Aboriginal WILLS HANDBOOK

A practical guide to making culturally appropriate Wills for Aboriginal people

Third Edition

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NSW Trustee & Guardian
19 O'Connell Street
Sydney NSW 2000

This handbook is also available to download at
https://www.tag.nsw.gov.au/sites/default/files/2021-07/Aboriginal-Wills-Booklet-3rd-Edition-2020_Web%20version.pdf

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Contents

Foreword

One of the reasons I wanted to become a lawyer was due to the devastating memory I have as a child when my father died intestate and was unable to guarantee that his property – our family land – in Hervey Bay passed to his children. At the beginning of the 20th century, my great grandmother and her family were moved from their country in Warra to the Cherbourg mission. My grandfather and his brother busted out of the mission and worked all over Queensland as stockmen, cane cutters and timber cutters. Eventually, they settled in Hervey Bay and bought land. This is the land where my dad grew up and the land where my family grew up. For various complex reasons, my Dad died without writing a will and we lost our interest in the land. Although my experience was in Queensland, it is a common story around Australia of the serious consequences of not preparing a will. For me, I was at UQ Law School at the time and it was an incredibly disempowering experience to learn that we could not do anything about it. Like many children of the Aboriginal underclass we grew up poor and in a low socio-economic environment. The land would have provided us with some inherited wealth and given us a head start. We used to lament: if only Dad had written a will. So, when I moved to UNSW Faculty of Law I was so excited to learn about the research Prue Vines was undertaking on this very issue that has affected my life so deeply. For me, as a junior academic, this was one of the most important research projects being undertaken on Aboriginal issues and the law, because it is rarely spoken about in the community and it is about access to justice.

And, in the course of my work as an expert member of the United Nations Permanent Forum on Indigenous Issues, I have come to learn that the problem of wills and succession in indigenous communities is a global concern.

This book is an extremely important contribution to the Aboriginal people of New South Wales who wish to make a will. In particular, it is sensitive to the fact that, like many areas of the law, intestacy is not always culturally appropriate. It is important that as a community we educate ourselves about the importance of writing a will and that we feel comfortable doing so: this publication provides that opportunity. It is a reminder for individuals and communities to think about, plan and register their wishes as to who they will pass their property to when they die. It is also an important resource that the community can provide to their lawyer to assist them in understanding the complexities that arise in dealing with Aboriginal culture and the drafting of wills.

This book is about empowering Aboriginal communities and individuals. Taking control of our lives in regard to drafting a will is a concrete example of self-determination: exercising the right to make decisions about our economic, social and cultural destiny.

Professor Megan Davis

United Nations Permanent Forum on Indigenous Issues;
Commissioner, NSW Land and Environment Court;
Director, Indigenous Law Centre, Faculty of Law, UNSW

Preface

As author I have many people to thank. This book would not have come about without the support of NSW Trustee & Guardian. Imelda Dodds, who became the first CEO of NSW Trustee & Guardian, was enthusiastic in ensuring this project came to fruition. The former Public Trustee, Peter Whitehead, recognised the importance of the project and was instrumental in initiating the project. Samantha Joseph and Terry Chenery at the Aboriginal Justice Advisory Council were encouraging and Delwyn Everard at the Arts Law Centre patiently answered questions. Renee J Watts, Peta MacGillivray, Alison Dutton and Lachlan McFarlane were able research assistants who put many hours into the project. Ruth Pollard, Jill Day and Michelle Maynard of NSW Trustee & Guardian also made significant contributions in drafting and choosing precedents and instruction protocols. Ruth Pollard also did extensive proof-reading and was a constant supportive presence. Lara Weeks, as always, was the perfect editor, polishing this rough diamond into a gem. Not least, the enthusiasm and support of Aboriginal Client Specialists, of whom Michelle Wellington from Nowra deserves particular mention, was invaluable in ensuring that Aboriginal community people had input and power over what went into this book.

This book is dedicated particularly to the women Elders of the Aboriginal communities we consulted, who gave their time and their wisdom to the project.

Prue Vines
Sydney 2012

How to use this book

This book has two aims:

- to explain why making a will is very important for Aboriginal people, and
- to give practical guidance to lawyers about how to make a culturally appropriate will for Aboriginal people.

Making a will is more important for Aboriginal people than for others because the law which applies to them if they do not have a will does not fit their situation or their families. Making a will can help to:

- prevent burial disputes by appointing an Executor
- make sure the correct people get the property of the deceased
- make sure young children are looked after following the death of their parent by a person the parent approves of
- protect some customary law matters and keep them secret.

If you are an Aboriginal person reading this book you can either

- read the first section 'For the Client' (chapters 1 to 5, chapter 4 probably being the most important) which explains all the matters above in more detail, fill in the preparation form in chapter 5 and then take it to a lawyer or NSW Trustee & Guardian to have a will drafted for you or
- just take the book to your lawyer or NSW Trustee & Guardian to have a will drafted for you.

This book focuses on New South Wales, although much of the information applies to Aboriginal people throughout Australia.

There is a list of organisations which can help you find a lawyer at page 138.

On page xi there is a List of Terms Used in the book which may help if you are finding terms unfamiliar.

This book can also be found at www.tag.nsw.gov.au/wills-for-aboriginal-people.html.

List of terms used in this book

Administrator: This is the person who administers an intestate estate or an estate which has no executor.

Beneficiary: Beneficiaries are those people or organisations named in a will who will receive a gift under the will. Beneficiaries may receive gifts of money personal or real property (land).

Bequest: A gift of personal property by will.

Codicil: An extra section added on to a will at a date after the original will has been signed. It will also need to be signed and witnessed in the same way as the original will was.

Devise: A gift of land by will. The person who inherits it is called the 'devisee'.

Estate: The estate is the testator's property, both real (land) and personal (things other than land).

Executor: An executor is the person appointed by the testator to carry out the terms of the will. The duties of an executor include: obtaining a grant of probate; collecting in the estate assets; paying debts; and distributing the assets to the beneficiaries named in the will.

Executor's Powers: Executors have certain powers by law but a will may give them more.

Guardianship: The control or management of a person or property, or both, of another who is incapable of acting for himself/herself. This includes persons appointed to be legally responsible to care for children under the age of 18 years.

Intestate: This is a person who has died without leaving a will.

Issue: The lineal descendants of a person, children being the first generation, grandchildren being the next, and so on.

Joint tenancy: Ownership of property in which when one party dies their share of the property automatically passes to the other party (as opposed to **tenancy in common**).

Legacy: a gift of personal property by will. The person who receives it is the 'legatee'.

Letters of administration: When a person dies intestate (without a will) the court will usually grant letters of administration to the person they appoint to take on the role of administrator. The letters of administration give that person the power to act over the property in the estate in the same way that probate gives the executor the power to act. If a will does not appoint an executor, the court may also give letters of administration to someone so that they can carry out that role in relation to the estate of the testator.

Personal property/estate: This has a technical legal meaning. It means all forms of property other than real property; that is, all forms of property other than land and interests in land (except that leaseholds are classified as personal property). Examples of personal property include: money, shares, bank accounts, cars, boats, domestic pets, furniture, household items, personal effects including clothing, jewellery etc.

Probate: A grant of probate is given to an executor of the will when the Court is satisfied that the will is valid. The grant gives the executor the power to deal with the estate. In New South Wales this power is then dated back to the date of death of the testator.

Real property/estate: Land and interests in land.

Residue: The rest ('residue' or 'remainder' is the technical legal word) of the estate is the gift of that which is left after all other gifts have been given.

Specific gifts: A gift within a will of a specific item to a named beneficiary(ies) such as an antique clock or a piece of jewellery.

Tenancy in common: Joint ownership of property. The owners have specific shares so that if one dies their share may pass as part of their estate to a beneficiary (as opposed to **joint tenancy**).

Testamentary capacity: The testator must have testamentary capacity for the will to be valid. This is the ability to understand the following: the nature and effect of a will; the nature and extent of

your assets; the people who might have a claim on your assets; and in relation to such people there must be no disorder of mind that would influence the person to omit such people from your will.

Testamentary trust: This is a trust set up in a will as opposed to an 'inter vivos' trust, which is one that is established during a person's lifetime.

Testate: Where a person dies leaving a will they are said to have died testate.

Testator: This is the person who makes the will.

Trustee: It is usual for a testator to appoint both an executor and trustee in their will. Often the executor and trustee is the same person, although a testator may appoint different people to take on these roles. A trustee's role is to administer any continuing trusts. For example, the will may set up a testamentary trust and it is the role of the trustee to look after this trust. An example of a trust established by will is where a testator provides that a gift is not to be immediately transferred to the beneficiary but held for their benefit for a specified period of years. The trustee's role in such a trust is to manage the property for the benefit of the beneficiary whose interests are paramount.

Will: A will, sometimes called a 'testament', is a legal document in which a person expresses their wish as to what will happen to their property when they die. A will can appoint an executor, or a guardian and dispose of property. A will only comes into effect upon the death of the person who made it. Anyone over the age of 18 with testamentary capacity can make a will.

FOR CLIENTS

1

Introduction

This book is intended to assist Aboriginal people in New South Wales who wish to make a will which is culturally appropriate for them. It is intended that the book be available to Aboriginal people, and to their lawyers, including lawyers in the Aboriginal Legal Service and Community Legal Centres and that the contents of the book should also be available on the internet. The book arises out of recognition that the law of intestacy in many cases is not culturally appropriate for Aboriginal people and that those who draft wills for Aboriginal people often are not sure about how to make a culturally appropriate will. It also arises because Aboriginal people have been the group in our society most unlikely to make a will for a whole range of reasons, and our research shows that the making of a culturally appropriate will can solve a number of problems Aboriginal people and their communities in New South Wales (and Indigenous people in the rest of Australia) currently face. Although this book focuses on the situation in New South Wales, it will be relevant and useful for Indigenous people elsewhere in Australia.

A will is a document which is made by a person in which that person states what they want to happen to their property after they die. It is tailor-made for the individual and can be cancelled ('revoked') or changed at any time before death. It is therefore

different from many other legal devices where there is less scope for the individual needs of particular people. In particular, it is different from the intestacy legislation which sets out a pattern of inheritance by which the estate of every person who dies intestate is distributed, regardless of the wishes of that individual. A will is also protected by law so the existence of a will gives the individual person's wishes legal force. This is the great advantage of a will. For Aboriginal people it means that a will is more likely to reflect their wishes and their cultural position than the intestacy laws which apply if no will is made.

If a person does not make a will and dies without one then the law of intestacy will apply to them. We discuss the law of intestacy in Chapter 3. The law of intestacy provides for property to be passed to certain family members on the death of their relative. Intestacy law is legislation which does not take account of the wishes of individuals but assumes that one pattern is suitable for everybody. Even though in New South Wales there is special provision under Part 4 of the *Succession Act 2006* which allows Aboriginal people to put in a special plan for the purposes of intestacy, this remains a complex process. It is simpler and more cost effective to make a will which provides for the wishes of the person themselves.

The impetus for this book

This book is the product of a research project carried out by Professor Prue Vines under the auspices of the Indigenous Law Centre of the University of New South Wales and NSW Trustee & Guardian and funded by NSW Trustee & Guardian. The project aimed to determine what Aboriginal people in New South Wales thought were their needs in relation to death and inheritance. Who I talked to and what I found are discussed in more detail in Chapter 3.

How to use this book

This book is aimed first at Aboriginal people who want to make a will to pass on their property to other people after they die. For those people Chapter 4 may be the most important chapter. It may be useful to read Chapter 4 and then complete the Will Preparation Form at the end of Chapter 5 before taking this book with you to the lawyer who is going to draft your will. You can contact NSW Trustee & Guardian, the Aboriginal Legal Service, any community legal centre or a private legal practitioner for more information about how to draft a will. Helpful organisations are listed in Appendix B at the back of the book.

Chapter 2 gives an overview of inheritance laws in New South Wales and is designed for any person with an interest in making a will. Chapter 3 explains some of the problems Australian law creates for Aboriginal people and what the Aboriginal communities I consulted told me about what they needed when they were considering the end of life. Chapter 4 explains how making a will can solve many of these problems.

The rest of the book aims to help an Aboriginal person and lawyers working with them to make a will which is suitable for that person and which assists with the issues Aboriginal communities have said need to be addressed.

Chapter 5 explains the formal requirements for making a will and includes a will preparation form that may be completed by the intended will-maker before talking to a legal centre or someone who is drafting your will for you. Some of the questions included are somewhat different from those which are normally asked because of the differing needs of Aboriginal people. If you are an Aboriginal person reading this, answering these questions will help the drafter of the will to write a will which is appropriate both culturally and for you as an individual.

Chapters 6 and 7 are designed for lawyers who are drafting wills for Aboriginal people. The aim is to fill the gap which other precedent books do not address, by including questions which are specifically addressed to some of the particular needs of Aboriginal people which my research has identified. Chapter 6 contains a set of questions (Instruction form) which may be used by the will-drafter to make sure the needs of the person making the will are clear and that their wishes can be effectively translated into words. Chapter 7 contains a set of wills precedents (forms of words), which are culturally appropriate for Aboriginal people in New South Wales. These wills precedents may need to be supplemented from other precedent books. They are not intended to cover every possible contingency any Aboriginal person may need since many of those will be covered in other precedent books.[1] This set of precedents seeks to fill the gap for Aboriginal people, which other sets of precedents may leave out.

At the back of the book there are some sample wills set out. There is an Appendix which sets out useful organizations and resources.

1 See for example, Birtles, C and Neal, R, *Hutley's Australian Wills Precedents* (9th ed, LexisNexis Butterworths, 2016) or Handler, L and Neal, R, *Mason and Handler Succession Law and Practice in New South Wales* (LexisNexis, looseleaf service/online).

2

Inheritance laws in New South Wales

What is succession law?

Succession law is the law concerning the inheritance of property from one holder to other persons, on the death of the first person. In New South Wales and the other Australian jurisdictions it is in three parts:

- the law of wills;
- the law of intestacy; and
- the law of family provision, or testator's family maintenance.

We will discuss each of these areas of law as they apply in New South Wales in turn.

Wills in succession/inheritance law

Australian succession law emphasises the importance of wills in the passing of property from one generation to another. A will is a document which is drafted to express the intentions of the will-maker ('testator') about what is to happen to their property when they die. Any property can be passed by using a will. It does

not need to be a house or a large amount of money. A will also can appoint an executor, the person who is to make sure those intentions are carried out. The executor, among other powers, has the power to deal with the body of the deceased. Sometimes the executor takes on another role, that of a trustee, if there are trusts in a will. At other times (depending on what the testator wants), a trustee will be a separate person from the executor. Another function of a will is to appoint a guardian for young children. This is not absolutely binding on the court which will ultimately appoint the guardian; however the wishes of the deceased as outlined in a will are likely to be highly persuasive.

To summarise, a will can:

- appoint an executor to look after the legal requirements of dealing with an estate of a deceased person, collect in and distribute the property and deal with the body of the deceased;
- pass any property the deceased owned according to their wishes;
- appoint guardians of children under 18 years.

As we said in Chapter 1, the vital thing about a will is that *it is the expression of the will-maker or testator's own individual wishes*. It is individual. As long as that person was sound in mind when they made that will, and the will was executed properly, it will be valid and effective.

To execute a will, normally it must be signed by the testator in the presence of two witnesses who also sign at the same time. The strictness of the rules about signing and witnesses has been relaxed in recent times. If it is quite clear that the will as it was made is the document the testator wanted to operate as his or her will, then it is likely to be effective. However, in order to be sure a will effectively carries out the testator's intentions, it is important that the formal rules for signing and witnesses are complied with. We discuss this further in Chapter 5.

Inheritance is a State matter in Australia and the law varies in its detail from State to State and Territory to Territory. In this book we concentrate on the law of New South Wales. The law of succession is contained in case law and in legislation such as the *Succession Act 2006* (NSW).

Intestacy

Intestacy is the name for the situation where a person dies without a will. The person who dies without making a will is often referred to as an 'intestate'. As in the other Australian jurisdictions, in New South Wales there is intestacy legislation (Part 4, *Succession Act 2006* (NSW)) which determines who will inherit if a person dies without a will.

Aboriginal people may come under the general scheme of that legislation which provides that if the person died leaving a spouse (including a de facto or same-sex spouse) and children, grandchildren and so on ('issue'), they will inherit and prevent anyone else from inheriting. If there is no spouse and no issue, the property will pass to the parents of the deceased, then to brothers and sisters, issue of brothers and sisters, grandparents, aunts and uncles and first cousins. If none of those exist the property goes to the State of New South Wales in what is known as 'bona vacantia'. In some circumstances people who were dependent on or had a just and moral claim on the deceased, or any organization or person for whom the deceased might reasonably be expected to have provided, can claim something from the State and the State will make a grant to them, but this is not something to be relied on.

There are three main problems with intestacy for Aboriginal people. First, kinship ideas in the intestacy legislation may mean the wrong person could inherit. Second, it can make it

more difficult to settle burial disputes. Third, it cannot deal with complicated customary law issues.

The intestacy regime of New South Wales, like other Australian intestacy regimes, is based on a view of kinship familiar to the western world. This view gives primacy to the spouse(s) (including domestic partners of the same or opposite sex) and children and other direct lineal descendants (issue) of the deceased, as defined by blood. This means it goes from parent to child, grandchild etc but tends to ignore sisters and brothers, aunts and uncles. If either a spouse or issue exists no other relatives will inherit from the deceased. It emphasises blood lines rather than other relationships. For many Aboriginal people this will not be adequate to deal with the people they think of as their family.

RUTH

Ruth is a 58 year old Aboriginal woman from southern New South Wales. She owns a small house outside a small country town which she has lived in all her life. She also owns an old Holden Torana and has a small amount of money in her bank account. She has two sons from her marriage to Tom who died five years ago. She also raised Gina, who was her sister's child. Ruth has always thought of Gina as her own child. Gina is now 14 years old.

If Ruth were to die without a will, whatever property she owns will go to her sons. The general law will not regard Gina as a person to whom Ruth has an obligation, because Gina is not Ruth's blood/biological child, nor has she been legally adopted by Ruth. So the law does not regard Gina as Ruth's daughter.

New South Wales has introduced legislation which allows Aboriginal people to provide a special plan which can be used in the case of intestacy; however this remains a complicated and relatively difficult process.[2] The plan is to be prepared in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged and must be made within 12 months of the grant of administration. Making a will is simpler and easier because an individual can, preferably with the help of a lawyer, make a document which fits the individual's circumstances and gives effect to their own wishes.

NSW intestacy law applying only to Aboriginal people (by application):
Deceased person must have identified as Aboriginal

▼

Submit a plan of traditional distribution of property
MAY INCLUDE OTHER RELATIVES ACCORDING TO THE LAWS, CUSTOMS, TRADITIONS AND PRACTICES OF THE COMMUNITY

General intestacy law in New South Wales

There are strict rules about who is defined as a 'spouse' or as a 'child' or 'issue' etc. These rules sometimes exclude the people that Aboriginal people might think of as their family, as the example of Ruth, above, shows.

2 In the Northern Territory which has had such a scheme for much longer than New South Wales, only two such cases have reached the Courts to date. One of these is *Re Application by the Public Trustee for the Northern Territory* [2000] NTSC 52. There have now been at least three cases using this legislation in New South Wales. The first was decided in 2017: *In re Estate of Wilson, deceased* [2017] NSWSC 1. See also *The Estate of Mark Edward Tighe* [2018] NSWSC 163 and *Re Estate Jerrard, deceased* [2018] NSWSC 781 .

Intestacy and burial disputes

When a person dies without a will ('intestate'), a number of problems may arise. One very significant problem arises where relatives disagree about what should happen to the body of the deceased.

This is particularly problematic for Aboriginal people. Unfortunately a very common problem where Aboriginal people have died intestate has been the development of disputes within the community and amongst the relatives of the deceased, about where the body is to be buried or how it is to be disposed of. A significant proportion of the court cases concerning burial disputes have involved Aboriginal people, and although cultural or spiritual factors are sometimes taken into account by the courts in mediating a dispute over rights to bodily remains, it is unclear who has the right to decide about disposal of a body

RUTH

Ruth died suddenly, without having made a will. One of her sons, Bill lived in Sydney and wanted her to be buried where he could visit her grave. The other son, Mark wanted her to be buried in her traditional country. Within the community, people began to side with Bill or Mark. The dispute went on and on while Ruth's body waited. After 5 days, Mark took Bill to court to get a decision about burial. This was hard to organise and it was expensive. Unfortunately the judge said that both sons would be equally entitled to letters of administration under the intestacy rules. Eventually, she decided that the body was in the morgue in Sydney so it should be buried where the least travel was involved. The community was upset and Bill became estranged from them.

when the person has died without a will. The decisive factor *may* be the statutory entitlement to letters of administration. A letter of administration is a document that is given to the person who the court decides is entitled to administer the estate of a person who dies intestate. It gives them the power to deal with the estate. Usually it is given to the person or persons with the greatest share or entitlement in the estate.

For Aboriginal people in particular, this can be problematic because quite often Aboriginal people do not apply for letters of administration, and if they do they are unlikely to do this in the short period between death and a funeral and burial or disposal of the body. Moreover, in several of the cases where disputes about burial did arise, including *Burrows v Cramley*[3] and *Calma v Sesar*,[4] it was not clear which party had the right to letters of administration. In such cases of uncertainty there can be no presumption that a particular party will be granted administration rights *before* the grant has actually been made.

In such cases as these, where there is no clear administrator, the courts have tended to resolve the issues largely on the basis of practical convenience, although cultural considerations have occasionally been considered relevant, as in *Dow v Hoskins*[5] and *Jones v Dodd*.[6] Also, where the estate is very small there may not be any application for letters of administration at all. This means that, unlike the position where a will has named an executor, it may be very difficult to determine who has the right to decide how to dispose of the body. This was a matter which Aboriginal consultees were very concerned about. It is one of the reasons why a will is a good idea. A will may appoint an executor, and the executor is regarded as the person who has the right to deal

3 [2002] WASC 47 (15 March 2002).

4 (1992) 106 FLR 446.

5 [2003] VSC 206 (10 June 2003).

6 [1999] SASC 125 (1 April 1999).

with the body of the deceased. This means that person can end the dispute by making a final decision which everyone has to abide by.

Family provision

All Australian jurisdictions also have Family Provision or Testator's Family Maintenance regimes.[7] These provide for certain people to challenge the will or intestacy on the basis that they have not been adequately provided for. In New South Wales, the people entitled to challenge are first the spouse (including de facto and same-sex partners) and children. People outside these categories are eligible in New South Wales if they were ever dependent on the deceased, and either were a grandchild, or a member of the deceased's household. A person may also be eligible if they were living with the deceased at the time of death and either that person or the deceased provided, without being paid, the other with domestic support and personal care. This latter category does not include a spouse or de facto spouse but could include another relative such as a sibling or friend. The categories of eligible people are slightly different in other jurisdictions.

The fact that people are eligible to apply for family provision does not mean they will automatically get provision out of the estate – that is determined by whether the judge hearing the case determines that there was already adequate provision made for them by the deceased. If not, then provision may be made for the applicant. However, making a claim for family provision requires

7 *Family Provision Act 1969* (ACT); *Succession Act 2009* (NSW); *Family Provision Act* (NT); *Succession Act 1981* (Qld); *Inheritance (Family Provision) Act 1972* (SA); *Administration and Probate 1958* (Vic); *Testators Family Maintenance Act 1912* (Tas); *Family Provision Act 1972* (WA).

people to go to court which is expensive; and it is no longer true that the cost of the court case will always come out of the estate.

It is worth noting that family provision claims can be made whether the deceased died intestate or having made a will. If the deceased has made a will it is far more likely that their wishes will be effective and their estate and the disposal of their body will go smoothly without disputes. It is worth noting that in NSW in family provision cases, the court is supposed to consider "Any relevant Aboriginal or Torres Strait Islander customary law."[8]

8 s 60(2)(o) *Succession Act 2006* (NSW).

3 Problems created for Aboriginal people by the law

The research background

This book is the product of many years of both research into the law and consultation with Aboriginal communities. The research demonstrated many of the problems intestacy created for Aboriginal people, in particular the issues of definitions of relationships.

The basic intestacy legislation, and the traditional way that wills are interpreted, is based on a view of kinship familiar to the western world. This view emphasises blood relationships over collateral or other types of relationships, and takes a very linear (indeed patrilineal – emphasising the father's line) view of kinship.

Indeed, historically, even the relationship of marriage was discounted on inheritance; spouses were not regarded as heirs-at-law, and were insignificant as next-of-kin. It wasn't until modern statutory treatment of inheritance that spouses were put into the dominant position in intestacy law. Blood was so important that a distinction was made between whole-blood and half-blood relatives. Traditionally these could only be whole-blood relatives in relation to land, although this distinction was not made in

relation to personal property.[9] This distinction was only recently removed from the NSW intestacy legislation.

As Aboriginal people know, the kinship patterns recognised by the common law may not be appropriate for Aboriginal people who may still have different ways of thinking about family. Aboriginal kinship has been described in this way:

> 'Aboriginal society gives the widest possible recognition to genealogical relationships. Systems of kin classification are governed by three principles: the equivalence of brothers; the bringing of relatives by marriage within the classes of consanguineal relatives; and, although every term has a primary meaning, the non-limitation of range. There is a certain pattern of behaviour for each kind of relative, and the kinship system regulates marriage.'[10]

One thing not mentioned here is the importance of adoption and the willingness to recognise kinship without benefit of a blood relationship among Aboriginal people.

Although there are differences amongst kinship groups in how they describe or think of their kinship patterns, and these patterns may be looser or tighter, this description helps to explain the poor fit between the family structure contemplated by the statutory intestacy regimes for non-Aboriginal people and the kinship structures which Aborigines continue to use.

Other issues the research threw up included the problem of burial disputes which has already been discussed and issues

9 *Watts v Crooke* (1690) Show 108; 1 ER 74 (HL).

10 I Keen, referring to Radcliffe-Brown's statement, in 'Kinship', in Berndt, RM, and Tonkinson, R (eds), *Social Anthropology and Australian Aboriginal Studies* (Aboriginal Studies Press, Canberra, 1988), p 80.

raised by the need to protect or maintain customary law matters if at all possible.

These issues were identified as significant problems in a series of papers.[11] I then decided to ask what Aboriginal people themselves identified as the problems with inheritance in NSW. The following pages set out what Aboriginal people have said are the important issues for them in relation to inheritance and death.

The consultation process

Consultations were carried out through organised informal meetings with groups of Aboriginal Elders and non-elders in a range of places throughout urban and regional New South Wales. A total of 100 people were consulted in groups, ranging from a session with just a single participant, to as large as 30 consultees. A range of geographical locations were selected to participate in these consultations including Campbelltown, Doonside, Penrith, Redfern, La Perouse, Nowra and Dubbo as each was expected to deal with different concerns and needs of Aboriginal people.

The meetings were conducted in an open-ended way to allow for the cultural differences between the researchers and the people attending. Many of the meetings were organised through the Land Council or the Supreme Court of New South Wales' Aboriginal Client Service Specialists/Community Liaison

11 P Vines, 'When Cultures Clash: Aborigines and Inheritance in Australia' in Miller, G (ed), *Frontiers of Family Law* (Ashgate Press, 2003), pp 98-119; Vines, P, 'Drafting Wills for Indigenous People: Pitfalls and Considerations' (2007) 6(25) *Indigenous Law Bulletin* 6-9; Vines, P, 'Wills as Shields and Spears: The Failure of Intestacy Law and the Need for Wills for Customary Law Purposes in Australia' (2001) 5(13) *Indigenous Law Bulletin* 16-19; Vines, P, 'Consequences of Intestacy for Indigenous People in Australia: the Passing of Property and Burial Rights' (2004) 8(4) *Australian Indigenous Law Reporter* 1-10.

Officers. In most cases the researchers, along with the Aboriginal Community Liaison Officers simply laid out some of the issues and asked if people agreed that these were problems or saw any other issues, or had any other concerns about what happened after people died. Each meeting took several hours.

Findings

There was a surprising level of consistency amongst the consultees about the issues they were concerned about. The major concerns of the Aboriginal people consulted were:

- concerns about the extent of disputes about disposal of the body of the deceased, including concerns about funeral insurance;
- dying with dignity and advance care directives;
- misconceptions about what a will achieves and when people are entitled to make a will;
- where to keep a will;
- concern about property disputes;
- concern about lack of recognition of kinship obligations and guardianship of children; and
- protecting customary law knowledge.

Disputes about disposal of the body

Disputes about burial and disposal of the body were found to be very common within the Aboriginal community. Indeed it seems that a large proportion of such disputes which are reported involve Aboriginal people. Throughout the course of the consultations, it

was found that this was a major issue of concern, particularly among women elders, with most consultees reporting that they had been affected by such disputes. These often resulted in long-standing ruptures in community relationships.

While nearly all people consulted knew someone who had been involved in a dispute over burial, some significant points that came up throughout the course of the consultation process included the common problem of disputes arising between Aboriginal and non-Aboriginals. This usually involved disagreements about a body being buried in Aboriginal 'country'. Some of these were disputes between a non-Aboriginal spouse and the Aboriginal family, where the spouse wanted to be able to visit a grave and the family wanted the body buried in the proper country. Many of these disputes have given rise to litigation which has been both expensive and led to long-lasting rifts in communities.

Funeral insurance and funeral funds

Many people were extremely concerned about funeral insurance issues. It is common for Aboriginal people to be paying premiums for funeral insurance in such a way that if they fail to pay the premium they forfeit all the money they have so far contributed to the fund. There were many stories told about people becoming unable to pay and others in the community paying for them in order to prevent the lapse of the policy. There was a strong sense that a great deal of money was going into these funds, far more than the ultimate cost of funerals.

The Australian Securities and Investments Commission ('ASIC') has twice obtained Federal Court injunctions to stop the Aboriginal Community Benefit Fund, one of the largest providers of pre-paid funeral schemes, from selling their products – in 1992 and 2004. The Federal Court succeeded in having the group change

its marketing practices after a 1999 Federal Court action alleging that it was engaging in misleading and unconscionable conduct.

ASIC has now published a guide to assist Aboriginal and Torres Strait Islander people who purchase products to pay for a funeral. *Paying for Funerals: Tips for Indigenous Consumers* may be obtained from ASIC by:

- downloading a copy from the Indigenous homepage on ASIC's consumer website MoneySmart at www.moneysmart.gov.au/life-events-and-you/indigenous/paying-for-funerals;
- Contact ASIC, connect at https://asic.gov.au/about-asic/contact-us and ask a question online. (don't forget to send your full name and mailing address); or
- by phoning 1300 300 630.

The NSW Office of Fair Trading also regulates funeral funds and gives useful information:

See https://www.fairtrading.nsw.gov.au/buying-products-and-services/buying-services/funerals/contributory-and-pre-paid-funerals or phone them on 1800 502 042 to see if a pre-paid funeral fund is registered. You can also contact the Aboriginal Enquiry Officer for ASIC on 1800 500 330.

Planning ahead: advance care directives, enduring guardianship and powers of attorney

Some of the consultees raised concerns about how to make sure they died as they wished to, and how to deal with loss of capacity for decision-making at the end of life. They were interested in advance care directives and enduring guardianship. They knew there was a thing called a power of attorney but had very little idea of how it worked. It is important to plan for later life and it

is becoming more common. One resource which is very useful in relation to general planning in later life is *Taking Care of Business: Planning Ahead in Aboriginal and Torres Strait Islander Communities* published by Department of Ageing, Disability and Home Care in 2008, see www.tag.nsw.gov.au/verve/_resources/Taking_Care_Of_Business.pdf. More specific resources are referred to in this section as we go.

Advance Care Directives

An advance care directive (sometimes called a 'living will') is a written document that expresses a person's wishes or directions in advance in case mental capacity is lost in the future. It is for situations where you are unable to communicate these wishes to the people around you or have lost the ability to make decisions for yourself. An advance care directive usually includes information about where the person does or does not wish to be cared for and by whom, or what treatment they want or do not want. For an advance care directive to be valid, the person making it must have the mental capacity to understand its nature and effect and the consequences of completing and signing the document. This must be done without any coercion, pressure, or influence by others. When making an advance care directive it is important to make sure:

- it is clear and easy to understand (an advance care directive will not be enforced if it is vague and non-specific about what you actually want to happen if you become unwell).
- that it is witnessed by someone, preferably by someone independent who is not referred to in the document.
- it is kept in a safe place and a copy has been given to relatives, friends or carers and to any person who has been involved in your treatment.

For more information or to obtain a copy of 'Using Advance Care Directives' contact NSW Health on (02) 9391 9000 or visit their website www.health.nsw.gov.au/patients/acd/Publications/

acd-form-info-book.pdf. You can also visit the Planning Ahead Tools website developed by the NSW Government for information and advice about advance care directives: www.planningaheadtools.com.au.

SANDRA

Sandra is 69 years old and has recently been diagnosed with early-onset dementia. Her oldest daughter, Kylie is in her late twenties. Sandra always knew Kylie would take care of everything if she could no longer make decisions for herself or care for herself. Sandra has spoken to Kylie about this on many occasions and Kylie has always said that she would take care of Sandra and act in her best interest if she was unable to do things for herself.

Sandra has a neighbour called Deirdre who also suffers from dementia. Deirdre can no longer take care of herself and she thought her own son would take care of everything but when she was unable to do anything for herself any more, the rest of her family started arguing about what her son was doing and the decisions he was making on Deirdre's behalf. Sandra doesn't want the same thing to happen to her so she made her daughter, Kylie, an enduring guardian. She talked about it with her daughter and made sure Kylie was clear on her wishes and was prepared to accept the responsibility. Sandra then had the Appointment of Enduring Guardian form signed by an appropriate witness.

Enduring Guardianship

Enduring guardianship is different from an advance care directive in that it allows an individual to choose for themselves a legal substitute decision-maker to make personal, lifestyle and health care decisions for the time when they might lose the capacity to make their own decisions. If a person does not appoint an

enduring guardian for themselves and they do lose the capacity to make their own decisions, then the Guardianship Tribunal or some other body may appoint a guardian. It is preferable to choose your own and discuss with them what your wishes are.

For further information regarding the Appointment of an Enduring Guardian access the Planning Ahead tools website: www.planningaheadtools.com.au.

Power of Attorney

Enduring guardianship is about personal and lifestyle decision-making while a power of attorney is about financial decision-making. A power of attorney is a legal document that appoints one person (the attorney) to act on behalf of another (the principal or donor) in relation to the principal's property and financial affairs. For example, the attorney may be appointed with authority to buy and sell property and operate your bank accounts. An ordinary power of attorney generally commences at the time it is signed and the attorney can start acting straightaway. It ceases to have any effect, and therefore cannot be used after the person who appointed the attorney loses capacity. However, an enduring power of attorney can be made which continues to have effect after the donor loses capacity. Forms to make a power of attorney can be downloaded from the Guardianship Division of NCAT (NSW Civil and Adminstrative Tribunal) website at https://www.ncat.nsw.gov.au/Pages/guardianship/gd_forms.aspx. Call 1300 006 228 and press 2 to speak to the guardianship division. You can also find information on the NSW Trustee & Guardian Planning Ahead tools website at www.planningaheadtools.com.au.

Misconceptions

Many of the consultees were under the impression that they did not own enough property to make a will. Many of them said they

did not own a house or anything except their clothes or jewellery etc and therefore felt they were not entitled to make a will. It also became clear that some agencies were under the same impression and had reinforced the idea that a person must own significant amounts of property in order to make a will. This is not true. There was confusion about whether debts could be passed on, many of the respondents being under the impression that a will passed on both property and debts. These misunderstandings appear to have contributed to Aboriginal people's reluctance to make a will.

Protecting customary law

The idea of protecting customary law knowledge in a will was regarded as significant as a backstop, but also as having some inherent dangers. For example, what if a person made a will saying they owned something, but the community disagreed? However, approximately a third of respondents were interested in the possibilities of being able to protect secret knowledge or ritual objects and pass them on. Some communities demonstrated very little interest in this – the Nowra group being one of these. Others were very interested, including the Redfern group. Some individuals expressed grave concern about the loss of secret knowledge and were keen to hear about the possible use of secret and half-secret trusts as a means of saving the knowledge from extinction. It may be that the Redfern group had a wider range of people from different communities (for example, one respondent was from the Northern Territory) who retain a stronger traditional customary law base. However, it was clear that this should be seen as a backup only, to be used only where all ordinary ways of passing on the customary knowledge or objects had been exhausted.

The Nowra community had an interesting discussion on this point in the context of discussing the possibility of drawing up

a plan of their traditional distribution after death (as in the New South Wales *Succession Act 2006*, Part 4.4 Indigenous Person's Estates). One younger man was very keen on this idea, but the women Elders said that it was impossible. They pointed out that their bloodlines were all mixed – for example, one had a mother who was Gamilaroi, a father who was from the South Coast, and a grandfather who was Bundjalung (north coast of New South Wales). In their view this meant that they could not produce a coherent plan of traditional distribution. However, this does not necessarily apply to communities which are not such mixed communities.

Where to keep a will

Most respondents raised the issue of where a will could be kept as they did not feel that their houses were appropriate because of crowding and/or their way of life. They were concerned about wills being lost and other people finding them. Lawyers who draft wills are commonly able to store them, and NSW Trustee & Guardian has a Will Safe, which provides secure storage for wills, powers of attorney and enduring guardianship documents for a small fee.

Kinship

The fact that kinship structures were different in different communities was taken for granted by all the consultees. They knew that non-Aboriginals didn't understand this and were interested in the idea that a will made properly could solve some of the problems of the intestacy laws and the problems created by poorly made wills.

Disputes over property

The respondents were generally very concerned about disputes over property. Most respondents observed that large disputes could erupt over very small items of property, and they suggested that where traditional dispute resolution patterns had broken down there was no person who could be turned to, to resolve the disputes. Thus the disputes were not resolved and really could destroy community relationships. There were many stories of parts of families which had not spoken to each other for many years over some item left after someone died.

There was considerable interest in the idea of an executor as the person who had the right to resolve the dispute.

Superannuation

Superannuation was a big concern and people had very little idea how it worked and no idea how it interacted or not with wills or debts. This is hardly surprising as much of the general population is in the same position.

Hostility to mainstream law

Each group of respondents had someone who raised the issue of hostility to mainstream law and distrust of mainstream legal institutions based on past experience. At the same time, the idea of the will as something which was under the control of an individual and could in some way be used as a weapon against 'whitefella' law was very attractive to many of the respondents.

Using NSW Trustee & Guardian

The project was carried out in conjunction with NSW Trustee & Guardian (formerly Public Trustee NSW), which would like to increase the access of its services to Aboriginal community members. Most respondents were willing to entertain the use of NSW Trustee & Guardian to make wills which were culturally appropriate. NSW Trustee & Guardian charges a standard fee for the preparation of a will. Preparation services are free for people eligible for a full Centrelink Age Pension (including people receiving other government benefits, such as a Department of Veterans' Affairs Pension, who would otherwise be eligible for a full Centrelink Age Pension). NSW Trustee & Guardian also charges for executor services, after a person has died, when it is appointed in this role. During the consultation, real concern was expressed at the prospect of paying a commission to NSW Trustee & Guardian for the role of executor. In some groups however, people acknowledged how very expensive disputes have been. It has been quite common for Aboriginal people to litigate over this, and find themselves paying a great deal more, as was pointed out by a number of consultees.

Conclusions

The consultations suggest that there is more to the problem of the application of the general law of inheritance to Aboriginal people in New South Wales than a simple mis-match of cultural expectations. Certainly these exist, but the problems created by a death in the Aboriginal community seem to be very great. The major concern of consultees was not so much about the passing of property, but the prevention of disputes.

Many of the problems raised by the community members can be solved by making a culturally appropriate will. In a will a person can choose who takes property, appoint a guardian and, by appointing an executor make it clear who is to decide how to deal with the body. By using various devices including secret and half-secret trusts a will may be drafted to protect secret knowledge until it can be passed on to the correct person under customary law. However, it was clear after the consultations with Aboriginal communities, that the most significant thing about a will for most consultees was the idea that the making of a will with the appointment of an executor could be an effective way of reducing damaging disputes in the community.

4 The advantages of making a will for Aboriginal people

Advantages

The general advantage of making a will for everybody is that the will is an individual document setting out the wishes of the individual person.

There are four main advantages of making wills that Aboriginal people consulted identified as significant:

- preventing and resolving disputes, particularly about dealing with the body of the deceased ;
- guardianship of children;
- making sure the right people inherit; and
- passing on traditional knowledge or objects.

One misapprehension that the research project uncovered, as mentioned in Chapter 3, was that many Aboriginal people think they can only make a will if they have substantial amounts of property and material assets. This is not so, and even if a person owns only a few possessions, making a will to ensure these go to the right people is important.

Making a culturally appropriate will can solve this problem by ensuring that the proper beneficiaries are named in the will.

Wills as dispute resolution and prevention devices

Wills can operate as vehicles for resolving disputes and as prevention devices for communities from becoming fractured as a result of a person dying intestate. The Aboriginal community groups I consulted emphasized that upon death, some communities had engaged in long-standing disputes over issues surrounding the wishes of the deceased, and these disagreements had resulted in long-standing ruptures in community relationships.

General

This project is based on the view that a will can operate to prevent many disputes and problems from arising, and that this is especially important for the Aboriginal community. The consultations show that members of the Aboriginal community share this view.

Preventing disputes about dealing with the body

There are two ways in which wills can be useful in relation to the disposal of the body. The first is that a will may be a place where wishes can be written, as long as people are told that that will is where the wishes are stated before the person dies. The second way is by the appointment of an executor who thereby has the power to deal with the body.[12] This also means the executor has the right to decide disputes.

12 *Williams v Williams* [2004] QSC 325 (17 September 2004)

One of the main areas of concern is the problem intestacy creates where there is a dispute about the disposal of the body of the deceased.

In the last decades of the 20th century a series of cases arose concerning disputes about the right to dispose of the remains or arrange the funeral of the deceased. In most of these cases the dispute only arose because the deceased died without making a will. This is a problem because if there is no executor named it is not clear in Australian law who has the right to deal with the body of the deceased. A significant number of these cases have concerned Aboriginal people.[13] Although issues concerning the disposal of the body are not exclusively issues for Aboriginal people, the cultural concerns of Aboriginal people in relation to how and where to bury a body make this a particular concern, and another reason to see intestacy as a significant problem within the Indigenous community.

Making a will and appointing an executor in the will can help to solve this problem. The executor is regarded by the law as the person who has the right and duty to dispose of the body. Indeed the executor has a right to do this even against the testator's wishes. It is important therefore to appoint an executor who will carry out the testator's wishes and to make directions in the will about what happens to the body after death and any funeral arrangements. The fact that these are written down in the will can help to resolve disputes in itself and if there is a dispute the direction in the will may help the Court to make a final decision.

Of course, because the will may not be consulted before the funeral and disposal of the body takes place, it is very important

13 Including *Calma v Sesar* (1992) 106 FLR 446; *Jones v Dodd* (1999) 73 SASR 328; [1999] SASC 125; *Dow v Hoskins* [2003] VSC 206; *Meier v Bell* [1997] VSC (Ashley J, 3 March 1997); *Burnes v Richards* (unreported, Cohen J, 6 Oct 1993 (noted in 68 ALJ 67)); and in England, *Buchanan v Milton* [1999] 2 FLR 844.

to ensure that the executor knows what the testator's wishes are and that the executor is one of the first people who knows of the testator's death.

Guardianship of children

A will can appoint the guardian(s) of children under the age of eighteen years if they are left without a living parent, and in some cases when the living parent is not suitable. When a person dies without making a will, the New South Wales intestacy laws may place greater emphasis on the relationship between the child and a blood relative rather than other relationships between the child and non-biological members of the kinship group which are likely to be recognized by Aboriginal community members. That is, the law may not recognize as family members those people the deceased thought of as their family.

The willingness of Aboriginal communities to recognize kinship without benefit of a blood relationship, as well as the occurrence of informal adoption, may not be adequately addressed if a person dies without making a will. For example, in some Aboriginal kinship groups, nieces and nephews of X would be regarded as X's children because they are the children of Y who is X's same-sex sibling. Thus a will can make sure the correct 'children' are referred to. Because Aboriginal kinship groupings differ from each other as well as from the Intestacy laws, making a will can allow the people the testator thinks matter to be named as family members so that the proper provisions can be made for the correct people.

Using a will to appoint a guardian can make sure that the right people are looked after. When a guardian is appointed it is vital that the intended guardian is asked if they are willing beforehand. If they are not, some other person can be asked, but

it is far better to find this out when the parent testator is alive than have the problem arise after their death.

Making sure the right people inherit

Having a will means that the testator is able to make sure the right people inherit. Wills can operate to ensure the wishes of the testator are respected in relation to the distribution of his or her property. If someone dies without making a will ('intestate'), the general scheme of intestacy legislation will give priority for the spouse of the deceased (including de facto, and same-sex partner) to make a claim. If the deceased does not have a spouse/partner or issue then the property goes to relatives including parents, siblings, issue of siblings, grandparents, uncles and aunts, and finally first cousins. First cousins are the most remote relatives who can take property in NSW.[14] If nobody fits any of those categories then the estate will go to the government. (See also the previous discussion regarding intestacy laws in New South Wales in Chapter 2, page 11.)

As with guardianship, making a will can solve the problem of mis-matched ideas of kinship by properly designating those who should benefit from the will from the point of view of the Aboriginal testator.

Passing on secret knowledge or ritual objects

Many Aboriginal people have customary law obligations which may need to be protected by a will. This might include ritual

14 *Succession Act 2006* (NSW), Chapter 4

objects and knowledge, and sometimes it may include secret knowledge or information which should be passed on to a specific person when they are entitled but not before. Traditionally and normally this would occur during the lifetime of the testator, but if it does not happen in life, a will might be drafted to operate as a vehicle which will protect the transmission of the object or information and, if necessary, keep secret the knowledge itself.

This can be done in a range of ways. The passing on of ritual objects can be done directly in a will unless that object should be kept secret. Where things must be kept secret, sometimes a practical way of doing it can be found, for example, keeping a sealed envelope with the will which can only be opened by a particular person at a particular time. It might also be done by using secret and half-secret trusts so that knowledge, such as traditional medicines, can be transmitted to the next generation without the secrets being destroyed by disclosure.

Secret trusts arise where property is passed apparently absolutely by the testator to another person (Y) and there has been an undertaking or agreement by person Y that the benefit is to be applied for the benefit of some other person or object. Such a trust with conditions is binding.[15] Unlike other transactions which involve land, fully secret trusts are constructive and therefore do not need to be in writing even if they concern land.[16]

Half secret trusts arise where the fact that the trust exists is made clear in the will but its terms are secret. For example, a will might say 'I give X to John on trust on terms of which he is aware'.

The usual methods of passing on customary law knowledge are during the lifetime of the relevant person, who passes it to

15 *Brown v Pourau* [1995] 1 NZLR 352; *Blackwell v Blackwell* [1929] AC 318; *Voges v Monaghan* (1954) 94 CLR 231.

16 *Dixon v White* (unreported, SC (NSW) Holland J, 14 April 1982); *Brown v Pourau* [1995] 1 NZLR 352.

a person who is qualified in customary law terms to hear the information. Often keeping it secret is critical. Obviously using the traditional processes is the best way to deal with the passing on of customary law knowledge. However, as a last resort it may be possible to have the process of information passing done by will, by using secret and half-secret trusts. The precedents attached offer some ways to do this, but it should be emphasised that these are a last resort.

The importance of the executor(s)

One of the major lessons learned from this consultation process is the extreme importance of the executor as not just the holder of legal title and the right to deal with the body, but as the person who can be the arbiter of disputes within a group. Our consultants suggested that this may have significance in the Aboriginal community beyond the way it is normally thought of in the non-Indigenous community. As they said, this depends on the extent to which traditional dispute resolution patterns have broken down and in New South Wales many Aboriginal communities are struggling with this issue. The precedents in Chapter 7 are drafted with this in mind.

NSW Trustee & Guardian

NSW Trustee & Guardian acts as an independent and impartial Executor, Administrator and Trustee. There is no charge to make or update your will with NSW Trustee & Guardian appointed as executor or substitute executor. Charges are applied on estate administration only. NSW Trustee & Guardian has over 100 years

experience in writing wills and has written more than 900,000 wills.

NSW Trustee & Guardian has a network of branches throughout metropolitan Sydney and regional areas across New South Wales. Where a NSW Trustee & Guardian branch is not accessible, the Registrar of the Local Court is the Agent.

The Sydney Office is located at:

19 O'Connell Street
Sydney NSW 2000

It can be contacted for business enquiries on (local call rate) ph 1300 364 103

Further information can also be found at www.tag.nsw.gov.au.

NSW Trustee & Guardian has sponsored this project because it believes that it is vital to increase the rate of will-making in the Aboriginal community.

5 The formal requirements for making a will

Making a valid will: the mental element

The testator must meet some requirements about the mental element concerning a will. The testator must intend the will to operate as his or her will, they must have knowledge and approval of the contents of the will and they must have capacity. The latter is probably the most significant thing to think about.

The testator must have the proper level of capacity to be able to make a will which is valid. First, the testator needs to be over 18.

The testator also needs to have the proper mental capacity to make a will. The test for this comes to us from the case of *Banks v Goodfellow*.[17] Although the case is quite old, it remains good law. To have mental capacity the testator must be able to:

- understand the will that they are making and how it will impact on the beneficiaries;
- understand the extent of his or her property – that is, they should understand what they own;
- understand who are the people who would ordinarily be

17 (1870) LR 5 QB 549.

regarded as likely to be beneficiaries of the will. In relation to these the testator should not be affected by any delusions which might affect how they might leave their property.

This means that the more complicated the property or the family or the will that the testator wishes to make, the higher the level of comprehension and understanding they will need to have.

For the will to be valid it also needs to be clear that no undue influence or duress has affected the testator. And when the will has been drafted it must be clear that the testator knew of and approved of the terms of the will.

Making a valid will: formal elements

It is important that the will complies with the legislation which exists in each State and Territory, setting out the requirements for making a valid will. A valid will must be a properly executed document that intends to convey the wishes of the free and capable will-maker. Generally speaking, a will complies with the formal requirements if:

- it is in writing. While not affecting validity it is important to date the will just in case the testator makes several wills all undated;
- it is signed by the testator in the presence of two adult witnesses who sign the will in the presence of each other and the testator. The witnesses should be independent and NOT beneficiaries under the will.
- to avoid needing the dispensing power (the power of the court to dispense with the formal requirements if it is satisfied that the will was the final will of the testator), the will should be signed by the testator in the presence of the two witnesses who sign in the presence of each other and the testator. It is

also good practice to have the testator and witnesses initial at the bottom of each page of the will and for the testator and the witnesses all to use the same pen.

- it is undesirable to use as a witness any person who may prove to be unable to give evidence due to their age, mental capacity or for any other reason. Blind people cannot witness wills in New South Wales.

The witness-beneficiary rule

In New South Wales, where a witness or a person claiming through the witness is a beneficiary, the gift made may be affected so that the beneficiary will no longer be entitled to the gift. The will itself remains valid, but the gift to the witness may be void so that the witness will lose the gift originally given to them in the will. This rule is subject to certain exceptions. If challenged, the court may need to be satisfied that the will-maker's intention was not perverted in any way, that they knew and approved of the gift and that the gift was made freely and voluntarily.

To avoid problems the lawyer should ensure that no witness is a beneficiary of the will.

Attestation clause

The will should contain a clause stating the circumstances in which the will was signed and witnessed. See Chapter 7 – Will Precedents for further information.

When signing, the testator and both witnesses should use the same pen in order to avoid suspicion that the will was not signed by the testator in front of the witness. It does not matter if it is black or blue, but it should not be another colour.

The effect of marriage on a will

A Will is automatically revoked upon marriage or re-marriage unless it specifies that it is made in contemplation of a particular marriage or even marriage generally.

However marriage will not revoke a gift to the person to whom the testator is married at the time of death or an appointment of the person to whom they are married at time of death as executor, trustee, advisory trustee or guardian.

Best practice is that upon marriage a new will should be made to avoid dying fully or partially intestate.

The effect of divorce on a will

Under section 13 of the *Succession Act 2006* (NSW), the divorce of a testator revokes any beneficial gifts or powers of appointment, the appointment of a spouse as a trustee, executor or guardian and takes effect as if the spouse had predeceased the testator. Making a new will upon divorcing should be considered if the testator wishes the former spouse to inherit or act as a trustee, executor or guardian. If a will has been made which nominates a former spouse as a beneficiary, and there is no longer a desire to have this person remain as such, a new will may not be necessary as divorce affects different parts of a will in different ways. If the testator wishes the will to continue to be effective after the divorce they can re-execute the will to do so, but the wisest course is to make a new will immediately after a divorce becomes absolute so that there can be no uncertainty about what the testator intended.

PREPARATION FORM

This form is for you to fill in and take with you when you go to see a lawyer or NSW Trustee & Guardian. It will help to save time and clarify your wishes.

Name: .....

Please advise of any other names that you are known by:

.....

.....

Address where you normally live:

.....

.....

.....

Other contact details (phone/email):

.....

.....

Date of Birth .....

Language(s).....

Have you made a will before? .....

Where is it? .....

Do you want to revoke/cancel this will? Yes / No

Appointment of Trustee(s)/Executor(s): The executor is the person(s) who has the responsibility and authority to manage, gather and give away your assets to your named beneficiaries and to take possession of your body for the purpose of disposal. You decide in

your will how you would like this to happen and who the executor will be. You should make sure that your executor is willing to be executor and that he or she understands what they will have to do. It is important that your executor is a trusted family member or friend and they know where to find your original will.

NSW Trustee & Guardian will make a will if you wish to appoint it as your executor and trustee or substitute executor and trustee.

Who would you like to appoint as the executor or trustee of your will?

Please provide name, relationship and address:

.....

.....

.....

.....

Who do you want to be a beneficiary* of your estate?

***A beneficiary** is a person who receives something in your will**. Are there any people who you would like to benefit from your estate?**

Name: .....

Relationship to you: .....

Address: .....

What do you want to give them?: .....

.....

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.....

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Name: .....

Relationship to you: .....

Address: .....

What do you want to give them?: .....

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Name: .....

Relationship to you: .....

Address: .....

What do you want to give them?: .....

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.....

.....

Are any of these people under the age of 18? If yes, do you want to appoint a guardian?

.....

.....

.....

Draw a diagram of your family tree including non-blood relatives

Do you want all these people to get something? Who? Who else? Are there any other possible beneficiaries who are not shown here?

.....

.....

.....

.....

If any of these people die before you, would you like their gift to go to someone else?

.....

.....

.....

.....

Do you want to give a gift to charity? If so, which charity? What do you want to give?

.....

.....

.....

.....

Deciding who to include in your will:

Regardless of how much or how little you own, you can give your possessions to whomever you decide is most deserving of them. But if you do not provide adequately for specific family members, family provision law gives some people the right to claim on your estate. The higher the value of your estate, the more likely it is that if there are eligible people for whom you have not adequately provided, they will contest your will in Court. It is helpful for your executor to have details of any potential claimants and some particulars as to why you have not included them or have not adequately provided for them.

People who may claim on an estate

There are certain people who may make a claim on your estate if they are not adequately provided for in your will. These people (if they exist in your circumstances) are regarded by the law as:

- your spouse including your de facto whether of the same or opposite sex; possibly your former spouse;
- your children, whether natural or adopted or those for whom you have assumed long-term parental responsibility;
- your grandchildren, but only if they have been a member of your household and financially dependent on you;
- anyone else who has lived with you and been dependent on you;

- anyone other than a spouse or de facto spouse who lived with you and you or that person provided the other with domestic support and personal care.

Your lawyer or will-drafter can give you further details. Considering what you intend to do in your will, is there anyone in the above list who is likely to think that they haven't been adequately provided for?

Yes / No

If yes, provide details for each person eligible to claim:

Name: .....

Relationship: .....

Address:.....

.....

Reason for exclusion: .....

.....

.....

.....

Name: .....

Relationship: .....

Address:.....

.....

Reason for exclusion: .....

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.....

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Name: .....

Relationship: .....

Address:.....

.....

Reason for exclusion: .....

.....

.....

.....

Your reasons for excluding particular people can assist your executor to defend your will on your behalf if it is challenged after you die. The information which you provide can be used in the Court as evidence. If the chances of a person being unhappy with your will are high, consider providing a detailed written statement setting out the circumstances. Your executor could be given it in a sealed envelope, only to be opened if a claim is made.

Do you own any of the following?:

Real estate e.g. house or land. Is there a debt or mortgage owed on this?

.....

.....

.....

.....

Do you own this yourself or is it shared with someone else?

.....

.....

.....

Do you own any of the following? Please provide details below.

Bank or other accounts	
Jewellery	
Car or other vehicle	
Artworks – created by you[17]	
Artworks – created by others	
Shares or bonds	
Other personal possessions	

17 If you require further assistance with artworks please contact the Arts Law Centre of Australia. Details are provided in the Appendix of this booklet and can be found at www.artslaw.com.au.

Do you have superannuation? Please provide details including whether you have nominated a death benefit to someone.

.....

.....

Does anybody owe you any money? If so please provide details of the person, the amount and what the money was for:

.....

.....

.....

.....

Do you owe anyone money? If so, please provide details

.....

.....

.....

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.....

How do you want your body to be disposed of? For example: burial, cremation, burial in my traditional lands. Please describe briefly.

.....

.....

.....

.....

.....

Please note: your executor has the right to deal with your body – please make sure he or she knows your wishes.

Do you object to having your name or image (e.g. photograph) used after you die? If so, under what circumstances and for how long?

.....

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Do you have a prepaid funeral? If so, please provide details:

.....

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.....

Is there any cultural knowledge or property which you wish to pass on in your will? Do you need to keep it secret? If so, please do not write details here but instead discuss with your lawyer.

.....

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.....

Where would you like this will to be kept?

.....

.....

FOR THE LAWYER OR DRAFTER

6

Taking instructions

The taking of instructions is a vital step in the drafting of a will. The protocol set out here is designed to elicit important information about Aboriginal will-makers and their families that may not always be elicited with a standard instruction-taking protocol. The questions asked include questions about the issues which were of major concern to the Aboriginal people we consulted – in particular, who is regarded as kin, funeral and disposal instructions and some matters of customary law. At the end of this chapter there are two checklists – one about the will-drafting and one about testamentary capacity which are included to help ensure that all the necessary processes have been completed. It is important to fill these in as fully as possible.

Wills instruction sheet for the Drafter

NOTE TO DRAFTER: this instruction sheet is written as a script to assist you in explaining some issues to the testator. It is suggested that you ask the client to sign the following:

CLIENT DECLARATION: This form is to assist my lawyer/will-drafter in preparing for making my will and for the information of my executor when it is time to administer my estate. This document is not intended to operate as my will and is not binding on me.

.....

(signed) (dated)

Literacy – read and write – YES / NO

Sign name – YES / NO

If NO, Name and address of linguist/translator –

Client/Testator's details:

NB Throughout this form are boxes: ☐

Mark the box with Y = Yes or a N = No

Dr/Mr/Mrs/Miss/Ms/Other .....

Surname: .....

Other Names: .....

Are you known by any other names?

.....

.....

.....

Address where you usually live:

.....

.....

.....

P/Code: .....

Date of Birth: .....

Place of Birth: .....

Phone (Home): .....

(Work/Mobile): .....

Email: .....

Occupation:.....

Proof of Identity? ☐

Type: ..... e.g. Drivers License

Language used:

English: ☐

Traditional/ancestral language: ☐

Specify: .....

Other: ☐

Specify: .....

Will the testator be able to read this will if it is written in English? ☐

If, no, why not:.....

.....

Testator's assets/property:

Real estate (land, houses etc)

Address: .....

.....

.....

.....

Owned singly/jointly with: .....

Mortgage: ☐ Specify which bank/credit union etc.

.....

.....

Where are the title deeds held?

.....

Money in bank accounts: ☐

Bank/Credit Union etc: .....

Owned singly/jointly with: .....

Bank/Credit Union etc: .....

Owned singly/jointly with: .....

Superannuation and Life Insurance: ☐

TO CLIENT: You can nominate a person to receive your superannuation and life insurance benefits on your death. There are restrictions on who you can nominate.

To find out how or to check who your nominated beneficiary is, contact your superannuation fund or life insurer.

If you have nominated a beneficiary it may be paid direct to them and without regard to the terms of your will. Review your nomination regularly to make sure it still reflects your wishes.

Name of Fund/Insurer: .....

.....

Has a beneficiary nomination been made? ☐

Is it binding? ☐

Specify who has been nominated: .....

.....

Contact details: .....

NOTE TO DRAFTER: most binding nominations need to be redone every 3 years to remain binding. For further information see Birtles, C and Neal, R, *Hutley's Australian Wills Precedents* (9th ed, LexisNexis Butterworths, 2016).

Shares in public companies/unit trusts/managed funds: ☐

Specify broker:

.....

.....

Does the client have a financial advisor / broker / centralised records with details of all your share portfolio? ☐

If yes, where: .....

.....

.....

If no, detail specific holdings: .....

.....

.....

TO CLIENT: Capital gains tax (CGT) or losses may apply when an executor sells or transfers your assets after you die.

It will assist your executor and minimise the costs to your estate if you keep a centralised record of all the details needed to work out whether you have made a gain or loss. These include:

1. the date you acquired the asset and what you paid for it;

2. the date you disposed of it and what you sold it for;

3. costs associated with keeping the asset, buying and selling it.

Your home will usually be exempt from CGT if you live in it as your principal residence.

Shares in private companies: ☐

Name of company:

.....

Specify Accountant:

.....

Is this a business which the testator operates? ☐

Will it be able to be sold as a going concern if you die? ☐

Is there a Succession Plan for the business? ☐

Is the testator a director? ☐

If yes, are there other directors/shareholders:

.....

Property held as trustee/interest in other trusts: ☐

Name of Trust: .....

Location of trust deed: .....

Name of Accountant/Lawyers who assist with trust:

.....

NOTE TO DRAFTER: It is important that the client seeks taxation advice in relation to the proposed gifts in a will including the implications in respect to any long terms trusts such as life interests or infant beneficiaries or trusts extending vesting beyond the age of 18 years.

Property not located at my place of residence: ☐

Brief detail / value .....

.....

Other assets: ☐

TO CLIENT: If you share a house with another person in a close personal relationship, it is generally assumed that all of the furniture and items used communally ('household goods') are jointly shared between the people that live there, as it can be difficult to determine ownership. This is not the case in regard to things which are used exclusively by you ('personal effects'). If you live with another person give brief details here of any personal effects or household goods which you do not consider to be jointly owned.

Other assets may include:

- a business you run as a sole trader or partner;
- livestock, crops, farming equipment, other real estate;

- debts due to you;
- specific items you wish to give away in your will, for example jewellery;
- interest in the estate of someone who has died;
- copyrights of books published;
- copyrights of books unpublished;
- publication contracts;
- patent rights;
- intellectual property rights e.g. in artwork;
- assets in another country;

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Cultural/Religious/Ceremonial knowledge:

Is the testator the holder of any cultural / religious / ceremonial object or knowledge which they wish to pass on? ☐

Does this need to be kept secret? ☐

NOTE TO DRAFTER: if there is information which needs to be kept secret explain to the client the most appropriate way of doing this may be to write the information down and seal in an envelope if possible. Precedents are available for secret trusts etc but generally the simpler the strategy the better.

Is it owned by you (as opposed to collectively or with other people?) ☐

If it is to be passed on, specify to whom: .....

.....

.....

Are there conditions to be met before it is passed on? ☐

If yes, specify:

.....

.....

.....

.....

Family:

SPOUSE OR PARTNER

NOTE TO DRAFTER: When the will-drafter takes instructions for the making of the will, including the guardianship of children, for an Aboriginal client, they need to be especially careful about the designation of beneficiaries. It is much safer to avoid the problems of kinship designations being misunderstood if people are given their names rather than being labelled as a class of relatives, for example 'children' or 'aunt'. The precedents are drafted so that beneficiaries are defined to assist in resolving this problem.

Current partner ☐

Name: .....

Other names known by: .....

.....

Tick which applies to your client:

Legally Married ☐

When: .....

Where: .....

De facto ☐

When did you commence living together? .....

Has this been a continuous relationship? ☐

If no, detail: .....

.....

.....

Engaged to be married or contemplating marriage in the near future? ☐

Are there any children born from this relationship? ☐

If yes, provide their names and details under 'Children' and indicate which child this is in the list:

.....

.....

.....

.....

.....

TO CLIENT: If you marry or divorce after you make your will it could cancel some or all of the gifts in your will. You should look at whether you need to make a new will whenever your family circumstances change. For example: when you marry, divorce, separate from a current partner, start a new relationship, become the parent of a child.

Any other current partner/s: ☐

Name: .....

Other names known by: .....

.....

Address: .....

.....

.....

.....

Tick which applies:

Legally Married ☐

When: .....

Where: .....

De facto ☐

When did you commence living together? .....

Has it been continuous? ☐

Additional details if 'No': .....

.....

.....

Engaged to be married or contemplating marriage in the near future? ☐

Are there any children born from this relationship? ☐

If yes, provide names, addresses and dates of birth

.....

.....

.....

.....

.....

Is there a maintenance payment arrangement? ☐

Details:

Previous partner/s: ☐

Name: .....

Other names known by: .....

.....

Address: .....

.....

.....

.....

Tick which applied:

Married ☐

When: .....

Where: .....

De facto ☐

When commenced? .....

When ended? .....

Why did you cease your relationship? .....

.....

Divorced ☐

When: .....

My partner died ☐

When: .....

Where: .....

Separated ☐

When: .....

Has it been continuous? ☐

Additional details if 'No': .....

.....

.....

.....

Were there any children born from this relationship? ☐

If yes, provide name, address and date of birth .....

.....

.....

.....

.....

Is there a maintenance payment arrangement? ☐

Details: .....

.....

.....

It is important that your executor is aware of:

- all of the people to whom you have been married, even If you are now divorced;
- current partners and former de facto partners, if a child has been born from the relationship;
- all of your children, even if they have never lived with you.

IF THE SPACE ON THIS FORM IS INSUFFICIENT ATTACH ADDITIONAL DETAILS ON ANOTHER SHEET OF PAPER.

Other children:

TO CLIENT: All children born of you have equal status regardless of whether you were married to the parent of your child or not. If you have legally adopted a child who was not naturally born to you, that child is legally regarded as your child. If you have given a child up for adoption, you are no longer legally regarded as a parent of that child.

Who do you regard as your child?

1. Name: .....

Date of birth: ..... /..... /.....

Current address: .....

.....

Is this child a biological child, legally adopted, step-child or do you consider yourself to be the parent of this child?

2. Name: .....

Date of birth: ..... /..... /.....

Current address: .....

.....

Is this child a biological child, legally adopted, step-child or do you consider yourself to be the parent of this child?

3. Name: .....

Date of birth: ..... /..... /.....

Current address: .....

.....

Is this child a biological child, legally adopted, step-child or do you consider yourself to be the parent of this child?

4. Name: .....

Date of birth: ..... /..... /.....

Current address: .....

.....

Is this child a biological child, legally adopted, step-child or do you consider yourself to be the parent of this child?

Other children

Do you consider yourself to be the parent of any other children not listed above? ☐

5. Name: .....

Date of birth: ..... /..... /.....

Relationship: .....

Are they in your care? ☐

If not, their address:

.....

.....

Are they financially dependent on you? ☐

Provide further details:

.....

.....

.....

.....

6. Name: .....

Date of birth: ..... /..... /.....

Current address: .....

.....

Are they in your care? ☐

If not, their address:

.....

.....

Are they financially dependent on you? ☐

Provide further details:

.....

.....

.....

.....

TO CLIENT: It is helpful if you could note any special circumstances such as whether any of your children:

— are adult and still financially dependent on you;

— have any special needs due to a physical or mental disability;

— are bankrupt;

— have any other issues such as drug or alcohol addiction which you think will affect their ability to manage any money you may give them.

If any of these circumstances apply, you may wish to consider creating a trust in your will for the benefit of that child. Discuss this when you give instructions for your will.

Additional details: .....

.....

.....

.....

Guardian:

Are any of your children under 18 years of age? ☐

If yes, do you want to appoint a guardian for your children, to take over their care and custody if you die? ☐

TO CLIENT: If your appointed guardian is not also the parent of your child, the surviving parent (if any) will generally retain their own custody rights which they may seek to enforce in preference to the appointed guardian. If you are not the custodial parent, your appointed guardian will not automatically have the right to custody of your child. You should speak to your intended guardian before you appoint them, to make sure they are agreeable to taking on this responsibility.

Name of Guardian: .....

Relationship: .....

Address: .....

Phone: (H) ..... (M): .....

Is this appointment to apply to all my children? State names of children:

.....

.....

.....

.....

Do you want to include children you may have in the future? ☐

Do you want to appoint a substitute guardian if the appointed person is not able to do it? ☐

If yes, Name of Substitute Guardian:

.....

Relationship: .....

Address: .....

Phone: (H) ..... (M): .....

TO CLIENT: It is preferable to appoint one person as a guardian rather than two together (such as a married couple). This will avoid any dispute about who takes on the role if they are not in a relationship together, when the guardianship takes effect.

Do you have any instructions to your guardian about how you would like your children raised? ☐

Specify details: For example: education/religion/Indigenous custom:

.....

.....

.....

.....

These instructions are not binding on your guardian.

Executor:

TO CLIENT: The executor is the person you appoint to carry out the terms of your will. The executor will be responsible for: arranging for your funeral and the disposal of your body, proving to the Court that it is your will (probate), collecting all your assets, paying all your debts and taxes, distributing your gifts to the people you have named. Ideally your executor should be younger than you as they will need to outlive you to carry out their role. You should speak to your intended executor before you appoint them, to make sure they are agreeable to taking on this responsibility and to make sure they are willing to carry out your wishes. It can be a difficult role, particularly if there are disputes to settle.

Alternatively you may wish to appoint a trustee company such as NSW Trustee & Guardian.

Name of executor:

.....

Relationship: .....

Address: .....

Phone: (H) ..... (M): .....

Do you want to appoint a substitute executor in case your executor isn't able to act? One of the benefits of appointing a professional executor such as NSW Trustee & Guardian is that you do not need to appoint a substitute executor as it is an enduring organization that will always be around to act. ☐

If yes, Name of Substitute Executor:

.....

Relationship: .....

Address: .....

Phone: (H) ..... (M): .....

Funeral and Disposal of body:

TO CLIENT: If you have a will, your executor has the right to make decisions regarding the burial or cremation of your body. If you die without a will which appoints an executor, it is not absolutely clear who can make this decision. Sometimes there may be dispute as to who should make this decision or disagreement as to how this is to be done. For example, the family of an Aboriginal person who has married a non-Aboriginal may wish for them to be buried in the traditional Aboriginal homeland according to custom, but the non-Aboriginal spouse wants a non-traditional cremation away from the homeland. Funeral and burial instructions in your will can help to avoid this dispute.

Do you have a prepaid funeral? ☐

If yes, specify the name of the plan and the location of the contract terms and payment details:

.....

.....

.....

Do you want to specify particular instructions for the disposal of your body? ☐

If yes, tick your preference and give details:

- burial ☐ in a particular place? Please provide details:

.....

.....

- cremation ☐
- according to Indigenous custom ☐

Specify details .....

.....

.....

If yes and NSW Trustee & Guardian is your executor, it is preferable to provide the name of a person for them to consult before they make decisions about this:

Name: .....

Contact Number: .....

other type of ceremony, e.g. religious ☐

If yes, specify details:

.....

.....

.....

TO CLIENT: The following information is to assist you in considering some of the things you need to include in your will. The wording required to give effect to your intentions will be considered by your lawyer/will-drafter and adjusted to suit your particular circumstances.

Beneficiaries

TO CLIENT: These are the people you intend to give your assets to. If you want to include children that may be born in the future, this should be discussed. Legally a child cannot receive a gift until they reach 18 years of age. The gift will be held for the child until they reach 18 years of age or satisfy some other condition which you specify. If you create a Trust in your will normally the executor would also be responsible for looking after the gift until it is able to be paid to the beneficiaries.

Real estate

TO CLIENT: If you give a person a specific gift of real estate, normally any mortgage liability secured over it will pass with the gift. This means that if the person you give the property to wants to keep it, they will be responsible for paying the mortgage debt. If you want to give the real estate to your beneficiary free of any debt, you must specify in the will other assets from which the debt can be paid.

Powers your executor may need

TO CLIENT: The law gives executors certain powers. However, to be able to give effect to the terms of your will, the additional powers you may need may include authorising your executor to do the following. If you want extra powers you need to specify them in your will:

- Power for your executor to decide whether to advance property from a trust for a beneficiary's maintenance, education and benefits adjustment.
- A direction that while property is held in trust, any income belongs to the beneficiary. This can help to minimise any tax which may be payable, especially if it is for a person under the age of 18 years.
- Power for your executor to be able to continue to run any business which you may have been operating.

- Power for your executor to be able to adjust assets between your beneficiaries. This can assist your beneficiaries to be able to choose to keep specific assets instead of your executor having to sell them and distribute the money.
- Power for your executor to retain shareholdings or other investments you may have so that they don't necessarily have to be sold.
- Power to sell or postpone selling real and personal estate.
- Directions to your executor that they must follow; such as who to consult when making particular decisions.
- Wishes as to how you would like particular things dealt with, if possible; these are not binding on your executor.

Charitable gifts

Do you want to make a charitable gift of any kind, including if your beneficiaries pre-decease you? ☐

.....

.....

.....

Finalising the will:

TO CLIENT: This part of the form is for completion by your lawyer/ will-drafter, when preparing your will, and at the time that it is signed.

Name of lawyer/will-drafter:

.....

Address: .....

Occupation: .....

NOTE TO DRAFTER: The *Succession Act 2006* (NSW) sets out who may make a will, how it should be drafted, signed, and witnessed. While the law does not require a will to be in any particular form the following procedure is recommended to ensure the legal requirements are met:

- Date the will;
- Ensure client signs the will in the presence of 2 witnesses who are not receiving any benefit under the will;
- Ensure client and 2 witnesses are all present together when signing and witnessing;
- Ensure each page of will is signed preferably at the foot of the page;
- Names of witnesses are printed below signature at attestation clause;
- If client wishes to make an alteration it is best to have the will reprinted but if alteration is small make correction and ensure client and 2 witnesses initial alteration, preferably in margin of will;
- All 3 people use the same pen – black or blue.

Will Drafting Checklist:

- Has all of the will Information Form been completed? YES ☐
- None of the answers on the will Information Form raise questions which require further explanation? YES ☐
- Does the will have a revocation clause? YES ☐
- Has an executor and trustee been appointed? YES ☐
- If there are children under 18 has a guardian been appointed? YES ☐
- Have all the beneficiaries been named individually? YES ☐
- Does the will dispose of all assets using a residue clause to cover future as well as current assets? YES ☐
- Does the will correspond with the client's instructions for the will? YES ☐
- Is this will to operate in respect of assets anywhere in the world? YES ☐
- If not, has the execution clause been adjusted to suit the circumstances. YES ☐
- Is the client able to read the will in English and sign their own name? YES ☐
- If not, has the attestation clause been adjusted to reflect the circumstances? YES ☐

Testamentary capacity:

NOTE TO LAWYER/DRAFTER: Anyone over the age of 18 with testamentary capacity can make a will. Testamentary capacity is the ability to understand the following:

- the nature and effect of making a will;

- the nature and extent of the property being disposed of under the Will;
- the people who might have a claim on their assets; and
- not suffer from any delusions or mental incapacity which would damage their moral sense or lead to them being unduly influenced by another person or in any other way interfere with their capacity to consider how their will shall be made.

Questions to explore capacity should be open ended, not simply requiring a yes or no answer.

For example, the client should be asked:

(a) What is a will?

(b) Why do you want to have one?

(c) When does a will come into effect?

(d) Do you have any property, money or other belongings? What are they?

(e) Who do you think would expect to receive a gift under your will? Why?

The answers to these questions should indicate that the client understands the nature and effect of the document.

Capacity Checklist:

Did the client fill in the Will Information Form themselves or provide all of the information at their direction? YES ☐

Did the client understand the nature of the will? YES ☐

Did the client know the nature and/or value of their assets? YES ☐

Did the client understand the possibility of family provision claims, in respect of eligible applicants? (if applicable) YES ☐

Have all the formalities for a will (see above) been complied with? YES ☐

Was the client seen alone to ensure that there was no influence on them when making the will? YES ☐

If not, state the name of the companion and detail their involvement in the will making process in the notes filed below.

Testamentary capacity is an objective test conducted by the lawyer at the time that the will is executed. If you are concerned about capacity it may be appropriate to request the client to obtain a doctor's certificate. For more information about the capacity test for making a will and for seeking a medical check see Chapter 7 and refer to the Attorney General's Capacity Toolkit. Go to www.justice.nsw.gov.au/diversityservices/Documents/capacity_toolkit0609.pdf and select 'Capacity Toolkit'. Or the New South Wales Law Society's publication: *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors*, at www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf.

If you have assessed the client as having capacity but there are circumstances which may raise doubt in the future, specify in detail the reasons for determining capacity or lack of capacity. File notes should reflect the actual words used by the client.

File Notes/Additional Information:

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Certification by Lawyer/Will-Drafter

I confirm that I have:

- completed the Will Drafting Checklist YES ☐
- completed the Capacity Checklist YES ☐
- attended to the due execution of the will YES ☐
- obtained a receipt for the will or instructions regarding its safe custody YES ☐

Name Lawyer/Will-Drafter:

.....

Address: .....

.....

Signed: .....

Date: / /

Acknowledgement by Client:

☐ I acknowledge that I have received the original of my will dated

.....

.....

OR

☐ my original will is to be held in safe custody at:

.....

.....

☐ I am aware that my will is valid until I revoke it or make a new will (although marriage or divorce may cancel parts or all of my will).

Name: .....

Signed: .....

Date: / /

7

Wills precedents

Preliminary notes for the lawyer/will-drafter

These precedents are not intended to be exhaustive. I have drafted those most likely to be useful for the making of a culturally appropriate will for an Aboriginal person in New South Wales. Refer to previous chapters for the research which has led to these conclusions. Other precedents which you might find useful to refer to include Birtles,C and Neal, *Hutley's Australian Wills Precedents* (8th ed, LexisNexis, 2014) and Handler, L and Neal, R, *Mason and Handler's Succession Law and Practice in New South Wales* (LexisNexis looseleaf/online service).

In order to have a valid will, as well as the proper process of execution, the testator must have testamentary capacity, know and approve of the contents of the will and these matters must not be affected by undue influence or fraud.

Capacity

As stated in the previous chapter, in New South Wales a will must be made by a free and capable testator. In order to have capacity the testator must be:

- over 18
- able to understand the nature and effect of making a will

- able to understand the nature and extent of his or her property
- able to understand the various claims which might be regarded as arising on him or herself – that is family members and others who would be likely to be regarded as entitled to consideration, and
- have no delusions likely to interfere with any of the above.

Go to https://www.justice.nsw.gov.au/diversityservices/Documents/capacity_toolkit0609.pdf. It is an important part of the lawyer/will-drafter's role, particularly if the testator seems weak or sick, to make detailed notes concerning the questions the drafter asked the testator and the testator's answers. Should there later be a question about capacity, these notes can then be used as evidence for the court. If practical, and the testator is willing, it may be useful to have their doctor examine them at the time and give a report on their testamentary capacity. However, it is not for the lawyer or will-drafter to insist on this.

When the will has been drafted it should be read out loud to the testator, with pauses to explain the clauses and ensure he or she understands, before the testator and the witnesses sign the will. Notes of this process should also be made by the drafter. This is to establish that the testator knew and understood the contents of the will.

If it is clear that the testator lacks capacity it may be possible for a statutory will to be drafted pursuant to section 18 of the *Succession Act 2006* (NSW). For further information, see the NSW Law Society's Publication *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors* at https:// www.justice.nsw.gov.au/diversityservices/Documents/capacity_toolkit0609.pdf.

Drafting

The instruction sheet in Chapter 6 is intended to assist the drafter in ensuring a culturally appropriate will. At the same time the usual requirements for will-drafting must be met. So the drafter

should keep comprehensive notes of the process of drafting and instruction-taking in case of future litigation.

Marriage and wills

It is important to consider whether the will should be made in contemplation of marriage because marriage has the effect of revoking a will not made in contemplation of marriage: see section 12 of the *Succession Act 2006* (previously section 15 of the *Wills Probate and Administration Act 1898* (NSW)). The rationale for this is the presumption that spouses will provide for one another.

Unlike the *Wills Probate & Administration Act 1898* the *Succession Act 2006* has saving provisions in section 12 to save:

- Gifts made to a person who is the testator's spouse at the date of death and the appointment of the spouse as executor, trustee or guardian;
- A will made in contemplation of a particular marriage whether or not expressed in the will; and
- A will expressed to be made in contemplation of marriage generally.

If a testator does not make a new will after marriage and the previous will included a gift to the testator's spouse, all the will, except the gift to the testator's spouse will be revoked. Apart from the gift to the spouse, the estate would be distributed according to the intestacy rules. An application for a grant of probate would then be sought there being a partial intestacy for the part of the estate not passing to the spouse. If the will contains no gift to the testator's spouse and the whole will is revoked by the subsequent marriage an application for letters of administration would be made.

In the case of an unmarried couple living together it would be appropriate to seek instructions as to whether they intend to marry in the future.

There are two types of contemplation of marriage provisions. They are:

- where the provisions of the will are the same whether the marriage occurs within the specified time; or
- where the provisions of the will change if the marriage does not take place within the specified time.

The client must advise the substitutions to other beneficiaries if this is the choice.

The wills instructions should clearly indicate the client's instructions for a will made in contemplation of marriage notwithstanding the provisions of the *Succession Act 2006*.

Section 12 applies to a Will made before 1 March 2008, in relation to a marriage solemnised on or after 1 March 2008. Otherwise section 15 of the *Wills Probate and Administration Act 1898* applies.

Divorce and wills

Testators should be advised to make a new will after marriage or divorce.

Generally a divorce or annulment cancels any gift or appointment of executor in favour of a former spouse. The will takes effect as if the former spouse died before the testator.

As a result of the introduction of section 13 of the *Succession Act 2006* the following amendments are effective for those beneficiaries who have divorced, or had their marriage annulled, on or after 1 March 2008, even if the will is made before 1 March 2008.

Where a former spouse has been appointed as trustee of property left by will on trust for beneficiaries who include the children of the deceased and the former spouse, divorce will now not cancel that appointment. Similarly, where a power to appoint

property exclusively in favour of the children of the previously married partners has been given to the spouse in the will, divorce will not revoke that power.

Section 15A of the *Wills Probate & Administration Act 1898* applies for divorces made absolute on or after 1 November 1989, but before 1 March 2008, and allows for a contrary intention to be expressed in a will but does not provide the other saving provision of the *Succession Act 2006*. Before 1 November 1989 divorce did not revoke a will.

It should be noted that a separation is not a divorce, nor is an annulment, and does not by itself revoke a will in part or in full. Divorce is not final until the decree absolute has been issued (that is, if only the decree nisi has been issued the pair is still husband and wife).

A divorced spouse may be entitled to seek provision from their former spouse's estate under the *Succession Act 2006*.

As with marriage it may be best to advise a client to make a new will setting out their intentions after a divorce.

Guardianship

Instructions should be taken if a guardian is to be appointed for a child who is a minor. For Aboriginal people it will be important to determine whether the child is likely to be regarded by the law as the child of the person seeking to appoint the guardian. If not, this does not mean no appointment as guardian should be made, but it may be important to ascertain from the client whether the child is generally considered to be their child in their community. As the appointment of a guardian is always in the discretion of the court, an appointment in the will may still be persuasive to the court if any dispute arises. It is important to consider whether the appointment of guardian should extend to future children. Testators should be advised to ensure that their chosen guardian is willing to act in the role.

You should also seek instructions from the client as to whether the appointment of guardian is to be worded so that it will only be effective in the event of another person, such as the client's spouse/partner, not surviving the client.

It is not desirable to appoint more than one testamentary guardian as it may lead to conflict between the appointees. It is preferable to appoint a substitute to act if the first guardian is unable to do so, rather than to appoint, say, a married couple to act together.

The client may wish to include directions to the guardian regarding the future upbringing of the children if the guardianship appointment takes effect. Such directions will be included in the will as a request. For example, there may be a request for the guardians to ensure the children are educated in Aboriginal culture and traditions. If the directions appear to be onerous you should discuss this with the client with a view to their reconsidering or ensuring that the guardian is willing to carry out these directions.

Often clients making wills do not discuss the intended appointment of a person as their children's guardian with the person to be appointed. It is important to advise the client that they should discuss the guardianship appointment with the person/s they intend to appoint to care for their children. A guardianship appointment carries with it an enormous responsibility for the person to be appointed as guardian and that person may not wish to undertake this role.

Where the child's parents are divorced a parent testator can appoint a testamentary guardian in their will (*Guardianship of Infants Act 1916* (NSW)) and the rights and obligations will be governed by the *Family Law Act 1975* (Cth). The surviving parent is in general also the guardian of the minor and will act jointly with any guardian appointed by the testator.

A non-custodial parent retains guardianship rights unless the court has specifically ordered the loss of those rights. In the absence of such an order a surviving parent will be a guardian whether or not the testator has appointed a testamentary guardian in their will.

If the testator is not the custodial parent (these rights have been given to another person under the *Family Law Act*) then the testamentary guardian does not acquire custodial rights.

If the testator is the custodial parent the appointed guardian assumes the right to full care and control of the child. The custodial right does not revive in the surviving parent without a court order.

The surviving parent may dispute the appointed guardian retaining custody and seek custody of the child himself/herself. This may be resolved by voluntary mediation or if this is unsuccessful, by application to the Family Court.

Anyone who can prove they have the child's interest at heart can apply for a parenting order under the *Family Law Act*.

There are four types of orders:

1 residence orders (where the child will live);

2 contact orders (visitation rights);

3 child maintenance (financial support);

4 specific issues (guardianship issues such as education, religion and other aspects of how the child is raised).

The Court will consider (among other details):

- what is in the best interests of the child;
- the views of the child (particularly over 12 years of age).

In one case, the child's great-grandmother was awarded guardianship in preference to the natural father, due in part to the natural father's limited financial resources.

PRECEDENTS

In this section notes to the will-drafter are enclosed in grey boxes.

A will is formally valid when it has been signed by the testator in the presence of two witnesses who also sign and are present at the same time as the testator and each other. It is good practice for all three to use the same pen. The will-drafter should ensure this happens in order to avoid the need for the dispensing power or the refusal of a grant of probate.

There are 4 separate important formal parts for inclusion in a will:

- The name and identification clause
- Appointment of executor
- Revocation clause
- Execution and attestation.

NAMING, REVOCATION AND APPOINTMENT OF EXECUTORS

Clause 1. NAMING

THIS WILL is made by me, [insert name] of [insert address] [insert occupation].

Clause 2. REVOCATION

2.1 This is my only will. This will sets out completely who I want to give my property to after my death. I cancel any earlier wills and testamentary acts.

2.2 I revoke all previous wills and testamentary acts.

Clause 3. APPOINTMENT OF EXECUTOR

Research shows that Aboriginal people are disproportionately likely to be in serious disputes about the disposal of the body. The appointment of executor (who has the right to possession of the

body and to decide on its disposal) is therefore extra important for them. The testator should be advised to ensure the executor is willing to carry out his or her wishes.

Where the testator appoints NSW Trustee & Guardian as sole executor or substitute executor (the only way the New South Wales Trustee and Guardian will presently consent to be executor) the precedent Clause 3.13 'NSW Trustee & Guardian will consult' should be used.

You should consider:

- whether the nominated person may in fact be alive at the time of the testator's death?
- the appointment of a substitute or alternate executor and trustee if the first nominated executor predeceases the testator or is unwilling or unable to act as the executor and trustee of the will.
- whether it may be appropriate to appoint more than one executor and trustee though this in itself may lead to problems if the nominated executors and trustees are unable to agree on matters pertaining to the estate. Consider what special clause should be included in the will to deal with this situation.
- whether the nominated executor has the requisite expertise to administer a gift being held for a minor child – in this regard whether it may be appropriate to appoint a professional executor such as NSW Trustee & Guardian or one of the private trustee companies.
- the executor and trustee's relationship to the beneficiary with special needs – will they have their best interests at heart?

Clause 3.1.1. NSW Trustee & Guardian as Sole Executor

EXECUTOR AND TRUSTEE

I appoint NSW Trustee & Guardian the executor and trustee of this will.

Clause 3.1.2. NSW Trustee & Guardian as Substitute Executor

EXECUTOR AND TRUSTEE

I appoint [FirstExecRelationship] [FirstExec] the executor and trustee of this will if s/he survives me.

If [FirstExec] does not survive me or is unable or unwilling to act, I appoint NSW Trustee & Guardian the executor and trustee of this will.

Clause 3.1.3. NSW Trustee & Guardian must consult – Various

NSW Trustee & Guardian MUST CONSULT

3.1.3.1 My Trustee must seek advice from [AdvisorRelationship] [Advisor] before it does any of the following:

– [Actions]

3.1.3.2 My Trustee will not be bound to follow any advice from [Advisor] but must give it serious consideration.

Clause 3.1.4. An individual as Sole Executor

I appoint [name of executor/trustee] the executor and trustee of this will.

Example:

I appoint my husband Geoff Walden the executor and trustee of this will.

Clause 4.1 LIMITS ON NAMING AND USE OF MY IMAGE AFTER MY DEATH

My name is not to be mentioned (except where required by law) and nor is my photograph or image to be shown or used for the period of [insert time period] after my death.

BENEFICIARY IDENTIFICATION CLAUSE

Because Aboriginal kinship may not match the common law's understanding of kinship it is important that beneficiaries are named. This avoids the situation which arises when a person regards X, Y and Z as their children in customary law, but the common law regards only X as their child.

Clause 5.1.

In this will the words 'my child' or 'my children' refers to: [names of beneficiaries], the words 'my brothers' refers to [names of beneficiaries], the words 'my sisters' refers to [names of beneficiaries], the word 'grandchildren' refers to [names of beneficiaries].

GIFT OF ALL ASSETS

In order to have the most effective and culturally appropriate will for Aboriginal testators it is most effective to ensure that when naming beneficiaries in the will they are identified by their names rather than as members of a class

The testator may wish to give everything they own at the time of their death – all their assets – to one beneficiary or to be shared between several beneficiaries or, to one or more charities or organisations. The following clauses are suitable for gifts of the whole of the estate.

Clause 6.1. GIFT OF ALL PROPERTY TO ONE BENEFICIARY

I give all of my property, after payment of my debts and funeral and testamentary expenses to [INSERT RELATIONSHIP OF BENEFICIARY AND NAME OF BENEFICIARY] if s/he survives me.

Example:

I give all of my property, after payment of my debts and funeral and testamentary expenses to my partner Jennie Warran if she survives me.]

Clause 6.2. ALL PROPERTY WITH GIFT OVER

If the gift to the first named beneficiary does not take effect because, for example, that beneficiary predeceases the testator, it is preferable to provide a substitutional beneficiary in the will to avoid an intestacy in the estate. The following clause should be used.

If the gift in Clause [X] does not take effect, I give all my property after payment of my debts and funeral and testamentary expenses to [INSERT RELATIONSHIP AND NAME OF BENEFICIARY] if s/he survives me.

Example:

If the gift in Clause [X] does not take effect, I give all my property after payment of my debts and funeral and testamentary expenses to my daughter Edith Smith if she survives me.

Clause 6.3. GIFT OF ALL PROPERTY TO MORE THAN ONE BENEFICIARY

I give all of my property, after payment of my debts and funeral and testamentary expenses to those of [INSERT RELATIONSHIP OF BENEFICIARIES AND NAME OF BENEFICIARIES] who survive me.

Example:

I give all of my property after payment of my debts and funeral and testamentary expenses to those of my children John Smith and Edith Smith who survive me.

Clause 6.4. ALL PROPERTY WITH GIFT OVER

If the gift in Clause [X] does not take effect, I give all my property after payment of my debts and funeral and testamentary expenses to those of [INSERT RELATIONSHIP AND NAME OF BENEFICIARY] who survive me.

Example:

If the gift in Clause [X] does not take effect, I give all my property after payment of my debts and funeral and testamentary expenses to those of my grandchildren Geoff Smith and Jean Smith who survive me.

SPECIFIC AND GENERAL GIFTS

A specific gift is one separated out from the rest of the estate, often by their description and the use of the word 'my' e.g. 'my pearl necklace'. (Gifts which are not separated out from the rest of the estate are called general gifts.) If specific gifts do not exist in the testator's estate at the date of their death the gift will not take effect.

Specific gifts may include items such as:

- personal effects, household goods and jewellery
- real estate
- motor vehicles
- bank accounts
- superannuation
- cash.

Clause 7.1. ONE SPECIFIC GIFT

I give [DESCRIPTION OF GIFT] to [RELATIONSHIP AND NAME OF BENEFICIARY] if s/he survives me.

Example:

I give my late grandmother's brooch to my daughter Edith Smith if she survives me.

Clause 7.2. GIFT OF PROCEEDS OF A BANK ACCOUNT

A gift of the proceeds of a particular account may fail if the testator closes that account during their lifetime. Consequently

it is preferable to make a gift of the proceeds of any account held by the testator in a particular banking institution or a gift of all accounts with any banks, building societies, credit unions or other similar financial institutions. A gift of a particular account should only be made if the testator is sure that they will still hold that account at the time of their death.

The following clause is added to the will with any gift of a bank account to ensure that interest payable after the testator's date of death is included in the gift:

'This gift includes the income from this account/these accounts due for payment after my death (without apportionment).'

Clause 7.2.1.

I give my [TypeofAccount] Account No. [BankAccountNo] to [INSERT NAME OF BENEFICIARY] if s/he survives me.

This gift includes the income from this account due for payment after my death (without apportionment).

Example:

I give my Commonwealth Bank Account No. ZZZZZ to my cousin Billie Smith if he survives me.

This gift includes the income from this account due for payment after my death (without apportionment).

Clause 7.2.2. Gift of All Bank Accounts

I give all my accounts with any Banks, Building Societies, Credit Unions or other similar financial institutions to [INSERT NAME OF BENEFICIARY] if s/he survives me.

This gift includes the income from these accounts due for payment after my death (without apportionment).

Clause 7.3. CAR – PARTICULAR MOTOR VEHICLE ONLY

I give my [VehicleMakeandModel] Reg. No. [VehicleRegNo] and all my accessories for it to [INSERT NAME OF BENEFICIARY] if s/he survives me.

Example:

I give my Holden Utility Registration No. XYZ and all my accessories for it to my daughter Edith Smith if she survives me.

Clause 7.4. HOUSEHOLD GOODS

When taking instructions details of the client's household goods should be recorded. You should consider whether the gift is to be a specific item of household furniture or if an item of furniture has already been made in the will consider if the gift should include all the rest of the client's household goods. For example, if a gift of an item of furniture has been made in the will you should use the wording 'all the rest of my household goods' when dealing with the remainder of these items.

Clause 7.4.1.

I give all [the rest of] my household goods to [INSERT NAME OF BENEFICIARY] if s/he survives me.

By 'household goods' I mean things which are used around the house and enjoyed by whoever lives there. For example, furnishings and appliances, decorations and ornaments, domestic animals and so on. The definition of 'household goods' includes any antiques and original artworks but does not include motor vehicles, or ritual objects.

Example 1:

I give all my household goods to my daughter Edith Smith if she survives me.

By 'household goods' I mean things which are used around the house and enjoyed by whoever lives there. For example, furnishings and appliances, decorations and ornaments, domestic animals and so on. The definition of 'household goods' includes any antiques and original art works but does not include motor vehicles or ritual objects.

Example 2:

I give my television set to my son Billie Smith if he survives me.

I give all the rest of my household goods to my daughter Edith Smith if she survives me.

By 'household goods' I mean things which are used around the house and enjoyed by whoever lives there. For example, furnishings and appliances, decorations and ornaments, domestic animals and so on. The definition of 'household goods' includes any antiques and original art works but does not include motor vehicles or ritual objects.

Clause 7.5. PERSONAL EFFECTS

When taking instructions, details of the client's personal effects should be recorded.

Clause 7.5.1.

I give all [RestOf] my personal effects to [INSERT NAME OF BENEFICIARY] if s/he survives me.

'Personal effects' means things which are readily portable and which I would use for my own enjoyment (more or less exclusively) wherever I was living. For example; clothing and toiletries, sporting gear, cameras and so on. The definition of personal effects does not include motor vehicles, jewellery or ritual objects.

Example 1:

I give all my personal effects to my daughter Edith Smith if she survives me.

'Personal effects' means things which are readily portable and which I would use for my own enjoyment (more or less exclusively) wherever I was living. For example; clothing and toiletries, sporting gear, cameras and so on. The definition of personal effects does not include motor vehicles, jewellery or ritual objects.

Example 2:

I give my clothing to my son Billie Smith if he survives me.

I give all the rest of my personal effects to my daughter Edith Smith if she survives me.

'Personal effects' means things which are readily portable and which I would use for my own enjoyment (more or less exclusively) wherever I was living. For example; clothing and toiletries, sporting gear, cameras and so on. The definition of personal effects does not include motor vehicles and jewellery or ritual objects.]

Clause 7.6. JEWELLERY

When taking instructions details of the client's jewellery should be recorded. If valuable items such as jewellery are held in safe custody details of the name and address of the bank or storage facility should be recorded.

Clause 7.6.1.

I give all [TheRestOf] my jewellery [Including/ExcludingWatches] to [INSERT NAME OF BENEFICIARY] if s/he survives me.

Example 1:

I give all my jewellery including watches to my daughter Edith Smith if she survives me.

Example 2:

I give my late grandmother's brooch to my granddaughter Daisy Smith if she survives me.

I give all the rest of my jewellery excluding watches to my daughter Edith Smith if she survives me.

If one item of jewellery is specifically given to a beneficiary the client must decide whether the rest of their jewellery is to be given to another beneficiary or to form part of the residuary estate.

Clause 7.6.2. Jewellery and Personal Effects

I give all [TheRestOf] my jewellery [Including/ExcludingWatches] and all my personal effects to [INSERT NAME OF BENEFICIARY] if s/he survives me.

'Personal effects' means things which are readily portable and which I would use for my own enjoyment (more or less exclusively) wherever I was living. For example; clothing and toiletries, sporting gear, cameras and so on. The definition of personal effects does not include motor vehicles, jewellery or ritual objects.

Clause 7.7. COLLECTIONS

It is useful to ask the client whether they have a collection, such as stamps or tribal artefacts, which they wish to give to someone.

Clause 7.7.1.

I give all [TheRestOf] my tribal artefacts to [INSERT NAME OF BENEFICIARY] if s/he survives me.

Clause 7.7.2.

I give my collection of [DESCRIBE] to [INSERT NAME OF BENEFICIARY] if he/she survives me.

Clause 7.8. SPECIFIC GIFT TO A MINOR – HAND TO CHILD'S PARENT OR GUARDIAN

If a specific gift is being made in the to a child (being a person under 18 years of age) it is appropriate to include the following clause in the to provide for the gift to be handed over to the child's parent or guardian.

Clause 7.8.1.

If [BENEFICIARY'S NAME] is still a minor when my Trustee is ready to distribute this property my Trustee may hand it over to [BENEFICIARY'S NAME]'s parent or guardian to hold on his/her behalf. If my Trustee obtains a receipt from the parent or guardian my Trustee will have no further obligation to see that [BENEFICIARY'S NAME] actually receives it.

Example:

If Josie Brown is still a minor when my Trustee is ready to distribute this property, my Trustee may hand it over to Josie's parent (or guardian) to hold on her behalf. If my Trustee obtains a receipt from the parent (or guardian), my Trustee will have no further obligation to see that Josie actually receives it.

A child cannot give a receipt to the executor for the gift until they attain 18 years and so it is important to make clear the difference between a private executor who can and NSW Trustee & Guardian who cannot store gifts such as jewellery or household items for minors until they attain their majority.

Clause 7.9. DISPUTE OVER SHARED PROPERTY

Where there has been a gift of personal effects, jewellery or household goods to more than one beneficiary and the beneficiaries cannot agree on a distribution of the gifts, the will

confers the power on the Trustee to make a final decision as to who should receive any particular item.

If the gift is made to more than one person the will should contain the following 'dispute clause' so that if there is a dispute among beneficiaries the executor can have the ultimate say in the distribution of the relevant items.

If my beneficiaries cannot agree which of them should take any particular item included in this gift my Trustee will decide and they must abide by his decision.

Clause 7.10. MONEY

The testator may need to be advised that cash gifts are very likely to be the first item to disappear in debts.

Clause 7.10.1.

I give [AmountinWords] dollars ([CashGiftAmount]) [EachorSharedAmong] to [INSERT NAME OF BENEFICIARY] if s/he/they survive/s me.

Example 1 – gift of cash to one person:

I give fifty dollars ($50.00) to my daughter Edith Smith if she survives me.

Example 2 – gift of cash to two people:

I give twenty five dollars ($25.00) to each of my children Edith Smith and Billie Smith if they survive me.

Example 3 – gift of cash to be shared between more than one person:

I give one hundred dollars ($100) to be shared between those of my children Edith Smith and Billie Smith who survive me.

Clause 7.10.2. Index gift to the CPI

Consider whether a legacy should be indexed to the Consumer Price Index (CPI) so that the real capital value of the gift may be preserved. If the gift is to be indexed in accordance with the CPI the following clause should be included in the will.

The gift in Clause [X] is to be indexed to the CPI starting from the date of my [death][will] to the date the gift is paid.

Any increase in the gift after taking into consideration the CPI is to be made up from the residue of my estate.

The CPI index to be used is the weighted average for the eight capital cities or whatever index is substituted for it from time to time.

Clause 7.11. REAL ESTATE

It is important to ensure the address of any real estate in which the client has an interest is correctly recorded. The principal place of residence should be noted as such.

You should record whether the property (or the client's interest in the property) is held in the client's sole name or whether it is owned jointly with one or more people. The names and address of the joint owners should be recorded as well as details of their ownership of the property. That is, whether the property is owned as joint tenants or as tenants in common and in what percentage shares. For example, 50% share as tenant in common.

The difference between **Joint tenancy** and **Tenancy in common** is summarised as:

Joint tenants – In the event of the death of either party the asset passes to the survivor.

Tenants in common – In the event of the death of either party the deceased person's share of the asset will form part of their estate.

It is useful to make notes in relation to any piece of real estate which may assist in the later administration of the estate. For example; the property is in the process of being sold, the property is vacant land, there is a short/long term lease for the property.

The date or year the property was purchased should be recorded if known. You should remind the client that it is important to keep good records regarding the acquisition of the asset, together with information about any capital improvements. This may be useful for assessing whether the asset is liable for capital gains tax (CGT) and if so, how much.

Collect details of any mortgage registered on the property. If the property is unencumbered ensure that the location of the title deed/s is noted. You can advise the client that their title deeds can be kept with their will in a safe custody packet at NSW Trustee & Guardian free of charge when they make a will appointing NSW Trustee & Guardian as their executor.

A gift of real estate should carefully describe the property being the subject of the gift. If the testator owns a share of the property the will should provide for a gift of 'my interest in the property [address]'. A gift of a company title unit should be expressed as 'my interest in my company title unit [property address]'.

If the testator owns a property as joint tenants with another person that property will pass to the co-owner of the property (the surviving joint tenant) and will not form an asset in the testator's estate. A property owned as joint tenants with another person will only become an asset in the testator's estate if the joint tenant predeceases the testator.

When taking instructions for a gift of real estate it is important to correctly establish whether the testator owns any real estate in his/her sole name or, jointly with others and, if so, details of the joint ownership must be obtained.

If it is intended to make a gift of real estate to a number of beneficiaries as joint tenants the words 'in equal shares' must

not be used. Use of these words will override the words 'as joint tenants' and the beneficiaries will take the property as tenants in common.

Mortgage over real estate

Debts secured by a mortgage over a particular property pass with that property. They are not paid out of residue: see section 145 of the *Conveyancing Act 1919* (NSW). The section can be excluded by a contrary direction in the will. Section 145 of the *Conveyancing Act* does not apply where the property is held as joint tenants. As a general rule in such cases:

- The property passes to the survivor automatically
- The estate is liable to the mortgagee for repayment of the whole debt, and
- The survivor is liable to contribute a share of the amount owed to the mortgagee.

Clause 7.11.1. Gift of all real estate

I give all my real estate to [INSERT NAME OF BENEFICIARY] if s/he survives me.

If this real estate is charged at the time of my death with the payment of money, for example, by mortgage, I confirm that this real estate so charged will be primarily liable for the payment of the charge.

Clause 7.11.2. Real estate – particular property

I give my property [PropertyAddress] to [INSERT NAME OF BENEFICIARY] if s/he survives me.

If this real estate is charged at the time of my death with the payment of money, for example, by mortgage, I confirm that this real estate so charged will be primarily liable for the payment of the charge.

If this real estate does not form part of my estate I give instead the property which I owned and last used as my principal residence before my death.

Clause 7.11.3. Real estate – interest in a particular property

(note that if the testator owns the property as joint tenant the property will not form part of the estate and will go by survivorship to the other joint tenant(s)).

Note: If the testator owns a share of a property, for example a one-half interest as tenants in common with another person it would be appropriate to use the following clause.

I give my interest in the property [PropertyAddress] to [INSERT NAME OF BENEFICIARY] if s/he survives me.

If this real estate is charged at the time of my death with the payment of money, for example, by mortgage, I confirm that this real estate so charged will be primarily liable for the payment of the charge.

If this real estate does not form part of my estate I give instead the property which I owned and last used as my principal residence before my death.

Example:

I give my interest in the property at 12 Concord Road Concord to my daughter Edith Smith if she survives me.

If this real estate is charged at the time of my death with the payment of money, for example, by mortgage, I confirm that this real estate so charged will be primarily liable for the payment of the charge.

If this real estate does not form part of my estate I give instead the property which I owned and last used as my principal residence before my death.

Clause 7.11.4. Principal residence clause

This is a useful clause to include in a will where a property may be sold after the will is made but before the death of the testator.

If this real estate does not form part of my estate I give instead the property which I owned and last used as my principal residence before my death.

Clause 7.11.5. Mortgage to be paid out of residue

I direct my Trustee to discharge any mortgage (or other charge) on this property using funds from the residue of my estate.

Clause 7.11.6. Direction to pay out the testator's share of a mortgage over a property held as tenants in common

I direct my Trustee to pay out my estate's share of any mortgage (or other charge) on this property using funds from the residue of my estate.

Clause 7.12. POLICIES AND FUNDS

Clause 7.12.1. Life insurance – particular policy

I give the proceeds of my life insurance policy [PolicyNo] with [HoldingCompany] to [INSERT NAME OF BENEFICIARY] if s/he survives me.

Clause 7.12.2. Life insurance – all policies

I give the proceeds of all insurance policies on my life to [INSERT NAME OF BENEFICIARY] if s/he survives me.

Clause 7.12.3. Superannuation – particular fund – refer to the explanation about nominations and trustee discretions

I give all money payable to my estate on my death from [Fund] to [INSERT NAME OF BENEFICIARY] if s/he survives me.

Any tax liability arising from this gift shall be paid from the superannuation fund proceeds and not from the residue of my estate.

Clause 7.12.4. Superannuation – all funds

I give all money payable on my death to my estate from any superannuation fund or scheme to [INSERT NAME OF BENEFICIARY] if s/he survives me.

Any tax liability arising from this gift shall be paid from the superannuation fund proceeds and not from the residue of my estate.

Clause 8. RESIDUE

A residuary clause must be inserted after specific gifts are made in a will to avoid an intestacy in the estate. For example if a gift of real estate is given but no other gifts are made and all remaining assets owned by the testator at the time of their death will not be disposed of by the will but according to the NSW intestacy laws. If the will does not specify anything to the contrary, debts will be paid in the following order: from any intestate estate, then from any residue, then from pecuniary legacies and finally from specific gifts. For further information on payments of debts refer to the Third Schedule of the *Probate and Administration Act 1898*.

Clause 8.1.1. Residue

I direct the rest of my estate be used first to pay my debts and funeral and testamentary expenses.

After payment of my debts and funeral and testamentary expenses, I give the rest of my property to [INSERT NAME OF BENEFICIARY] if s/he survives.

Clause 8.1.2. Gift over of residue to one person

If Clause [X] does not take effect, I give the rest of my property to [INSERT NAME OF BENEFICIARY] if s/he survives me.

Clause 6.1.3. Gift over of residue to more than one person

If clause X does not take effect, I give the rest of my property to those of [INSERTBENE] who survive me.

OTHER IMPORTANT CLAUSES AND CONSIDERATIONS

Clause 9. ARTWORKS created by the testator

Clause 9.1

I give all my intellectual property in [specify artwork] to [INSERT NAME OF BENEFICIARY] absolutely if he/she survives me.

This is a specialist area and it is suggested that where there is any complicated issue concerning art you consult the Arts Law Centre of Australia at:

The Gunnery
43 – 51 Cowper Wharf Road
Woolloomooloo NSW 2011
www.artslaw.com.au
Telephone: (02) 9356 2566
Tollfree: 1800 221 457]

Clause 10. MINOR BENEFICIARIES

Infant children, that is minors, are by law prohibited from receiving their entitlement until they become capable adults at the age 18 years. A gift to a minor will take effect when the child turns 18 years of age unless otherwise provided for in the will.

Some people consider that at 18 years a child is still too young to receive a large sum of money or other valuable gift so consideration should be given as to whether a gift in the will to a minor should be conditional on the child attaining a higher age. Some people specify the age of 21 or 25 years.

Some people wish to specify that the age requirement be higher than 25 years but anything higher than 25 may risk the intended beneficiary making a family provision claim under the *Succession Act 2006* to seek payment of the gift earlier than the age specified in the will.

It is the duty of the appointed trustee to hold the beneficiary's entitlement in trust until the beneficiary turns 18 or any higher age specified in the will.

Most testators make provision in the will for the trustee to be able to advance any money held in trust for the minor beneficiary to provide for their maintenance, education, benefit or advancement. While the beneficiary is a minor it is usual practice to specify in the will for these payments to be made to the child's parent or guardian. Where the gift is not to be made until a higher age of 21 or 25 years the trustee should have power to make payments to the beneficiary from 18 until that age.

The statutory provisions in the *Trustee Act 1925* (NSW) for maintenance payments are generally adequate but the provisions for advancement may not be and consideration should be given to what is adequate for the client's minor beneficiaries. Due to the restrictions in the legislation it is preferable to include specific powers in the will rather than rely on statutory provisions and the following examples may be used.

The words maintenance, benefit and advancement have legal meanings. 'Maintenance' refers to a payment made by a trustee that is periodical whereas 'advancement' refers to a payment that may be a one-off of a large sum. 'Benefit' refers to payments that may not be either maintenance or advancement. For further reading on the case law relating to these terms refer to Heydon, JD and Leeming, MJ, *Jacobs' Law of Trusts in Australia* (8th ed, LexisNexis Butterworths, 2016).

Powers of maintenance and advancement for minors [These will not be necessary if precedent xxx at end of section is used.]

Clause 10.1.1. Mortgage to be paid out of residue

My Trustee may in his/her discretion, pay, or pay to any person he/she thinks fit, for the maintenance education advancement or benefit from the whole or any part of the capital and income of

that part of my estate of which that minor beneficiary is entitled or may in the future be entitled.

Powers of maintenance and advancement for gifts vesting beyond minority

Clause 10.1.2.

My Trustee may in his/her discretion, pay, or pay to any person it thinks fit, for the maintenance education advancement or benefit from the whole or any part of the capital and income of that part of my estate of which that beneficiary is entitled or may in the future be entitled.

1 beneficiary already living at time testator makes the will

If the minor beneficiary is to take the gift at age 18 the following clause may be used but delete the words 'and reaches X years of age'.

Clause 10.1.3.

[RecipientRelationship] [Recipient] if s/he survives me and reaches [RecipientAge] years of age.

Example:

I give all of my estate, subject to payment of my debts and funeral and testamentary expenses, to my daughter Edith Smith if she survives me and reaches 25 years of age.

1 beneficiary already living at time testator makes the will and future children

If the minor beneficiaries are to take the gift at age 18 the following clause may be used but delete the words 'and reach X years of age'.

Clause 10.1.4.

[RecipientRelationship] [Recipient] if s/he survives me and reaches [RecipientAge] years of age and any future children I may have after making this will who survive me and reach [RecipientAge] years of age.

Example:

I give all of my estate, subject to payment of my debts and funeral and testamentary expenses, to my daughter Edith Smith if she survives me and reaches 21 years of age and any future children I may have after making this will who survive me and reach 21 years of age.

2 or more beneficiaries including future children at a specified age

If the minor beneficiaries are to take the gift at age 18 the following clause may be used but delete the words 'and reach X years of age'.

Clause 10.1.5.

I give all of my estate, subject to payment of my debts and funeral and testamentary expenses, to those of the following people and any future children I may have after making this will who survive me and reach [RecipientAge] years of age ('the specified age'):

[Recipients]

Example:

I give all of my estate, subject to payment of my debts and funeral and testamentary expenses, to those of the following people and any future children I may have after making this will who survive me and reach 23 years of age:

my daughter Edith Smith

my son Billie Smith

my son Tom Smith

my daughter Rosalie Smith

Clause 10.2. GUARDIAN

[The general issues raised by the appointment of testamentary guardians are discussed at pages 88–90.]

Clause 10.2.1.

I appoint [Guardians] as [GuardianorGuardians] of [ChildRelationship] [ChildName] / my children including [ChildrensNames] .

Example:

I appoint Robert Calder and Alice Calder as guardians of my son Billie Smith.

I appoint Robert Calder and Alice Calder as guardians of my children including my daughter Jean Smith.

Clause 10.3. SUBSTITUTE GUARDIAN

Clause 10.3.1.

If [Guardians] is unwilling or unable to act as [GuardianorGuardians] I appoint [SubstituteGuardians] as [SubGuardianorGuardians] of [ChildRelationship] [Childname] / my children including [Childrensnames] .

This appointment will only come into effect if my spouse dies before me.

Example:

If Robert Calder and Alice Calder are unwilling or unable to act as guardians I appoint my brother John Smith as guardian of my children Billie Smith, Edith Smith and Rosalie Smith.

This appointment will only come into effect if my spouse dies before me.

Clause 10.4. GUARDIAN NOT TO BE DISADVANTAGED BY APPOINTMENT AS GUARDIAN

Clause 10.4.1.

My Trustee may make advances or loans (on whatever terms my Trustee thinks fit) to any person acting as guardian or carer of any of my children from the child's presumptive share of my estate. I wish my Trustee to exercise its powers so as to ensure, so far as seems reasonable to my Trustee, that the guardian or carer of my children is not financially disadvantaged by their care for my children.

Clause 11. EXECUTOR AND TRUSTEE'S POWERS AND DUTIES

Executors are given powers by law. However, further powers may be given to the executor and trustee if that appears to be useful. The following is an extensive set of powers and duties. It is suggested that it may be useful to consult other precedent books if any other powers are needed.

Clause 11.1.1. Trustee's powers and duties

(1) My executors may in their discretion:

(a) exercise any powers given to them by law;

(b) exercise the powers of a trustee for sale in respect of any property in my estate and my executors may:

(i) without being liable for any loss (including liability for taxation on capital gain) caused by so doing, postpone sale;

(ii) without being liable for any loss (including liability for taxation on capital gain) caused by so doing, retain in its form of investment at my death any part of my estate, even though it is wasting, hazardous or reversionary;

(iii) sell, by public auction or private sale, and for that purpose may extend credit;

(c) lease or acquire property for use, enjoyment or occupation by a beneficiary (including with other persons);

(d) delegate a power or function, and execute a power of attorney or other instrument to make the delegation;

(e) make loans to beneficiaries on any terms

(f) carry on any trade or business in whole or in part in which I am interested at my death, whether alone or with other person or persons;

(g) where the estate has an interest in a corporation or business, vote, apply for and accept directorship of the said corporation and be involved in any arrangement affecting the shares, securities, or control of that corporation or any of its concerns, and in relation to such a corporation or business apply for, accept or take up securities of any description or denomination, bonus shares or other rights or benefits made available by a company or corporation in which my estate is or may become interested or concerned;

(h) decide whether receipts or outgoings are capital or income, or partly capital or income, so as to bind the beneficiaries, even though the receipts are from a company or corporation that has made a decision on the matter;

(i) apply the whole or part of the capital or income of any part of my estate to which a beneficiary is or may become entitled for that beneficiary's maintenance, education (including travel to broaden the mind), advancement or benefit; and if the beneficiary is a minor to their guardian or parent and accept the receipt of that payee as sufficient discharge;

(j) whether or not any beneficiary agrees, my Trustee may satisfy the entitlement of that beneficiary to a share in my estate, by cash payment, by transferring specific

assets in the estate, or partly by cash and partly by transferring specific assets;

(k) take out or maintain insurance policies including those on estate property or risk, life of any person, or for the health or accidental harm to any person; and benefit schemes for any person including trade union or other employee benefit scheme, superannuation or pension scheme, funeral benefit or payment scheme;

(l) borrow money (with or without giving security), and enter into any mortgage, charge, bill of sale, lien or security over any part of my estate; and any money borrowed is to be treated as part of my estate or trust property, whichever applies;

(m) lease any part of my real or personal property on terms my executors think fit;

(n) accept surrenders of leases or tenancies of my estate or any part of it;

(o) maintain, repair, improve, develop, alter, renovate, pull down, erect or re-erect any part of my estate;

(p) partition or appropriate any part of the real or personal property of the estate for the purpose of satisfying any legacy or share for beneficiaries in my estate whether or not the beneficiaries agree and in doing so the following provisions apply:

(i) the value of any such property is that agreed by those of my beneficiaries affected or, if my executors are satisfied that no value can be agreed in this way, the value is that determined by an independent valuer appointed by my executors for the purpose;

(ii) my executors need not take into account any differences in value of particular property to particular beneficiaries other than the value of the property as decided in subparagraph (i);

(q) if my executors dispose or are deemed to have disposed of property from which income tax is to be paid, they may determine from which part of the estate income tax is to be paid and for that purpose they may determine what is capital and what is income, but I express the wish that, if it seems appropriate to my executors to do so, proceeds of such a disposal be resorted to in the first instance;

(r) allocate separately different types and sources of income into different accounts and record this in the books of account;

(s) appoint and empower nominees to act and hold property for my executors; and appoint custodians of any property and documents (including documents relating to property) in my estate;

(t) for any reason set aside a fund from my estate sufficient to meet all debts, charges and liabilities of the estate for any reason. If, having discharged all such debts, charges and liabilities any balance remains, that balance does not form part of the residue of my estate, but is to be distributed as if it were part of the residue.

(2) I wish my executors to make available and give to my beneficiaries any documents relevant to the property they inherit or the assessment of tax relating to that property.

Clause 12. DEBTS, LOANS AND SHAREHOLDINGS AND OTHER GIFTS

Debts and Loans

The following clauses cover various situations involving debts and loans.

Directions regarding debts

Debt to be repaid by beneficiary where beneficiary is a debtor

Clause 12.1.1. Debt to be repaid by [DebtorRelationship] [Debtor]

[INSERT NAME OF BENEFICIARY] owes me [AmountinWords] dollars ([CashGiftAmount]). (This debt arises from [DebtDetails]).

I direct my Trustee to treat this as an enforceable debt owed by [INSERT NAME OF BENEFICIARY]. If it would otherwise be unenforceable by lapse of time it is to be charged against [insert bene]'s interest in my estate.

Example:

My cousin Paul Darbin owes me one thousand dollars ($1,000.00). (This debt arises from money I loaned to him to buy a car.)

I direct my Trustee to treat this as an enforceable debt owed by my cousin Paul Darbin. If it would otherwise be unenforceable by lapse of time it is to be charged against my cousin Paul's interest in my estate.

Direction to repay loan

Clause 12.1.2. Debt to [CreditorRelationship] [Creditor] to be repaid

I have borrowed [AmountinWords] dollars ([CashGiftAmount]) from [insert NAME of Creditor]. This loan carried interest at [LoanRate] % per annum / was interest free and was to be repaid on [RepayDate] .

I direct my Trustee to treat this debt/debt (and all accumulated interest) as due and payable from my estate even though legal action to recover it may be barred by lapse of time. (This direction has priority over all gifts.)

Clause 13. FUNERAL AND DISPOSAL OF BODY

For information about burial issues and disputes you should refer to pages 19–32.

Traditional Ceremony

Clause 13.1.1.

I wish my funeral to be a traditional ceremony as discussed with my executor.

Specific Religious Ceremony

Clause 13.1.2.

I wish to be [BodyDisposal] with a [Religion] service.

> *Example*:
>
> I wish to be buried at Warrangabee Station with a Christian service.

No Religious Ceremony

Clause 13.1.3.

I do not want any religious ceremony conducted for me after my death.

Other special instructions

Clause 13.1.4.

I wish my body to be buried in the cemetery at [specify location] with a handful of soil from my traditional country [specify].

Inexpensive Funeral

Clause 13.1.5.

I direct that my body be disposed of with as little expense as possible.

Cremation

Clause 13.1.6.

I direct my body be cremated.

Optional: I wish my ashes to then to be [insert directions as to what is to be done with ashes].

Clause 14. MARRIAGE AND DIVORCE

Will not Revoked by Marriage

Clause 14.1.1. Marriage will not cancel will

I want this will to have effect immediately and to continue after my marriage to [FianceName] .

DIVORCE – GIFTS AND APPOINTMENTS IN WILL NOT REVOKED BY DIVORCE

Clause 14.1.2.

In this codicil to my will dated [insert date of will] I confirm that the gifts and appointments in that will are not revoked by my divorce from [insert name of former spouse].

Note: This is a codicil (a short additional piece which is added onto a will which has already been executed). This should be executed as for a normal will – use the execution and testation clause at 16. Note that this is only appropriate if after divorce the testator wants to confirm every aspect of the previous will. In most cases it will be preferable to draft an entirely new will.

Clause 15. PASSING SECRET INFORMATION OR RITUAL OBJECTS

Direct passing of information

Clause 15.1.1.

I give the material in the sealed envelope labelled [INSERT LABEL] to [INSERT NAME OF BENEFICIARY].

Conditional passing of information

Clause 15.1.2.

I give the information set out in the sealed envelope labelled [INSERT LABEL] and held by [MY LAWYER / NAME OF HOLDER] to [INSERT NAME OF BENEFICIARY] on condition

that he/she meets the following requirement: set out condition e.g. [NAME] says that he/she is ready to receive it

I give the [ritual object] to [INSERT NAME OF BENEFICIARY] if he has been initiated; if he has not been initiated then I give it to the initiated male designated by Elders [insert names].

Half-secret trust

Clause 15.1.3.

To give [insert gift/information] to [insert trustee] on trust on terms of which he/she is aware.

Letter to set up secret trust

Testator to trustee:

Dear [insert name of trustee], In my will I intend to give you [insert gift, object information] to give to [INSERT NAME OF BENEFICIARY]. If you are willing to do this please sign the attached letter and return to me. Yours etc [testator]

Trustee to testator:

Dear [insert testator's name]. I am happy to carry out the terms of the proposed gift in your will. Yours etc [trustee]

Letters to set up half-secret trust (These should be sent before the will is drafted)

Clause 15.1.4. Testator to trustee:

Dear [insert name of trustee], In my will I intend to give [insert gift/object/information] to you as trustee to give it to [INSERT NAME OF BENEFICIARY] when you are satisfied that he/she has met the requirements to receive it. If you are willing to do this please sign the attached letter and return it to me. Yours etc

Clause 15.1.5. Trustee to testator:

Dear [insert testator's name]. I am happy to carry out the terms of the proposed gift in your will. Yours etc [trustee]

Clause 16. EXECUTION OF THE WILL

Clause 16.1.1.

Dated .....

The testator signed in the presence of both of us being present at the same time and we attested his/her signature in the presence of he/her and of each other

……..
Testator

Witness..... Witness .....

Full name: Full name:

Occupation: Occupation:

Address: Address:

Clause 16.1.2.

Dated .....

The testator being unable to read or write the will was read out clause by clause and explained by [insert name of person who did this]. The testator appeared to understand and stated that he/she understood and approved of the terms of the will. He/she then signed/marked the will in the presence of both of us being present at the same time and we attested his/her signature/mark in the presence of him/her and of each other

……..
Testator

Witness.....	Witness .....
Full name:	Full name:
Occupation:	Occupation:
Address:	Address:

8

Sample wills

All of these example wills are based on imaginary families.

Sample will 1

MARY BROWN is 63 years old. She owns her own home in Goulburn and has several children and grandchildren and a large extended family. Her eldest son is Joseph Brown; her eldest daughter is Gemma Brown. The younger surviving children include Alice Brown and Geoffrey Brown. She also counts as her children those born to her sister Theresa Jones, who include Martha Jones, Wayne Jones and Frederick Jones. Martha Jones's daughter, Sarah Rosebud Jones who is now 12, has lived with Mary since Sarah was 2 years old.

1. THIS WILL is made by me, MARY BROWN of 23 Wangaratta Street, GOULBURN, seamstress.
2. This is my only will. This will sets out completely who I want to give my property to after my death. I cancel any earlier wills and testamentary acts.

FUNERAL

3. I wish to be buried in my traditional country at Murranderrah with a Christian service.

EXECUTOR AND TRUSTEE

4. I appoint JOSEPH ADOLPHUS BROWN the executor and trustee of this will if he survives me.

4.2 If JOSEPH ADOLPHUS BROWN does not survive me or is unable or unwilling to act, I appoint NSW Trustee & Guardian the executor and trustee of this will.

4.3 JOSPEH ADOLPHUS BROWN and NSW Trustee & Guardian are referred to as my Trustee throughout this will.

4.4 My Trustee must seek advice from GEMMA LOUISE BROWN before he does any of the following:

disposes of my body

4.5 My Trustee will not be bound to follow any advice from GEMMA LOUISE BROWN but must give it serious consideration.

LIMITS ON NAMING AND USE OF MY IMAGE AFTER MY DEATH

5. My name is not to be mentioned (except where required by law) and nor is my photograph or image to be shown or used for the period of 12 months after my death.

IDENTIFICATION OF BENEFICIARIES

6.1 In this will the words ‘my child’ or ‘my children’ refers to JOSEPH ADOLPHUS BROWN, GEMMA LOUISE BROWN, ALICE WILMA BROWN and GEOFFREY DAVID BROWN, MARTHA ELIZABETH JONES, WAYNE RODERICK JONES and FREDERICK ARTHUR JONES.

6.2 In this will the words ‘my grandchild’ or ‘my grandchildren’ refer to SARAH ROSEBUD JONES, SARAH VIOLET BROWN, DAVID MOSES JONES, WILLIAM MANNING BROWN and any children born to or legally adopted by my children listed above.

APPOINTMENT OF TESTAMENTARY GUARDIAN

7. I appoint GEMMA LOUISE BROWN as guardian of my grandchild, SARAH ROSEBUD JONES.

CARER OR GUARDIAN NOT TO SUFFER FINANCIAL HARDSHIP

8.1 Whether or not in so doing they exhaust my estate, my Trustee may make loans:

(a) whether secured or unsecured;

(b) on interest or interest free;

(c) on whatever terms my Trustee (without being liable for loss) thinks fit;

to any person caring for any of my children (whether as guardian or otherwise) (even though that person is also my executor) from the presumptive share of the trust fund of that child or those children.

8.2 I wish my Trustee to exercise his powers so as to ensure (so far as seems to him reasonable having regard to the funds at his disposal and other relevant matters) that any person caring for any of my children (whether as guardian or otherwise) does not suffer in the course of caring for those children a financial burden or loss (whether or not it is incurred strictly within her or his duties as carer or guardian), and I trust that the carer will accept it as my wish that the powers be exercised in this way.

GIFTS

9. I give my estate to my Trustee on trust to give the following gifts

(i) I give my collection of shell paintings to my grandchild SARAH ROSEBUD JONES if she survives me.

(ii) I give the proceeds of my BANK of GOULBURN Account No 1234567 to those of my grandchildren who survive me.

This gift includes the income from this account due for payment after my death.

(iii) I give my 2001 Toyota Corolla Reg No ZEP 123 and all my accessories for it to GEMMA LOUISE BROWN if she survives me.

(iv) I give all my household goods to those of my daughters who survive me.

By 'household goods' I mean things which are used around the house and enjoyed by whoever lives there. For example, furnishings and appliances, decorations and ornaments, domestic animals and so on. The definition of 'household goods' includes any antiques but does not include motor vehicles or ritual objects.

(iv) I give all my personal effects to those of my grandsons who survive me.

'Personal effects' means things which are readily portable and which I would use for my own enjoyment (more or less exclusively) wherever I was living. For example; clothing and toiletries, sporting gear, cameras and so on. The definition of personal effects does not include motor vehicles, jewellery or ritual objects.

(v) I give all my jewellery including watches to those of my granddaughters who survive me.

(vi) I direct the rest of my estate be used first to pay my estate liabilities.

After payment of my debts and funeral and testamentary expenses, I give the rest of my property to those of my children who survive me.

(vii) If none of my children survive me I give the rest of my property to SARAH ROSEBUD JONES if she survives me.

TRUSTEE'S POWERS

10. Trustee's powers and duties

(1) My Trustee may in his discretion:

(a) exercise any powers given to him by law;

(b) exercise the powers of a trustee for sale in respect of any property in my estate and my Trustee may:

(i) without being liable for any loss (including liability for taxation on capital gain) caused by so doing, postpone sale;

(ii) without being liable for any loss (including liability for taxation on capital gain) caused by so doing, retain in its form of investment at my death any part of my estate, even though it is wasting, hazardous or reversionary;

(iii) sell, by public auction or private sale, and for that purpose may extend credit;

(c) lease or acquire property for use, enjoyment or occupation by a beneficiary (including with other persons);

(d) delegate a power or function, and execute a power of attorney or other instrument to make the delegation;

(e) make loans to beneficiaries on any terms;

(f) carry on any trade or business in whole or in part in which I am interested at my death, whether alone or with other person or persons;

(g) where the estate has an interest in a corporation or business, vote, apply for and accept directorship of the said corporation and be involved in any arrangement affecting the shares, securities, or control of that corporation or any of its concerns, and in relation to such a corporation or business apply for, accept or take up securities of any description or denomination, bonus

shares or other rights or benefits made available by a company or corporation in which my estate is or may become interested or concerned;

(h) decide whether receipts or outgoings are capital or income, or partly capital or income, so as to bind the beneficiaries, even though the receipts are from a company or corporation that has made a decision on the matter;

(i) apply the whole or part of the capital or income of any part of my estate to which a beneficiary is or may become entitled for that beneficiary's maintenance, education (including travel to broaden the mind), advancement or benefit; and if the beneficiary is a minor to their guardian or parent and accept the receipt of that payee as sufficient discharge;

(j) Whether or not any beneficiary agrees, my Trustee may satisfy the entitlement of that beneficiary to a share in my estate, by cash payment, by transferring specific assets in the estate, or partly by cash and partly by transferring specific assets;

(k) take out or maintain insurance policies including those on estate property or risk, life of any person, or for the health or accidental harm to any person; and benefit schemes for any person including trade union or other employee benefit scheme, superannuation or pension scheme, funeral benefit or payment scheme.

(l) borrow money (with or without giving security), and enter into any mortgage, charge, bill of sale, lien or security over any part of my estate; and any money borrowed is to be treated as part of my estate or trust property, whichever applies;

(m) lease any part of my real or personal property on terms my executors think fit;

(n) accept surrenders of leases or tenancies of my estate or any part of it;

(o) maintain, repair, improve, develop, alter, renovate, pull down, erect or re-erect any part of my estate;

(p) partition or appropriate any part of the real or personal property of the estate for the purpose of satisfying any legacy or share for beneficiaries in my estate whether or not the beneficiaries agree and in doing so the following provisions apply:

(i) the value of any such property is that agreed by those of my beneficiaries affected or, if my Trustee is satisfied that no value can be agreed in this way, the value is that determined by an independent valuer appointed by my Trustee for the purpose;

(ii) my Trustee need not take into account any differences in value of particular property to particular beneficiaries other than the value of the property as decided in subparagraph (i);

(q) if my Trustee disposes or is deemed to have disposed of property from which income tax is to be paid, he may determine from which part of the estate income tax is to be paid and for that purpose he may determine what is capital and what is income, but I express the wish that, if it seems appropriate to my Trustee to do so, proceeds of such a disposal be resorted to in the first instance;

(r) allocate separately different types and sources of income into different accounts and record this in the books of account;

(s) appoint and empower nominees to act and hold property for my Trustee; and appoint custodians of any property and documents (including documents relating to property) in my estate;

(t) For any reason set aside a fund from my estate sufficient to meet all debts, charges and liabilities of the estate for any reason. If, having discharged all such debts, charges and liabilities any balance remains, that balance

does not form part of the residue of my estate, but is to be distributed as if it were part of the residue.

(2) I wish my executors to make available and give to my beneficiaries any documents relevant to the property they inherit or the assessment of tax relating to that property.

EXECUTION

Dated: 26th June 2012

The testator signed in the presence of both of us being present at the same time and we attested her signature in the presence of her and of each other

Mary Brown
.....
Testator

Witness 1 .....*Sidney Webb*.....

Full name: Sidney James Webb

Occupation: painter

Address: 75 Colin St
Eden NSW 2551

Witness 2 ....*Sarah L'Estrange*...

Full name: Sarah Maria L'Estrange

Occupation: teacher

Address: 21 College St
Buladelah NSW 2423

Sample will 2

Rupert Jones is a storeman who lives in Belmore in Sydney. He is 48. He is married to Janetta Jones and they have two living children, Zach (now 14) and Henrietta or 'Hetty' (now 12). Rupert lived in Mudgee as a child but his mother brought him to Sydney when he was about 12 and he has lived here ever since, but frequently visited his own country to carry out ritual duties during that time. Janetta came from Grafton. They married in 1987. Rupert has one brother living. Rupert has custody of a ritual object which can only be passed to an initiated man and which should be kept secret. He aims to do this during his lifetime but is concerned that if he is unexpectedly killed he will be able to pass it on by his will. He has discussed what should happen to it with his brother John Charles Jones, who has agreed to do as Rupert wishes with it.

THIS WILL is made by me, RUPERT WILLIAM JONES of 123 CASUARINA DRIVE, BELMORE NSW 2037, storeman.

This is my only will. This will sets out completely who I want to give my property to after my death. I cancel any earlier wills and testamentary acts.

2 (i) I appoint my brother JOHN CHARLES JONES the executor and trustee of this will if he survives me.

(ii) If JOHN CHARLES JONES does not survive me or is unable or unwilling to act, I appoint NSW Trustee & Guardian the executor and trustee of this will.

(iii) JOHN CHARLES JONES and NSW Trustee & Guardian are referred to as my Trustee throughout this will.

3. I wish my body to be buried at MUDGEE CEMETERY.

4. In this will the words 'my child' or 'my children' refers to ZACHARIAH HENRY JONES and HENRIETTA MARIA JONES.

5. If my wife JANETTA ELIZABETH JONES fails to survive me

(i) I appoint my mother HENRIETTA EVELYN JONES as guardian of my children ZACHARIAH HENRY JONES and HENRIETTA MARIA JONES.

(ii) If HENRIETTA EVELYN JONES is unwilling or unable to act as guardian I appoint my friend SARAH FRANCES MILES as guardian of my children ZACHARIAH HENRY JONES and HENRIETTA MARIA JONES.

(iii) I wish my Trustee to exercise his power so that the guardian of my children is not financially disadvantaged by the care of my children, so far as it is reasonable to do so.

6. My Trustee is to hold my estate on trust to give the following gifts:

(i) I give my car ZEX 557 to my son ZACHARIAH HENRY JONES if he survives me.

(ii) I give my stamp collection to my daughter HENRIETTA MARIA JONES if she survives me.

(iii) I give $1000.00 to my brother JOHN CHARLES JONES whether or not he acts as my Trustee.

(iv) I give the ritual object of which JOHN CHARLES JONES knows to him on trust on terms of which he is aware.

(v) I give my property 123 CASUARINA DRIVE, BELMORE to my wife JANETTA ELIZABETH JONES if she survives me.

(a) If this real estate is charged at the time of my death with the payment of money, for example, by mortgage, I confirm that this real estate so charged will be primarily liable for the payment of the charge.

(b) If this real estate does not form part of my estate I give instead the property which I owned and last used as my principal residence before my death.

(vi) I direct the residue of my estate be used first to pay my estate liabilities.

After payment of my debts and funeral and testamentary expenses, I give the rest of my property to my wife, JANETTA ELIZABETH

JONES if she survives me. If she fails to survive me I give the residue of my property to those of my children ZACHARIAH HENRY JONES and HENRIETTA MARIA JONES who survive me.

If my children fail to survive me then I give the residue of my property to those of the children of ZACHARIAH HENRY JONES and HENRIETTA MARIA JONES who survive me.

Dated 26th June 2012

The testator signed this will in our presence both being present at the same time and we attested his signature in the presence of him and of each other

.....*Rupert Jones*.....
Testator

Witness 1 .....*Stan Wall*.....

Full name: Stan Wall

Occupation: Electrician

Address: 75 Colin St
Eden NSW 255

Witness 2 .....*Penelope Cox*.....

Full name: Penelope Cox

Occupation: Plumber

Address: 22 Mills St
Buladelah NSW 2423

Sample will 3

Kylie Peters lives in Nowra where she has lived since she was in her twenties. She is a Wiradjuri woman who married a Bundjalung man who died fifteen years ago. She has cancer and has been told she may not live more than twelve months.

THIS WILL is made by me KYLIE FRANCES PETERS, of 27 Samuels Lane, Nowra, cashier.

1. This is my only will. I cancel all previous testamentary documents.
2. (i) I appoint my friend SARAH JOSEPHS the executor and trustee of this will if she survives me.

   (ii) If SARAH JOSEPHS does not survive me or is unable or unwilling to act, I appoint the NSW Trustee & Guardian the executor and trustee of this will.

   (iii) SARAH JOSEPHS and NSW Trustee & Guardian are referred to as my Trustee throughout this will.
3. I wish my body to be buried with a handful of soil from my traditional country placed in the grave with me.
4. In this will the words 'my brothers' refers to JACOB JOSEPHS, MATTHEW FREDERICK FRIEND, THOMAS PERCIVAL JONES and JOHN CHARLES MCINTYRE; the words, 'my sister' refer to ALISON MARGARET HUGHES, the words 'my children' refer to BRIANNA JOANNA PETERS, PHILOMENA EDITH STONE, PETER ROBERT STONE, DAVID GEORGE STONE AND MARK WAGNER JOHNS
5. I give my estate to my Trustee to hold on trust and give

   (a) my household goods to those of my brothers who if they survive me.

   By 'household goods' I mean things which are used around the house and enjoyed by whoever lives there. For example, furnishings and appliances, decorations and ornaments, domestic animals and so on. The definition of 'household

goods' includes any antiques but does not include motor vehicles or ritual objects.

(b) my personal effects to those of my children who survive me and if more than one in equal shares.

'Personal effects' means things which are readily portable and which I would use for my own enjoyment (more or less exclusively) wherever I was living. For example; clothing and toiletries, sporting gear, cameras and so on. The definition of personal effects does not include motor vehicles, jewellery or ritual objects.

(c) I give the rest of my estate to those of my children who survive me.

(d) If none of my children survive me I give the residue of my estate to the Cancer Council or the organisation which in the opinion of my Trustee most nearly resembles it.

Dated 26th June 2012

The testator signed in the presence of both of us being present at the same time and we attested her signature in her presence and the presence of each other

Kylie F Peters
.....
Testator

Witness 1 ..... Paul Wynn .....

Full name: Paul Wynn

Occupation: painter

Address: 75 Colin St
Eden NSW 2551

Witness 2 ..... Susan Dixon .....

Full name: Susan Jane Dixon

Occupation: clerk

Address: 3 Baron St
Buladelah NSW 2423

Appendix

Helpful agencies and resources

Planning Ahead Tools (Get it in black & white)
www.planningaheadtools.com.au
A NSW Government website
Telephone: 1300 887 529

Aboriginal Legal Service (NSW/ACT)
199 Regent Street
Redfern NSW 2016
www.alsnswact.org.au
Telephone: 1800 733 233

Aboriginal Health and Medical Research Council
66 Wentworth Street
Surry Hills NSW 2010
www.ahmrc.org.au
Telephone: (02) 9212 4777
OR
Aboriginal Community Controlled Health Services
www.nsw.gov.au/aboriginal/pages/contact.aspx

NSW Trustee & Guardian
19 O'Connell Street
Sydney NSW 2000
www.tag.nsw.gov.au
Telephone: 1300 364 103

Community Legal Centres NSW Inc.
102/55 Holt Street
Surry Hills NSW 2010
www.clcnsw.org.au
Telephone: (02) 9212 7333

Arts Law Centre of Australia
The Gunnery
43 – 51 Cowper Wharf Road
Woolloomooloo NSW 2011
www.artslaw.com.au
Telephone: (02) 9356 2566
Toll free: 1800 221 457

NSW Law Society
170 Phillip Street
Sydney NSW 2000
www.lawsociety.com.au
Telephone: (02) 9926 0333

Ageing and Disability Commission
www.ageingdisabilitycommission.nsw.gov.au
Telephone: 1800 628 221

Funeral Funds

MoneySmart *Paying for funerals: Tips for Indigenous Consumers*
www.moneysmart.gov.au/life-events-and-you/indigenous/paying-for-funerals
Email: infoline@asic.gov.au
Telephone: 1300 300 630.

Taking Care of Business: Planning ahead in Aboriginal and Torres Strait Islander Communities (2008)
www.tag.nsw.gov.au/verve/_resources/Taking_Care_of_Business.pdf

Advance Care Directives

An advance care directive is a direction to medical practitioners not to carry out certain medical procedures, usually so that the person can die as they wish. For more information or to obtain a copy of 'Using Advance Care Directives' contact:

New South Wales Health
www.health.nsw.gov.au/patients/acp/Publications/acd-form-info-book.pdf
Telephone: (02) 9391 9000

See also:
Taking Care of Business: Planning ahead in Aboriginal and Torres Strait Islander Communities
Ageing, Disability and Home Care
www.tag.nsw.gov.au/verve/_resources/Taking_Care_of_Business.pdf

Appointment of Enduring Guardian

For further information regarding the Appointment of an Enduring Guardian (that is, a person who can make decisions about medical matters and ordinary daily life after the time when the person has lost the capacity to do this for themselves) contact:
Guardianship Division of NSW Civil and Administrative Tribunal (NCAT)
Telephone: 1800 463 928
www.ncat.nsw.gov.au/ncat/guardianship.html

See also:
Taking Care of Business: Planning ahead in Aboriginal and Torres Strait Islander Communities (2015)
www.tag.nsw.gov.au/verve/_resources/Taking_Care_of_Business.pdf

Appointment of Enduring Power of Attorney

For further information regarding the appointment of an Enduring Power of Attorney (that is, the appointment of a person to act for you in relation to financial and business affairs including after you have lost capacity) please contact:

NSW Trustee & Guardian
Telephone: 1300 364 103
www.tag.nsw.gov.au

See also:
Taking Care of Business: Planning ahead in Aboriginal and Torres Strait Islander Communities
www.tag.nsw.gov.au/verve/_resources/Taking_Care_of_Business.pdf

Other resources for lawyers and will-drafters

Croucher, R and Vines, P, *Succession: Families, Property and Death* (LexisNexis Butterworths, 5th ed, 2018).

Certoma, L, *The Law of Succession in New South Wales* (4th ed, Thomson Reuters, 2010).

Dalpont, G and Mackie, K, *Law of Succession* (LexisNexis Butterworths, 2017).

Handler, L and Neal, R*, Mason and Handler's Succession Law and Practice in New South Wales* (LexisNexis, looseleaf/online service).

Birtles, C and Neal, R, *Hutley's Australian Wills Precedents* (9th ed, 2016).

Vines, P, Chapter 12.2 Guide to the Preparation of Wills, *Lawyers Practice Manual,* (Thomson Reuters, looseleaf service).

Vines, P, 'Making Wills for Aboriginal People in New South Wales' (2011) 49(8) *Law Society Journal* 72-74*.*

Vines, P, 'Drafting Wills for Indigenous People: Pitfalls and Considerations' (2007) 6(25) *Indigenous Law Bulletin* 6-9.

Vines, P, 'Consequences of Intestacy for Indigenous People in Australia: the Passing of Property and Burial Rights' (2004) 8(4) *Australian Indigenous Law Reporter* 1-10.

Vines, P, 'When Cultures Clash: Aborigines and Inheritance in Australia', in Miller, G (ed), *Frontiers of Family Law* (Ashgate Press, 2003), pp 98-119.

Vines, P, 'Wills as Shields and Spears: the Failure of Intestacy Law and the Need for Wills for Customary Law Purposes in Australia' (2001) 5(13) *Indigenous Law Bulletin* 16-19.

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Aboriginal
WILLS HANDBOOK

"This book is an extremely important contribution to the Aboriginal people of New South Wales who wish to make a will. In particular it is sensitive to the fact that, like many areas of the law, intestacy is not always culturally appropriate. It is important that as a community we educate ourselves about the importance of writing a will and that we feel comfortable doing so and this publication provides that opportunity. It is a reminder for individuals and communities to think about, plan and register their wishes as to who they will pass their property to when they die. It is also an important resource that the community can provide to their lawyer to assist them in understanding the complexities that arise in dealing with Aboriginal culture and the drafting of wills."

Professor Megan Davis
Director, Indigenous Law Centre, UNSW and UN Expert Member of the United Nations Permanent Forum on Indigenous Peoples

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