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Wills and succession

Recognition of a will

Either s 11 must apply or s 14

Section 11

- Will must be in writing
- Will must be signed by will maker and witnessed – two people
 - o Witnesses must not be beneficiaries of the will (or their partners)
- Will should appoint executor
 - o Person who will stand in the position of the deceased to pay bills on his behalf.

Major effect of Wills act is that the need for formalities is ameliorated by s 14 of the Wills Act.

- Under s 14 High Court may declare a will valid
- Requirements:
 - o Document appears to be a will
 - o Does not comply with s 11
 - o Came into existence in or out of NZ
 - o Court must be satisfied that the document expresses the persons testamentary intentions.
 - On considering the document, evidence on signing and witnessing, persons' intention and statements made by them.
 - o Courts will take a liberal approach – will seek to realise your intentions if you write them down.
- Examples;
- *Macneil*
 - o Deceased left a suicide note saying it was her last will and testament.
 - o Very informal document but the Court recognised it.
 - o It was clearly intended to represent her intentions. Despite the fact the contents was quite vague. 'whoever would like my possessions'
- *Re Hickford*
 - o Got a new will drafter for new wife, old wife died.
 - o Was not signed or witnessed but evidence that he intended it to be his will.
- Marriages and civil unions revoke your prior wills unless the will is made expressly in contemplation of the marriage.

Intestacy

If you don't leave a will, intestacy rules apply under the Administration Act.

- Section 77

- If you only have a partner and no children (issue) and no parents – they get everything.
- Partner + child = one third partner: two thirds child
- Partner + parents = two thirds partner: one third split parents
- Parents = just parents
- No partner, no parents = siblings full or half.
- None of the above but grandparents – will be split between grandparents.
- No one who takes these interests then the Crown does
 - o They will split this among dependents and other people the person would have reasonably made provision for.

Executors:

- Common law – have the ability to decide what happens with your body when you die.
- Law Com's view was that people should be able to appoint a death or body representative to determine what should happen to their remains.
 - o Intentions of the testator are important but not completely definitive.
 - o This process was not built

Executor rule and application to Māori

- Takamore v Clarke
- Conflict between Pakeha wife and the deceased's extended family who wished to retain the body at family lands.
- Elias:
 - o Tikanga could be applied at common law.
 - o If he had retained connection with Māori family then he would be bound to allow them to decide.
 - o The fact he didn't maintain connection on the facts meant that his immediate family should take priority
 - o NZ law should recognise tikanga.
- Majority:
 - o Common law trumps tikanga. Executor should decide.
- Resolved by realism because the court order to enable wife to uncover the body was never enforced.

Relationship Property

- Defacto relationship – couple living together for more than 3 years.
- Relationship Property Act
 - o Option A under Section 61 – gives the surviving partner the ability to make a claim for RPA settlement
 - Will usually be around 50%
 - Barely used – because most people will get more under the will, or under intestacy rules they would get everything
 - o RPA is only advantageous where there are claims against the will which would reduce your share to less than 50%

Family Protection Act

- Enables surviving people – spouses, children grandchildren to claim that they should get more from the estate. (S 4)
 - o Applies where the will or intestacy does not make adequate provision for the proper maintenance and support of that person.
 - Not only about financial need but also moral support in terms of feeling alike part of the family (*Williams*)
 - o FPA can trump your world under NZ law.

- The only way to get around the FPA is to make a trust
 - o Because the FPA still applies if you make a will
 - o But if you make a trust then they can't get around that your children can be restricted from being beneficiaries and there will be no money left in the estate to apply under the FPA.
 - Bc. Trust money belongs to the beneficiaries.

S 5 FPA

- Sometimes a judge might find it is not appropriate to make an order under FPA
- Ie. if the person obviously wasn't a good daughter.
- Court is realistic about these claims.
 - o But you can't rely on this if you have someone you don't want to inherit

Examples:

- *Walsh*
- *Williams*:
 - o Two children – significant disadvantage to the wealthier child in the will
 - o Parent is less concerned about the wealthier child.
 - o Wealthy daughter has no need to be provided for from the estate. No financial need.
 - o But argues she still has moral need to be adequately provided for.
- Judgement:
 - o Act applies to more than just resolving financial need it is also about moral obligations to protect your children. Satisfy the moral requirement that makes them feel part of the family.
 - o This should be left to the court.
 - Sometimes there won't be enough money.
 - Otherwise 12-20% to each child.

This frustrates personal autonomy in how people deal with their property

- People should be entitled to disinherit their children
- Particularly in a situation like *Williams* where there was no financial need.
- But legislature intervenes.

To avoid your wishes being subject to this you can:

- Make an adequate provision for child in your will (change your wishes)
- Or – set up a trust. So there is no money to give when you die.

Testamentary Promises Act

- This is another area where we don't have complete testamentary freedom
- Section 3
 - o Means that promises by the deceased to pay someone for work or services rendered, made during their lifetime – through a provision to the deceased in their will can be enforced by the court and taken out of the deceaseds' estate.
 - o Will just be treated like other debts.
 - Paid to the same manner and extent as it would have been if the deceased had been alive.
- Examples:
 - *Welsh*
 - o Mr Stuart was involved with step father, Mr Welsh, as a son.

- Argues he should get the interest deserved to him under the will due to his performance of work on an asset.
- \$200,000 - \$20,000 (CoA)
 - Judgement:
 - This is taking a very extended definition of promise.
- **Critique:**
 - Court is rewarding promises which would not be valid contracts or subject to common law.
 - They would fail for lack of consideration. Promising to pay someone after they have done the service is not consideration.
 - Obligation to pay seems to be less stringent than if there was a contract.
 - Inconsistency in the law here.

Alterations and revocations to will - Undue influence

Which person do we honor in these cases – the person who the deceased was during their lifetime or the person who the deceased is at the time of their death.

- Good to honor who they were during life
- Also good to honor and give respect to them as a sick person.

Test: (*Green*)

- Focus is not on the intention of the person or their unconscionability in trying to overturn the persons will
- The fact to be determined is whether there was impairment of free will.
 - Focus is on the mind of the person consenting to the impugned transaction.
 - Not necessary to demonstrate unconscionability.
- Court must be satisfied on the balance of probabilities that it is more likely the persons' will was overborne than that it was not.
- Presence or absence of independent advice is often a factor in deciding on undue influence.
 - This will be a compelling factor – it will then be up to the person seeking to rely on the will to prove it was not made under undue influence.

Green:

- Facts:
 - Green multimillion dollar businessman
 - Five children – one Maryanne was his business partner.
 - Towards the end of his life Green wants to involve other siblings in his business.
 - M doesn't want John to be involved.
 - Green makes new decisions about his will and who should run the business after he dies.
 - M is excluded.
- Application
 - There was undue influence.
 - Maryanne wants to say – there was no other explanation – Court rejects this
 - It must be positively proved.
 - But the lack of independent advice for Green was bad.
 - Chief advisor for Green was a man who was not a lawyer
 - Green had minimal contact with him
 - His role was facilitating John's advice.

Lack of capacity

Different to undue influence.

Issue is whether you are fit to make a will?

- Testamentary freedom to make a stupid will contrasts with whether you are actually fit to make a legal document.

Looseley:

- Allison was dying of cancer
- Had an estate of 2 mill
- Previous will divided it equally among 4 nephews and nieces
- Final will changed it to prioritise the children of one sister over the other.
- Closebonds with family.
- Over her life she treated them evenly.

Judgement:

- Woodward Smith Test
- Testator needs to understand the nature of the act and its effects and the extent of property they are disposing.
- Free of disorder of the mind.
- It is the soundness of the mind that is to be attended to. Might be incompetent to do other business but ok to make a will.
- Mind does not need to be that sound. Does not need to be the same capacity

Court's application

- Highlight two things:
 1. That there is no reason for the change.
 - o High Court focused on the idea that there has been a massive change and should be reasons for this.
 - o What about the fact that you don't need an explanation for changing your mind?
 - o CoA says – you have a right to change your mind but we would expect the absence of reasons to be something we might consider re. Capacity.
 - o Almost seems to be implying that people with capacity use reasons to change their mind.
 - o Seems a bit flawed – people are entitled to make rash decisions.
 2. Lawyer should have enquired reasons for the change.
 - o This would show her understanding of what the changes were.
 - o Why they changed their mind and that they knew what they were doing.

Concluded that she did not have testamentary capacity

- She was in acute pain, self medicating pain killers.
- Tension between two kinds of evidence.
 - o That people at the hospital said she was fine and exercising autonomy
 - o BUT her family who knew her said that she was not fine and she lacked capacity
 - o Chose to uphold the real Alison as the person who often disagreed with family but did not abandon her relationships.

What do you need to do to ensure last minute changes to a will are legally valid?

- Need to document reasons for the change – this will be evidence in support of capacity
- Need to seek evidence of nurses and doctors as to the person's capacity but also people who have known the person for a long time.