acquires his or her interest at the time of transfer and the effect of X's death is said merely to free the property from the control of its owners.
  - In *Russell v Scott* (1936) 55 CLR 440 an elderly businesswoman was helped in her business by her nephew. She opened a bank account in both their names, telling her solicitor that her nephew would look after her and pay her accounts by withdrawals signed by both of them and that any money remaining in the accounts at her death would be her nephew's.
    - An argument that this was a testamentary disposition which failed for non-compliance with the formalities of the Wills Act was rejected, the High Court holding that the nephew's right, which carried with it title by survivorship, vested when the account was opened in his name.
- Covenants:
  - If X makes a binding covenant during her lifetime to pay money or transfer property to Y after her death it is not testamentary; but if there is no intention to be bound until death then it is.
    - An example of the former is *Beyer v Beyer* [1960] VR 126 where the deceased held shares in a company, the other shares in which were held by members of his family.
      - During his lifetime he executed a deed in which he agreed with the other members of his family that the shares of which he died possessed should be disposed of within the family.
      - It was held that the deed imposed immediate binding obligations on the deceased and the fact that they were to be carried out on his death did not make the deed testamentary (so it was valid even though not executed like a will).
    - An example of the latter is *Bird v Perpetual Executors & Trustees Assoc* (1946) 73 CLR 140.
      - The deceased and his wife had lived without charge for a long period with the plaintiff, his wife's sister, and took the view that he should recompense her.
        - He therefore executed a deed "I hereby acknowledge that I am indebted to Mary Bird for the board of myself and my wife and I direct by executors on my death to pay her a sum calculated at 4 pounds per week from 1929 to my death".
      - Dixon J said (146) that if from the deed an implied covenant with the plaintiff could be spelt out immediately to bind himself and his estate towards her, it was no objection that his death was the event upon which the obligation was to be fulfilled. However, no covenant was expressed and none could be implied – the strongest word was "acknowledge" – at most the deed was a direction to his executor to pay the amount after his death, and as such failed for non-compliance with the formalities of the Wills Act.

        - The covenant may arise either under seal or by simple (including oral) contract (for consideration). And a promise not contractually binding may raise an estoppel.
            - In *Gillett v Holt* [2000] 2 All ER 289 the plaintiff worked on the deceased's farm for many years. On many occasions the deceased promised the plaintiff that he would leave him with the farm in his will.
            - A will to that effect was made but forty years later the two fell out and the plaintiff was kicked off the farm and cut out of the will.
            - The Eng CA held this to be unconscionable; the plaintiff was entitled to the farm by proprietary estoppel.
    - *Donationes mortis causa*:
        - Meaning: A gift made in contemplation of death, intended to take effect on death, but completed by delivery at the time of the gift.
            - As it is conditional on death, it is revocable until then.
        - Elements:
            - The gift must in contemplation of death, although not necessarily in expectation of death and the donor must be contemplating death from some specific cause, such as illness, extreme old age or embarking on a dangerous enterprise – mere recognition of the inevitability of death is not enough.
            - Applies only to personal property, not realty.
        - *Watts v Public Trustee*:
            - Sometime before her death, the deceased handed to the plaintiff a bank-book and a certificate of title of some land of hers and said "take these: when I am gone they are yours". Subsequently on two occasions the passbook was returned to the deceased so the she could make withdrawals from the account. On each of these occasions the passbook was returned to the plaintiff.
            - It was held that there had been a valid donation mortis causa of the money standing to the credit of the account – the document had been delivered with the intention that the plaintiff should have whatever benefit possession of the document might afford when the deceased died – and that the re-delivery of the passbook for withdrawals evidenced a revocation of the gift only to the extent to which money was actually withdrawn.
                - There was no valid donation mortis causa, on the other hand, of the land, the court affirming the traditional view that donationes mortis causa apply only to personality, not realty.
        - However, cf *Sen v Headly* (English case):
            - Rejected the assumption on which the traditional exclusion of land was based, declining to follow *Watts v Public Trustee*.
        - *Public Trustee v Bussell* (1993) 30 NSWLR 111
            - The CA held that handing over share certificates (the deceased said to his best mate "I'm giving you the certificates now, Mick, as the solicitors are coming down on Monday to make my will" (he died before making the will) was a valid donatio mortis causa but it is questionable whether handing over issuer sponsored holding statements would do.

Making a Will

- Capacity:
    - Infancy – Wills Act 1936 (SA) s 5:
        - Extract:
            - (1) Subject to this Act, a minor cannot make, alter or revoke a will.

- (2) A minor who is or has been married may make, alter or revoke a will as if he or she were an adult.
- (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.

- Minor: under the age of 18 (s 3).
- Section 6 enables any minor to apply to the Court for an order authorizing the minor to make or alter a will in terms approved by the Court:
  - (1) The Court may, on application by a minor, make an order authorising the minor to make or alter a will in specific terms approved by the Court, or to revoke a will.
  - (2) An authorisation under this section may be granted on such conditions as the Court thinks fit.
  - (3) Before making an order under this section, the Court must be satisfied that—
    - (a) the minor understands the nature and effect of the proposed will, alteration or revocation; and
    - (b) the proposed will, alteration or revocation accurately reflects the intentions of the minor; and
    - (c) it is reasonable in all the circumstances that the order should be made.
  - (4) A will or instrument altering or revoking a will made pursuant to an order under this section—
    - (a) must be executed as required by law and one of the attesting witnesses must be the Registrar or the Public Trustee; and
    - (b) must be deposited for safe custody with the Registrar under section 13 of the *Administration and Probate Act 1919*. The will may not be withdrawn from deposit with the Registrar by the minor unless the Court has made an order authorising the minor to revoke the will or the minor has attained the age of 18 years or is married.
  - For the purpose of the law of SA, the relationship of parent and child exists between a person and their natural mother and father.

- Mental Capacity:
  - The traditional phrase used to describe testamentary capacity is "sound mind, memory and understanding". The classic test was put forward by Cockburn CJ in Banks v Goodfellow (1970) LR 5 QB 549, 565:
    - "It is essential to the exercise of testamentary power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he out to give effect; and with, a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or shall prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have made."
  - Four elements:
    - 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 (this does not require that it be established that the testator had specific recollection of every item of his or her property – a basic capacity for some idea of the extent of property is sufficient.
    - 3. An ability to comprehend and appreciate the claims to which the testator ought to give effect (this does not require the testator to name all or some or any of the persons having

a moral claim on him or her as beneficiaries – just that he or she was capable of appreciating the ordinary claims of spouse, children and other dependants);

- 4. No insane delusion must have influenced a departure from giving effect to such claims.
    - Usually defined as a belief in something which no rational person could believe in. Even in the testator suffers a delusion in this sense if it does not affect the disposition of property then there is no ground for denying capacity: *Banks v Goodfellow*
        - Testator suffered from periodic delusions of persecution from one man, notwithstanding the death of this man some years previously (the mere mention of Featherstone Alexander's name was enough to throw him into a frenzy).
        - He made a will leaving all his property to his niece. The will was contested on the grounds of insanity but it was held that as there was no evidence that the delusion had influenced the will itself, it was valid.
    - Cf *Bull v Fulton*:
        - The testator's delusion was of such a character as to have a direct bearing on the provisions of the will so it was invalid. Believed her signatures on various documents prepared by her nephews (including wills) were false despite the wealth of evidence presented to her.
    - *Kerr v Badran*:
        - In applying the test in *Banks*, give consideration to the differences in life since the case was decided – life expectancy is greater, and memory loss more common.
        - Older people today may well be aware they own substantial assets yet not have an accurate understanding of the value of those assets or the particular items (many have handed over management of shares and realty to advisers). They may well still be able to distribute those assets by will.
    - In the *Estate of Bohrmann* [1938] 1 All ER 271 the English Probate Division held that if a delusion which impairs testamentary capacity affects part only of the will, that part may be severed, leaving the rest valid but the NSW SC in *Woodhead v Perpetual Trustee Co Ltd* (1987) 11 NSWLR 267 declined to follow *Bohrmann*.
        - The judge went back to a consideration of what testamentary capacity is by quoting from *Banks v Goodfellow* and held that if the will maker suffers from an insane delusion which affects the disposition of property, it follows that he or she is not a competent testator.

- The burden of proving that the testator had capacity is on the proponent. But if the will is rational on the face of it and duly executed there is a presumption of capacity (that is, the proponent need not adduce independent evidence of capacity).
    - If there is independent evidence of incapacity the presumption is displaced and the proponent must prove that the will itself was not affected by any insane delusion (it was executed during a sane interval or the dispositions were not influenced by insanity).
        - Where capacity is in doubt the court requires a vigilant examination of all the evidence but a residual doubt is not enough to deny probate – the standard of proof is the ordinary civil one.
    - In *O'Connell v Shortland* (1989) 51 SASR 337 the testator made a will three days before dying of cancer. There was some medical evidence that the build-up of drugs he had been