

# The Peter Cane Prize for Legal Reasoning by an Aspiring Lawyer 2022

The Legal Reasoning Prize for 2022 is about succession law. Succession law is an important area of law: it regulates what happens to a person's property when that person dies. Section 1 of this document contains a hypothetical case. Section 2 contains legislative material. Section 3 contains the question.

The questions posed can be answered from the material provided and the application of sufficient thought, but research is welcomed. For example, a vast collection of reports of cases decided by the UK courts is available at [www.bailii.org](http://www.bailii.org) and by the Australian courts at [www.austlii.edu.au](http://www.austlii.edu.au), and many local libraries have textbooks on law.

## 1. Hypothetical case

Li is very unwell. Having received news that his condition will not improve, Li asks his doctors to call for his close friend, Freya. When Freya arrives, the following conversation takes place:

Li: *There is a notebook in my bag. I want you to write something down. I'm not sure how long I have left, and I just realised I never prepared a proper will.*

Freya: *Of course. What do you want me to write?*

Li: *First, write 'Li's wishes' at the top.*

Freya: *Done.*

Li: *Then write 'Aunty Annie is to get my tractor'. It was our wish for her to have it. Everyone knows that's what we wanted. And write 'Marco is to get my farm': he always worked so hard for me and is the best employee I ever had. Then write that your name: you get my beachhouse. Finally, write 'subject to these earlier gifts, everything else I own goes to my only child, Tina. It's what my late wife would have wanted too.*

Freya: *Done.*

Li: *Perfect. I'll sign it, but let's call in the solicitor tomorrow to formalise everything, in case we forgot something.*

Li signed the note. Freya signed the bottom of the notes with her name as well.

Li died the next day. Tina is now claiming that she is entitled to everything once owned by her father. Tina says that is because Li died without a valid will: the notes were either not intended to be Li's will (because they were mere 'notes' of a draft will) or, if intended to be a will, they do not qualify as a will because they were not signed in the presence of two witnesses.

Aunty Annie, Marco, and Freya are confused: they say that Li clearly wanted to leave them something and that Li's clear intention to benefit them ought to be sufficient.

## 2. Legislative material

The Wills Act 1837<sup>1</sup> allows an adult to make a will providing for the disposal of her, his or their assets on death. The person who creates a will is known as the 'testator'. To create a valid will, certain requirements must be met. If a person dies without a will, they are said to die 'intestate' and the relevant property will be dealt with in accordance with certain default rules.

The requirements for a valid will are set out in section 9 of the Wills Act.

### 9 Signing and attestation of wills

(1) No will shall be valid unless—

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears that the testator intended by his signature to give effect to the will; and

---

<sup>1</sup> <https://www.legislation.gov.uk/ukpga/Will4and1Vict/7/26/contents>

- (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- (d) each witness either—
  - (i) attests and signs the will; or
  - (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),but no form of attestation shall be necessary.

These requirements are mandatory. There are only limited situations (not presently relevant) in which these requirements will not apply. This contrasts with the position in other jurisdictions, such as Australia, which may give courts a ‘dispensing power’. Such a power allows a court to dispense with the formal requirements for a will in certain situations and to treat a document as a valid will. Consider the following provision of the Succession Act 2006 (NSW):<sup>2</sup>

### **8 When may the Court dispense with the requirements for execution, alteration or revocation of wills?**

- (1) This section applies to a document, or part of a document, that—
  - (a) purports to state the testamentary intentions of a deceased person, and
  - (b) has not been executed in accordance with this Part.
- (2) The document, or part of the document, forms—
  - (a) the deceased person’s will—if the Court is satisfied that the person intended it to form his or her will[...].
- (3) In making a decision under subsection (2), the Court may, in addition to the document or part, have regard to—
  - (a) any evidence relating to the manner in which the document or part was executed, and
  - (b) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person.
- (4) Subsection (3) does not limit the matters that the Court may have regard to in making a decision under subsection (2).

### **3. Question**

Explain what section 9 of the Wills Act 1837 means for those wishing to prepare a will, considering the following questions in particular.

1. Why do you think formality requirements for the creation of wills might be necessary?
2. In light of section 9, what is the likely outcome of the hypothetical case? Provide reasons for your answer.
3. What might be the likely outcome of the hypothetical case if section 8 of the Succession Act 2006 (NSW) were made part of English law? Provide reasons for your answer, including a discussion of what factors the court might consider under sections 8(3) and 8(4) of the Succession Act.
4. Do you agree with the likely outcomes in questions (2) and (3) above? Critically discuss the advantages and disadvantages of providing courts with a ‘dispensing power’ like section 8.

---

<sup>2</sup> <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2006-080#sec.8>