Successions

What happens to a person's property when they die?

- Do they have any property?
- Who is going to get the property?
- Do you need to get a grant of administration?
    - Small estates will not need to go to court to probate the will or have a person granted letters of administration – s 65 Administration Act 1969.

- If no-one receives the property, then the state takes it.

Intestacy

- No will, or partial intestacy (some property not disposed of by will or trust invalid so property returns on resulting trust) – intestacy rules apply unless provisions stipulating who receives the residue estate
- Letters of administration granted to an administrator
- To distribute according to statutory rules – Administration Act 1969, s 77
- Personal Chattels – s 2 - does not include any chattels used exclusively or principally at the death of the deceased for business purposes or money or securities for money
- Children – by descent or adoption
- Partial intestacy – s 79

Wills

- Allow a person to decide what happens to property when they die (subject to challenges)
- Wills Act 2007
- What are the formalities – s 11 – must be in writing, signed by witnesses, must witness the will-maker signed the document and then sign the document themselves in the will-maker's presence. s 11(5) witnesses may, as evidence of compliance with s 11(4), state the requirements of s 11(4) – forestalls any claim as to whether they signed in the right way.
- Witnesses – ss 12 and 13
- Declaration of validity despite informality – s 14; *Re Brundall*
- Changes – s 15
- Revocation – ss 16, 18, 19

- Requires certain formalities before a will is valid
- s 13 disposition of property in the will void if made to a witness or witnesses' life partner
- Exception under s 13: to satisfy the HC that the will maker knew, approved and made disposition voluntarily.
- Will, s 8: document must be made by an actual person and disposes of property to which they are entitled to when they die
- If will not valid then dramatic result as friends or charities do not receive property. If go through trouble of making a will then presume want to benefit people in it
- Courts somehow find documents were signed despite non-compliance with s 11 as do not want to disappoint wishes of will-maker. Unfair to strictly insist on formality.
- Eg. witnesses outside the room when person signed and the court: they properly witnessed it as could have looked through window at the person.

- Formalities exist:
    - Clarity over who receives what i.e. writing
    - Evidence
    - Prevention against fraud i.e. witnesses (easy to commit if will-maker dead)
    - Avoid transaction costs over whether will was signed by will-maker etc
    - Avoids costs associated with validating a will
- s 14 HC can declare a will valid – applies when document appears to be a will, non-compliance with s 11 i.e. unsigned written document or not witnesses properly and comes into existence in and out of NZ and satisfied it expressed the deceased person's intention
- Oral will not a "document" under s 8 and s 14 – seems to rule out validating an oral will.

- Re Brundall – usually when people argue on s 14 they have a good case document is a valid will. Courts are especially likely to uphold a document if there is no resistance towards validation.
- s 15 changes – generally require same formality as the will itself.
- s 16 revocation – a latter will must revoke an earlier will. Later statements of what happens takes priority over earlier ones.
- s 16(c) the will-maker marries or enters a civil union and if will not made within contemplation of civil union etc, that voids any existing wills - Unless clear current will made in contemplation of marrying spouse.

Testamentary Capacity

- Wills are a legal act creating property rights on will-maker's death.
- Will-maker must intend to create the will and have the mental capacity to do so.
- Woodward: because creating a will involves moral responsibility – have legal duties to spouses on separation and duties to provide for children which end when they become adults
- Testamentary capacity – the intention to make a will and distribute property on death to particular people may not exist when the will-maker does not have mental capacity.
- Eg. people approaching end of their life and with serious illness, although not in itself show there was no mental capacity but often the cause of doubt over capacity.

Procedure:

- Loosley v Powell: [20]
- Those propounding the will i.e. want will to be valid, do not have to establish testamentary capacity unless evidence raising a lack of capacity as an issue. In the absence of such evidence – the will-maker will be presumed to have testamentary capacity.
- If evidence raises lack of capacity as an issue or if will seems irrational, then the onus of satisfying the court that there was testamentary capacity rests on those who propound the will.
- The standard is at the balance of probabilities
- Woodward: Standard of proof means case cannot be left finely balanced. Court must be able to find reasonable inferences relating to testamentary capacity.

- Testamentary capacity has to be shown at the time when the will is executed by the will-maker
- Exception is the rule in Parker v Felgate – if there was testamentary capacity when the will-maker gave instructions on the preparation of the will to another person who had prepared the will according to the instructions – then the will is valid even though at a later time when the will is executed the will-maker no longer has testamentary capacity.
- Will-maker still has to be capable of understanding that they engaged in executing the will for which they gave instructions, but do not have to know the content of the instructions or be capable of giving instructions at a later point.

Test for capacity:

- Banks v Goodfellow: will-maker must have a sound and disposing mind and memory. He must be capable of making the will with an understanding of the nature of the business in which he is engaged, a recollection of the property he has, the objects of the will and the manner it is to be distributed. Do not need to view it with the eye of a lawyer.
- Woodward at [19]:
- (1) Moral responsibility: the possession of intellectual and moral faculties
- (2) Testator must:
- i) understand the nature of the act and its effects and the extent of the property he is disposing i.e. creating a will and its results
- ii) comprehend and appreciate the claims he ought to give effect to i.e. people who may claim they should receive something in the will.
- iii) be free of any disorder of the mind which would affect his sense of right or prevent the exercise of natural faculties – no insane delusions will affect his will.
- (3) Unsoundness of mind arising caused by defective organization, physical infirmity or the decay of advancing age, as distinguished from mental derangement is equally cause of incapacity. But:
- [i] though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains.
- [ii]It is enough if the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done.
  i.e. will-maker can have slightly less capacity provided they have enough mental capacity to understand the above
- (5) testamentary capacity depends on the soundness of the mind, and not the state of bodily health. The latter may be in a state of extreme weakness, feebleness or debility and yet he may have enough understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property.
- (6) A testator who has reflected over the years on how his property should be disposed of by will is likely to find it less difficult to express his testamentary intentions than to understand some new business
- (7) Testamentary capacity does not require a sound and disposing mind and memory in the highest degree; otherwise, very few could make testaments at all;

- Delusion: Re Rhodes – will is set aside if there is a condition reasonably calculated to affect the views of the will-maker of those who are naturally the probable recipients. Not insanity in mental health terms but things which pervert the will-maker's ability to appropriately weigh claims that are naturally pressing. Sometimes found in fixed or irrational beliefs. Old age, general physical or mental enfeeblement is not conclusive by itself against the will-maker.
- A delusion is a belief in the existence of something which no rational person could believe in and has to influence the will to be set aside
- Brown v Porou: will-maker was an elderly Maori lady who in the years before her dearth entered into a trance-like state where she supposedly spoke to spirits. Evidence did not show that the will-maker was mentally ill or had diminished capacity due to trance and also did not show that the trances had an effect on the property dispositions under her will. Will was not set aside.
- (8) Testator does not need to retain capacity as they did previously. Their mind may have been weakened, memory may have become enfeebled and yet they may still understand and make a sound assessment in all the circumstances to enter into a rational, fair and just will – need to have mental capacity to make a will.

- Does not mean court will challenge the rationality or fairness of the will if the will-maker has testamentary capacity.
- However irrationality or unfairness of the will is part of the evidence that a court takes into account when determining whether the testator had mental capacity
- Eg. Loosley – removal of an executor which was not disproportionate or improvident or irrational or unfair – therefore claim that the will was irrational as evidence of incapacity was dismissed.

Advising a will-maker:

- 1) is there any reason to doubt testamentary or mental capacity.
- Issue for people who are more likely to make wills i.e. seriously ill or elderly, associated with mental incapacity.
- Eg. Woodward – will-maker was elderly and suffered a stroke which affected his mental and physical abilities
- Once evidence which suggests incapacity, onus shifts and person trying to prove the will must show testamentary capacity exists – factual question determined by evidence
- Relevant evidence of capacity and mental state i.e. from people who interacted with will-maker. Medical professionals often have evidence of capacity in relation to diagnosing and monitoring development of illnesses – even those not involved in care of patient can interpret evidence they do see and giving professional opinion.
- 2) Get evidence at the time when the will is executed.
- Solicitor has legal responsibility to act with reasonable care in facilitating the will-maker's actions in creating the will
- No strict rules about how to gather evidence to prove capacity. Only need to make sure meet the tests stated.
- Best if there are lots of medical practioners and experts who can test for capacity.
- Solicitor views in determining capacity do not carry as much weight as medical experts but they can ask the right questions which a will-maker has to be able to answer to prove

capacity – and recording those questions and answers so subsequent medical practioners can offer their views on mental capacity.

- Capacity requires:
    - will-making act
    - extent of will-maker's property
    - what persons exist who may receive property to
    - no insane delusions
- Medical journals set out for practioners what law requires – factual tests for capacity
- Loosley focus on the test from Goodfellow for capacity. Non-compliance with a check-list is not fatal is provide evidence that the will-maker's mind was such that it satisfied the court that there was capacity.

Woodward v Smith
Facts: • Onus shifted as there was evidence of incapacity. The will-maker was elderly and had suffered a stroke which diminished his abilities. • Different medical opinions between experts and will-maker's GP on the GP and public trustee's transcripts testing for capacity.
Result: • Cumulatively testamentary capacity proven from independent professionals who thought the will-maker had capacity based on questioning or review of evidence. • Will-maker had himself, unaided, created a rational set of instructions for changes he wanted to make explained why he wanted to do them. • Will-maker knew he was creating a will, knew about his property, the people who had claims based on his ability to create the instructions. • Longstanding knowledge of will-maker by his GP seen as giving the GP an advantage in assessing capacity.

Loosley v Powell
Facts: • Presumption of testamentary capacity had been displaced by evidence of terminal illness whereby at the preparation and execution of the will, the will-maker was in a depleted physical condition and state of mind. Onus on executors to prove capacity. • Will executed when will-maker was 8 days from death at a hospice where self-medicating with morphine • Medical personnel attending her on the day noticed lethargy, tiredness and an inability to process too many questions. • General specialist medical advice around the time indicated questions over capacity. She was very ill and in much pain • Issue: whether exception in Parker v Fellgate applied • Claim she had testamentary capacity at an earlier time when the instructions for the will drawn up. Mixed evidence from family who were parties to the dispute. • Senior medical doctor whose evidence was given significant weight added to argument that testamentary capacity did not exist. • Diary changes showed confusion over the will and changes will-maker thinking of • Medical evidence of dementia and medication affecting her clear thinking • Instructions for changing will had no rational basis and founded on an idea of her niece and nephew that had no basis in reality.

Result:
- Will-maker was incapable of comprehending and appreciating claims on her estate.
- No testamentary capacity even at the earlier time.

Undue influence

- Will-maker may have made or changed their will not as a product of free-will but because of undue influence.
- Green [35]: difference between actual and presumed undue influence, the latter is where a party makes use of an evidential presumption which arises if the person subject to the undue influence placed trust and confidence in the other and the transaction called for an explanation. Possible shift in the burden
- However, Carey v Norton: Elias J: in the testamentary context, undue influence could not be presumed. Not at stake in Green

Procedure

- Actual undue influence
- Onus of proving undue influence falls on person alleging it
- The standard is at the balance of probabilities.
- Appellants in Green: higher standard of proof needed that undue influence was the only possible hypothesis for why the transaction as concluded.
- Court: rejected – find undue influence if satisfied that the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole

Test for undue influence:

- Green: "influence was undue in the sense that the transaction was not the result of the free exercise of an independent will"
- Question of fact - emphasises circumstantial reasoning is sufficient.
- Influence can come in different forms and not all influences are undue.
- Influence is strong pressure to make a decision which the will-maker cannot resist even if they do not want to make that particular decision.
- Overbears the will-maker's free exercise of judgment – taken away the ability for the will-maker to freely make their own decision.
- Will must be offspring of will-maker's own volition and not the record of someone else's intention
- Influences such as persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like are legitimate.
- Influences such as pressure of whatever character, i.e. acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. This includes importunity or threats which the will-maker *cannot resist* and yielded for the sake of peace and quiet, or of escaping from distress of mind or social discomfort
- Emphasis on pressure is controversial – academics argue court applying a doctrine of illegitimate pressure that relate to strong pressure. In other cases of undue influence there may be no pressure i.e. non-violent threats or constant wearing down

Carey v Norton
Facts: • Will-maker indicated to brothers that she wanted to share her estate equally between her 6 nieces and nephews, but provide more for 2 of her nieces. • Brothers advised that the estate be divided into 8, with the extra 2 parts given to the 2 nieces
Result: • Found undue influence as will-maker relied on brother's advice and did not make her decision based on her own freewill. • Despite brothers doing nothing wrong, nor did they apply any pressure. • Undue influence concerns whether there was too much influence rather than illegitimate pressure.

Green v Green
Facts: • Deceased was highly successful business with company worth hundreds of million. • His daughter involved in management of his companies and trusts which owned the companies. • Deceased changed the will due to influence from his son and son's lawyer by removing the daughter from her role as director and trustee of the trust. • Court found will-maker had testamentary capacity at the material times, despite will-maker being sick, intermittent mental lapses, sometimes forgetful, sometimes confused, emotional, tired, unwell, found it difficult to make big decisions and did not engage in detail of such decisions
Result: • Found undue influence due to son's determination to have a role in the companies and feel himself from sister's continued opposition, which caused pressure on the father to remove the sister. • Key: the son and his lawyer driving the agenda which caused the will-maker to remove the sister. • Lawyer advising will-maker was not his usual lawyer but a close friend of the son. Evidence demonstrated son gave directions to the lawyer, instead of the will-maker • Son initiated decisions and attended meetings when decisions made by will-maker • Will-maker later denied he had removed the daughter from her positions and did not know why the daughter had been removed, nor did he know who prepared the papers for him to sign. • Undue influence from son instigating choices about decisions which the father should have made with independent legal advice • Fault or wrongdoing is not required on the part of the influencer • Focus is on the mind of the person consenting to impugned transaction, not on the motives of the person exerting pressure or influence • MB: focus is not on pressure and also operates when decision maker does not make up their mind and consider the decision themselves sufficiently to be their own decision.