

Episode 81: Summary

Episode name: Will They or Won't They: Combating Ambiguity in Wills

Guest(s): Anne Brown

What area(s) of law does this episode consider?

Full and partial intestacy, residue clauses, and best practice will drafting.

Why is this topic relevant?

The *Succession Act 2006* (NSW) (**Succession Act**) is the source of truth for the processes that happen to someone's estate when they die without a valid will in NSW - this is known as intestacy.

But sometimes the documents which describe and allocate the property of the deceased may not have been updated for quite some time and, in the intervening period, the person may have acquired property which is not mentioned at all in their will when they die. This is known as a partial intestacy.

To make things even more confusing, drafting wills is an area of law in which a simple mistake or just loose drafting may not be discovered until after the death of the client - usually in the form of a dispute between potential beneficiaries.

Knowing how to spot - and prevent - potential disputes and errors before they arise is a key skill for any lawyer.

What legislation is considered in this episode?

Succession Act 2006 (NSW)

Family Provision Act 1982 (NSW)

What cases are considered in this episode?

[Wales v Dixon & Ors \[2020\] EWHC 1979 \(Ch\)](#) (British and Irish Legal Information Institute link)

- Peter Wales granted property to his “*nieces and nephews*” in equal measures, but did not specify whether this meant nieces and nephews related to him by blood or whether it also included nieces and nephews related to him by marriage. There were 7 nieces and nephews related by blood and 8 related by marriage. This difference in definition determined whether the will had 7 joint beneficiaries or 15. It was found that “*nieces and nephews*” included those related by marriage.

[Re Staughton; Grant v McMillan \[2017\] VSC 359](#) (Jade link)

- The will in question had been drafted years before the deceased's second child married his wife, who had two children from a previous marriage. The Court considered the relationship between the testator and the people in dispute and how they had been referred to while alive. The Court found that the step-grandchildren should be included as “grandchildren” for the purpose of the will.

What are the main points?

- Where someone passes away without a will, the *Succession Act* sets out how their assets will be distributed, generally to their spouse and/or children first.

- Partial intestacy occurs where a person's assets have not been dealt with under their will when they pass away. This could occur because a document has not been updated or something has not not been considered.
- This situation can often be dealt with through a residue clause.
- Anne has never seen a solicitor-drafted will which does not have a residue clause.
- A lack of a residue clause is more often associated with a DIY or will kit will.
- A big issue in drafting wills is ambiguity, such as not describing assets properly or not specifying what happens to the assets if they are sold.
- Typically, lawyers will allocate the value of property using a percentage to account for that value changing.
- There are also difficulties in not being specific enough when leaving assets to groups of family members, such as grandchildren or nieces and nephews.

What are the practical takeaways?

- The most important thing for lawyers drafting wills is to develop a relationship with the client.
- This helps to fully understand their estate and family relationships so that these can be better accounted for in the will.
- Draft a holistic will and look beyond just the solicitor-client relationship and consult with accountants and financial planners where appropriate to fully understand the client's situation.
- Seek statutory declarations from clients to explain their decisions, such as why they have left certain family members out of their will.
- Also, take detailed notes when taking instructions from a client. These could both potentially help in the case of future litigation.
- It can be useful to bring a second lawyer to any client meetings so they can take more detailed contemporaneous notes, especially if the client is tiring quickly.
- Where a lawyer is unsure of their client's capacity to draft a will, they should seek the advice of the doctor or nurse taking care of them.
- Where a client has fluctuating capacity, persist with them to ensure their wishes are upheld. Refer to the treating practitioner's view as to whether you should visit them and if they are able to alter their will.