Fundamentals of Proactive Estate Planning

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1. A distinction is sometimes made between writing a will on the one hand and estate planning on the other. The focus of this paper is on the latter.
2. Estate planning takes the will writing process much further. Estate planning looks at tax matters, potential challenges to the will, and ways in which the estate plan may be undermined by changes in circumstances in the future.
3. Purpose of this paper is to focus on how to structure the estate plan with a view to limiting the ways in which the plan may go off the rails in the future.

The Process of Making a Will

4. I summarise that process as follows:
    a. Understanding the *status quo* (particularly how intestacy operates);
    b. Understanding and assessing testamentary capacity (perhaps presuming it);
    c. Identifying estate assets;
    d. Understanding non-estate assets;
    e. Structuring an appropriate retainer; and
    f. Drafting, execution, and storage of wills.
5. Practitioners may debate the correct order of the above and they may be quite right to do so.
6. We will focus on the ways in which the above steps can give rise to an unanticipated weakness in the estate plan and how you might be able to plan for them in advance.

Identifying Risks to the Estate Plan

7. Acting proactively necessarily requires the identification of risks and the consideration of strategies to avoid or minimise those risks.

8. It should go without saying that no one can predict the future. However, clients will still sometimes ask for an ironclad estate plan. While this is not strictly achievable, it is plausible to nevertheless defend against many of the most obvious challenges to the estate plan and provide options to balance the risks with other risks.

9. The most obvious ways in which an estate plan can go wrong are as follows:

    a. Assumptions as to how the Will works;

    b. Family provision risks;

    c. Unanticipated adverse tax outcomes;

    d. The whole Will failing; and

    e. Inadequate preparation of non-estate assets or structures as part of the estate plan.

10. There are probably many other ways in which in a state plan could go awry. I have attempted to capture as many of the major sources of uncertainty as possible. I welcome input on any other sources of uncertainty that I may have missed.

<u>Assumptions</u>

11. There are few things in legal practise that can cause more problems than assumptions. Assumptions can be made about a relationship status, the ownership of particular property, the detail of instructions, or how the law works.

12. That said, every Will precedent is full of starting points – assumptions by another name – that may or may not reflect the wishes of the willmaker.

13. It is relatively easy to avoid assumptions as it relates to elements of the client's instructions. The simplest approach is to ask more questions, even when you believe you know the answer, taking further enquires, such as title searches.

14. Interrogating the client's instructions can be uncomfortable at first. However, it is arguably what a client expects of our profession.

15. What is more complicated is avoiding assumptions in relation to how the law works. The legislation across the jurisdictions applies a range of different statutory presumptions that may be inconsistent Here are a few significant examples.

Methods of Execution

16. In *Summerville and Ors v Walsh* [1998] NSWCA 222, a solicitor was called to prepare a will for Ronald Bruce Lang who was badly burned and dying.

> *In the presence of Mrs Katherine Ann Saville, who was a telephonist and receptionist at the hospital, Mr Summerville said to the deceased: "Bruce, I will read you what I have written and I want you to tell me if it is what you wish."*
>
> *Mr Summerville then read the wording of the will to him and he said:*
>
> *"Yes that's a hundred per cent Frank."*
>
> *According to Mr Summerville, he appeared fully to understand what had been read. Mr Summerville said: "Bruce, do you think you can sign the will?" The theatre sister or ward nurse placed the writing pad attached to a board in front of the deceased and attempted to hand him a pen. Because of the burns and bandages on his hand or because of lapsing consciousness (Mr Summerville was not sure which) the deceased was unable to hold the pen or make any identifiable mark. Grey smudges on the paper were caused by his hand or bandages touching the paper. Mr Summerville deposed: "He then appeared to lapse into unconsciousness." Mr Summerville said to Mrs Saville and the other lady present: "He just can't sign it" and they agreed. Mr Summerville then completed what was written on the piece of paper by apparently lining through the two lines commencing "Signed by the testator as his last will the same having been read over to him" and wrote underneath:*

"The testator attempted to sign this as his will at 4.45am after the same was read to him and he said 'Yes that's a hundred per cent Frank'

Having done this Mr Summerville handed the paper to Mrs Saville to read and said to her: "When I read the above to Bruce, did you hear him say, that's a hundred per cent Frank?" She replied: "Yes." Mrs Saville then signed the document. Mr Summerville also appears to have signed it although his affidavit does not mention this. According to Mr Summerville, he remained in the ward for a couple of minutes during which the deceased "appeared to be either asleep or unconscious". However, as he was leaving one of the ward staff said: "Bruce, your solicitor is going now." The deceased appeared to stir and said: "Goodbye Frank and thanks very much." As Mr Summerville started to walk out, there was a pause in his breathing. The sister said: "Is he breathing, perhaps I had better send Monica in." then "No he is breathing. I saw his chest move." or words to that effect.

17. The Will was not admitted to probate. Bruce's 'friend', Monica Walsh, received nothing and a previous Will made in favour of his estranged wife, Ala Olive Lang, was admitted to probate instead.

18. Mr Summerville was sued in negligence for failing to execute the will by signing at the direction of Bruce. Mr Summerville argued that he could not be expected to know that it was an option to execute the Will at the direction of the Willmaker.

19. This argument was not accepted and Mr Summerville's appeal was dismissed with costs.

'Standard' Language

20. Understanding the language in your Will precedent is critical to any estate planning exercise. Proactive drafting requires imagining what might happen in the future and planning to cover some of those circumstances by expressly dealing with them within the terms of the will.

21. The words 'before attaining a vested interest' commonly appear in wills. Those words are not meaningless though little thought are often given to them.

22. They have been persuasively construed to mean that a person who survives but dies before the residue has been determined will not receive the gift and the backup provisions will instead apply. This is worthy of exploration.

23. In *Kinloch v Manzione* [2022] ACTSC 76 Lucy Kinloch left a will that read as follows (emphasis added):

> **3.1 Survivorship**
>
> Where any gift is made to a person who does not survive me for a period of 30 days, the person is deemed to have died before me, and the gift fails.
>
> **3.2 Distribution**
>
> (a) If at the date of my death I own the property located at 54 Foveaux Street Ainslie in the Australian Capital Territory (the Ainslie Property), I leave the Ainslie Property together with all household chattels to my daughter Elizabeth Vasantha Kinloch, but if she does not survive me then I leave the property to my children Robert Gilchrist Kinloch and Eleanor Ai-Lin Kinloch in equal shares.
>
> (b) I leave the balance of my estate to my children Robert Gilchrist Kinloch, Elizabeth Vasantha Kinloch and Eleanor Ai-Lin Kinloch in equal shares.

(c) If a child of mine has already died or dies before me or before attaining a vested interest leaving children who survive me and who attain their majority then those children on attaining their respective majorities take equally the share which their parent would otherwise have taken.

24. Lucy Kinloch died on 19 August 2019. Robert died on 24 November 2019. This raises the question – when does someone attain a vested interest in the estate, and was Robert's vested or not?

25. If Robert's interest were vested then his interest in the estate would pass to his estate to be distributed by his Will. If not, it passes in accordance with the substitutional gift in favour of Robert's children.

26. Kennett J held that there were three circumstances where the gift could fail:

a. Having already died (see 3.1 and 3.2(c));

b. Dying within 30 days (see also 3.1 and 3.2(c)); and

c. Dying before attaining a vested interest (see 3.2(c).

27. On the third category he held:

> 18. Importantly, the words "or before attaining a vested interest" in cl 3.2(c) (denoting the third circumstance) are redundant if an interest is relevantly "vested" in a child of the testator at the point when he or she first becomes entitled to a share of the residue of the estate under sub-cl (b), because that occurs if the child does not "die before me" as defined (which is the second circumstance). Generally, a document is to be construed on the understanding that words have not been included in it for no reason; and a construction of the document that avoids surplusage is to be preferred over one that creates it. This principle has often been stated in relation to many kinds of documents (see, e.g, Herzfeld and Prince at [22.50]). It has been applied to wills by

Australian courts: Re Hewitt [1945] SASR 102 at 107; Public Trustee v Loney [2009] SASC 17 at [17]; Woodgate v Tanks [2013] QSC 204; 1 Qd R 481 at [24]. The words "or before attaining a vested interest" in cl 3.2(c) have work to do only if they are understood to refer to an event occurring after the date 30 days after the testator's death. This supports the position of the plaintiffs: that the words are to be understood as referring to the time when the estate administration has been completed, liabilities are paid and the estate can be distributed.

19. The general principle that surplusage is to be avoided is not a rigid one. In some cases, it may be clear that the drafter has added seemingly unnecessary words or an entire provision out of an abundance of caution or for special emphasis. However, that is unlikely to be the explanation for the inclusion of additional words when those words are framed as an alternative to what has gone before (introduced by the word "or") and when, on a coherent alternative construction, they extend the operation of the provision. The general principle may also give way to other rules of construction if its application produces a result inconsistent with the purpose of the document or the overall intention of those who executed it (e.g, in the context of a will, Marshall v Tasmanian Perpetual Trustees Ltd [2015] TASFC 2; 26 Tas R 120 at [7]).

…

44. On the proper construction of the will, the phrase "dies before attaining a vested interest" in cl 3.2(c) means "dies before the estate is fully administered and available to be distributed".

28. Similar clauses were construed in *Application by Elizabeth Marie Robinson* [2015] NSWSC 1387 and *Serwin v Dolso* [2020] NSWSC 370 with similar reasoning being applied.

29. The effect of this is that the inheritance does not form part of their estate and does not pass as part of their estate. This may or may not be what the client wants to happen.

30. The relevance and effect of this clause may have surprising implications. Be alert to them and be ready to provide otherwise in the Will if needs be.

31. A substitutional gift applies where a person or persons receives a benefit of gift where the gift to the original beneficiary fails. Legislation across Australia presumes that where a gift is made to a lineal descendant then the willmaker intends their grandchildren to take their child's share.

32. Statutory substitution was considered in *In the Estate of Koppie* [2019] ACTSC 106.

33. Kathleen May Constance Koppie died on 29 October 2016.

34. The Deceased left her estate as follows:

> I give devise and bequeath the whole of my estate unto my trustee upon trust to pay thereout my just debts funeral and testamentary expenses and to hold the balance then remaining for the benefit to such of my children as shall survive me and attain the age of eighteen (18) years and if more than one in equal shares as tenants in common.

35. One of her children, Margaret Koppie, died in 2014 at the age of 62.

36. The core argument mounted by the plaintiff was that the Will expressed a contrary intention within the meaning of section 31 of the *Wills Act 1968* through the use of the words 'if more than one in equal shares as tenants in common'. Since, it was

argued, there were three surviving children they are the ones who share the estate equally and to the exclusion of the children of Margaret.

37. McWilliam AsJ (as she then was) held:

> 41. Those words are not mere surplusage on a construction of the Will that favours statutory substitution of living issue. Such words mean that if Margaret died leaving no children, the residue is to be divided into 3 equal shares which could then be passed on to whomever each chooses (as opposed to a joint tenancy). As Margaret has surviving children, the words operate to divide the residue into 4 equal shares.
>
> 42. Alternatively, if those words are considered to be relevant to the specific intention of the Testatrix as to the condition that a child of the Testatrix also reach the age of 18, then I would have found that the words confirm the operation of s 31 of the Wills Act, rather than giving any indication of a contrary intention. The apportionment is of equal shares 'as tenants in common' rather than joint tenants. Such an arrangement allows the beneficiary to pass the benefit or bequest to his or her issue, or someone else of the beneficiary's choosing. Dividing the residue as tenants in common is therefore inconsistent with the benefit only being made to the living issue of the Testatrix and no further.

38. Her Honour also considered a range of decisions from other jurisdictions about similarly-worded clauses that had the opposite outcome. That is to say, the outcome of *Koppie* would likely be very different if it occurred in another jurisdiction. See for example *Longmore v Longmore* [2018] NSWSC 90; *Bassett v Hall* [1994] 1 VR 432; *Public Trustee of Queensland v Jacob* [2006] QSC 372; [2007] 2 Qd R 165.

39. The Will should be drafted to take account of substitution and provide directly for it. This ensures that the estate will pass as the willmaker wishes it to.

40. Accrual is a concept that arises when multiple people receive shares (equal or unequal) in an estate and what happens when one of them dies. If a gift or estate is ever divided into shares then it is critical to provide for accrual. Specifically, what happens if a gift to a beneficiary fails but they do not leave children?

41. In *Mortenson v State of New South Wales* [1991] NSWCA 207 the deceased left a will that simply divided the estate equally between her neighbour's children - Vicky, Libby, and Peter. Peter died before the deceased.

42. Since no provision was made for what ought to happen in the event one of them died first, the gift was treated as having divided the estate into three distinct shares with one share having failed and passing on intestacy.

43. Section 42 of the *Succession Act 2006* (NSW) would rectify this situation were it to arise again. However, this provision is not replicated in other jurisdiction.

Family provision risks

44. Family provision claims or testator family maintenance claims arise from a relationship between a willmaker and a person to whom a moral duty is owed. Those relationships may or may not exist when first meeting with the client so it can be difficult to plan for.

45. Claims of this kind can be broken down into those that arise before and after the estate planning process is complete.

46. It is not wise to treat every technically eligible person as a family provision risk. For example, each child may be entitled to make a claim but if they each receive an equal share of the estate then such a claim is unlikely even if it is technically possible.

47. Where a risk can be identified then the focus turns to minimising that risk. The willmaker may:

a. Seek to make adequate provision for the proper maintenance, education and advancement in life of the person (note this may be *inter vivos* or testamentary);

b. Proceed with the Will as planned, but make a contemporaneous statement recording the reasons for the level of provision made; and/or

c. Deal with the estate to ensure that the assets of the estate at the date of death are as limited as reasonably possible (perhaps extending to ensuring as few assets as possible are located in New South Wales).

48. The adequacy of provision is generally assessed at the date the application is made, not when the will is made or when the person dies. This means that planning to provide adequately for any potential plaintiff requires a degree of crystal ball gazing.

49. In *Cowap v Cowap* [2019] NSWSC 1104 the deceased died on 11 December 2015 left his entire estate to his wife of 57 years. At the time of his death his son Nick was healthy and gainfully employed. However, he suffered serious heart attacks shortly after his adoptive father's death that lead to significant disability and financial difficulty.

50. The only estate asset was the family home that was in the joint names of the deceased and his widow. In the ACT this may well be a complete answer to any claim. However, in New South Wales it is possible to designate property as being notionally part of the estate for the purposes of a family provision claim.

51. Nick reluctantly made a claim on the notional estate of the deceased and an order for provision in the amount of $600,000 was made.

52. When there are clear reasons for the provision and the client is able to set those out in writing then it should be recorded in a document outside of the Will.

53. This allows the executor to review the utility and accuracy of the statement if a claim is made and make a strategic decision at that time.

54. If reasons are recorded in the Will then there is no opportunity for a strategic decision and it may be sufficiently inflammatory to provoke a claim where one would not have been made previously.

55. The reasons are specifically relevant in the ACT (see section 22 of the *Family Provision Act 1969*) and will be given weight in NSW. Specific exceptions are provided for the introduction of such evidence by section 121 of the *Evidence Act 2011* (ACT) and the *Evidence Act 1995* (NSW).

56. Care must be taken in preparation of such statements. It should not be taken as an opportunity to vent though equally it should not be devoid of any emotion. The statements will not be treated as gospel and may well have the entirely opposite effect to that you hope for.

57. In *Kitteridge v Kitteridge* [2022] NSWSC 193, Brenda May Kitteridge died leaving a series of wills that made ever-decreasing provision for two of her sons Lee and Robert. Steven lived with and cared for his mother for decades. Lee and Robert had little to do with her.

58. The Will provided:

> I have made no provision for my sons ROBERT KITTERIDGE and LEE KITTERIDGE as they have refused to have any contact with me for many years.

59. Everyone had a story to tell including, in this instance, the deceased. She left several statements setting out her reasons for not making provision for Lee and Robert.

Given the clause setting out partial reasons, it was necessary to introduce those statements in evidence.

60. Lee made a family provision claim seeking a significant share of the estate. Ultimately the statements were taken as part of a narrative that purportedly showed that the deceased was not acting reasonably (emphasis added):

> [93] The deceased's bitterness as a result of these events is obvious, most clearly from her 12 May 1997 statement where she said, as recorded above: "My ex-husband used and abused me in every possible way, mentally & physically – to achieve his chosen way of life – as Lord & Master and me as his servant." The Court has no way of judging the fairness of the deceased's feeling towards her ex-husband. The deceased also expressed the belief that Lee conspired with her ex-husband in 1988 to try to persuade her doctors that the deceased was mentally incapable in order to have her committed to a mental institution. There is no evidence to support the deceased's apparently passionate belief that she had been betrayed by Lee, but it is clear that she harboured that belief.
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> …
>
> [110] The evidence suggests that the breach between Lee and the deceased was exacerbated by Lee's involvement in the family provision application made by the deceased in relation to her own mother's will, which occurred after the mother's death in 1995 or 1996. It was no fault of Lee's that his grandmother decided for the reasons that she expressed in her own testamentary statement to make a gift in her will to the deceased's children rather than the deceased. It appears that the deceased formed the view that Lee should have deferred to her and not participated in the executor's defence of his grandmother's will,

notwithstanding his own need as a young married man for some capital to assist him to establish himself in life. Whatever view may be taken about the deceased's response to the predicament in which Lee found himself, nothing that Lee did justified the extremity of the view formed by the deceased about the significance of Lee's conduct. I have set out extracts of the deceased's 14 June 1996 testamentary statement above. Those extracts show that, in an entirely irrational way, the deceased conflated the actions of one of her brothers, the executor, Robert her ex-husband, and two of her children, one of which was Lee. There was no basis for believing that the brother, her ex-husband and two of her sons had "joined forces" for the purpose of her sons gaining a benefit under their grandmother's will, and the consequent exclusion of the deceased from any inheritance under that will.

61. Ultimately provision of $460,000 was made in Lee's favour.

62. The absence of reasons can also be problematic as it gives the court nothing to look at to counter a plaintiff's claims.

63. In *Nenes v Armouti* [2021] ACTSC 53 (12 April 2021) the absence of the reasons for the lack of provision was addressed by Crowe AJ as follows:

> 142. Section 22 of the FPA requires me to have regard to Con's reasons for omitting Michael from his will, so far as they are ascertainable. While I have inferred that his initial decision in 2009 to change his will was based on his disagreement with Michael and Stella over the care of Alex, and perhaps the management of his property, it is not really possible to determine why Con determined to continue that omission up to the time of his death. Mr Wijesundara suggested in his evidence that Con remained unhappy about the partnership split in 2011. That

might explain why he did not revisit the 2009 will. However, the wish referred to in [140] above rather suggests that Con did have second thoughts towards the end of his life. However, he did not act upon them. Overall, I consider that Con's reasons for Michael's omission are not sufficiently ascertainable to enable me to take them into account as required by s 22.

64. When the appeal was heard in *Armouti v Nenes* [2022] ACTCA 3 (11 February 2022), McWilliam AsJ (as she then was) held:

> [128] A distinction must be made between the existence of any statement of a testator's reasons and the principle of testamentary freedom. A concession that it was correct not to take into account any expression of reasons made by the Testator because they were not sufficiently ascertainable to meet the requirements of s 22 has no bearing at all on the latter. Section 22 of the Act is a facilitative provision to enable the Court to form a view about matters that affect what is "proper" provision. If a testator does take the trouble to explain choices made about who should receive the benefit of the estate, then s 22 requires the Court to take them into account. However, a testator does not have to give reasons for the choices they make about who should be provided for in the Will.

65. There is no doubt that the reasons of a willmaker is of assistance to the court. However, care should be taken to ensure that the statement is factual, emotionally balanced and (where possible) supported by contemporaneous documentation.

Unanticipated adverse tax outcomes

66. It is true that we are not accountants so we cannot give tax advice. However, there is no reason why can cannot explain the application of tax law to clients with the assistance of an appropriately qualified accountant.

67. There are no death taxes in Australia. However, superannuation death benefits tax and capital gains tax can feel like a kind of death tax.

68. Superannuation can be passed to particular people tax free: s302-195 of the *Income Tax Assessment Act 1997* (Cth). They are:

    a. A spouse or former spouse;

    b. A child of the person who is under the age of 18;

    c. A person in an interdependency relationship; or

    d. A financial dependent.

69. This list does not align perfectly with the persons who can be nominated to receive superannuation via a binding death benefit nomination.

70. Where possible, nominations should be made in favour of a tax dependant (with the possible exception of a will incorporating testamentary trusts) with advice to withdraw funds from the superannuation environment (with any terminal illness benefit) so that when the person dies they are dying with a bank account rather than superannuation that is taxable.

71. Any such planning as this requires the involvement and assistance of financial advisors and accountants.

72. Capital gains tax has a less binary resolution. Tax is going to be payable eventually for any post-CGT asset (note the date of 12 September 1985) – it is just a question of how much is payable. The worst thing you can do in this context is direct that the

estate be sold and converted to money. That arguably forces a CGT event and misses an opportunity for it to be managed by the executor.

73. The main residence is an exception to CGT. No CGT is payable on the main residence of deceased person if the property is sold within 2 years of the date of death. Extensions can be granted on application to the Commissioner.

74. In some circumstances you may identify a family where the residue is divided equally and the parent is ailing. Perhaps parties wish to keep the house and some wish to keep shares. However, the house may be the main residence and the shares will attract capital gains tax.

75. If the ailing parent had a low level of income then they can sell down some shares in this financial year, possibly sell some in the next financial year and then sell down others as part of the estate.

76. This is available because the estate is a separate taxpayer with its own tax-free threshold. The estate becomes a taxpayer on the date of death and is liable for tax on income earned from the date of death to the end of the financial year.

77. The appropriation power is extraordinarily useful in circumstances such as this. It may allow the executor to distribute superannuation death benefits to a tax dependant and a main residence to someone who lives or intends to live at the home still.

The Whole Will Failing

78. Wills are the scaffolding for any good estate plan. If the Will is invalidated, the plan has little chance of being effective.

79. A Will can be invalidated wholesale if they do not represent the last will of a free and capable testator. This anticipates challenges based on capacity, undue influence, or a lack of knowledge and approval.

80. Generally, detailed file notes should be prepared and securely stored to ensure that you can adequately respond to a challenge being made to a Will prepared.

Capacity

81. An adult person should be presumed to have capacity unless there is evidence to the contrary.

82. If the person taking instructions has concerns about whether the person has capacity they should open questions aimed at satisfying the elements of the test for testamentary capacity. Questions that lend themselves to a yes or no answer ought to be avoided.

83. The test for testamentary capacity was expressed by Sir Alexander Cockburn in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565:

> *"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which if the mind had been sound, would not have been made."*

84. The somewhat opaque language of the test has been elegantly re-stated by Basten JA in *Carr v Homersham* [2018] NSWCA 65 at [5] – [6] (citations omitted):

> *5. Testamentary capacity is not a statutory concept but is derived from the case-law, from which the primary judge fairly took as his starting point the decision of Cockburn CJ in Banks v Goodfellow. The concept is sometimes divided into component parts, with affirmative and negative elements. The primary judge accepted that there were three affirmative elements, namely:*

(a) the capacity to understand the nature of the act of making a will and its effects;

(b) understanding the extent of the property the subject of the will, and

(c) the capacity to comprehend moral claims of potential beneficiaries.

6. The negative elements, commonly identified in archaic language, do no more than identify the conditions which might be understood to interfere with full testamentary capacity. They include "disorders of the mind" and "insane delusions". Too much attention should not be paid to the precise language of the negative elements; importantly, although they tend to be expressed in general terms, they are only relevant to the extent that they are shown to interfere with the testator's normal capacity for decision-making.

85. If a person suffers from delusions they may still have testamentary capacity. In order for a delusion to undermine testamentary capacity there needs to be a nexus between the delusions and the testamentary decision-making: see *Timbury v Coffee* [1941] HCA 22 vis-à-vis *Estate Cockell; Cole v Paisley* [2016] NSWSC 349.

86. Where you take actionable instructions from a client with questionable capacity it is best practice to prepare and execute the will provided you also prepare detailed file notes. You should also consider preparing a codicil and a new will reflecting the terms the client wishes to achieve and then executing them in that order.

87. Where you are unable to take actionable instructions, you should not prepare or execute the Will.

88. All jurisdictions permit a person to apply to the court to have a statutory will made on behalf of the person without testamentary capacity. This may be what needs to be done if you really want to ensure the estate plan takes effect.

89. A statutory Will can be used to undertake estate planning by, for example, including a testamentary trust in the Will: *Re Matsis; Charalambous v Charalambous & Ors* [2012] QSC 349. This may be particularly important where family law or bankruptcy considerations arise, though there can be some arguments to be made as to appropriateness of the orders: *Hausfeld v Hausfeld & Anor* [2012] NSWSC 989 (inappropriate in circumstances of bankruptcy); ADT v LRT [2014] QSC 169 (inappropriate in circumstances of family law matters) but reversed on appeal *GAU v GAV* [2014] QCA 308.

90. Statutory Wills are extraordinarily proactive and can be used to prevent significant injustices: RE DH: APPLICATION BY JE AND SM [2011] ACTSC 69 (4 May 2011). It is possible for solicitors to make the application, but these are rare instances.

Undue Influence

91. It is difficult to prove undue influence in a probate context. It is necessary to show that the deceased person's will was entirely overborne – it is not sufficient to show that pressure was exerted on the deceased.

92. In *Chalik v Chalik* [2024] NSWSC 117 Henry J stated the principles that relate to undue influence as follows (citations excluded):

> [252] Undue influence in probate has been described as "pressure of whatever character", "coercion", "the exercise of the power to unduly overbear the will of the testator" and conduct that "destroys free agency", such that the will the testator has executed can be said to have not been what they intended or desired by way of disposition.
>
> [253] Not all influences and persuasions amount to undue influence in probate. Persuasion, influence, moral pressure to favour a person by will or appeals to the affections of ties of kindred or sentiments of gratitude for past services are

not invalidating in probate unless such a force overpowers the volition of the testator and results in a will they did not intend to make:

93. *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275 is one of the most recent (if not the most recent) finding of undue influence in recent probate litigation. The finding of undue influence arose in circumstances where:

    a. English was not a language the deceased could read, write or speak;

    b. the Will was not translated into Macedonian;

    c. The solicitor engaged was instructed by the nephew;

    d. The nephew was present during meetings with the solicitor;

    e. The nephew put incredible pressure on his aunt, including allegedly threatening legal proceedings; and

    f. The aunt's health was failing at the time;

94. Hallen AsJ held at [313] that the deceased was not led but driven to make the Will and as a result there was undue influence.

95. The easy, proactive, steps that could be taken to avoid a similar situation is:

    a. Ensuring the Will is translated into the person's primary language;

    b. Meeting with the client alone;

    c. Be alert to anything that may indicate pressure or distress; and

    d. Explore the logic behind the distribution.

96. The evidence of these steps (or the client's refusal and reasons to follow these steps) should be recorded in detailed file notes. A recording may also be appropriate, if the client consents.

<u>Knowledge and Approval</u>

97. A person must know and approve the contents of the Will in order for it to be a valid Will. A duly executed will gives rise to a presumption of knowledge and approval.

98. In *Tobin v Ezekiel* [2012] NSWCA 285 per Meagher JA explained this concept as follows:

> [46] Upon proof of testamentary capacity and due execution there is also a presumption of knowledge and approval of the contents of the Will at the time of execution. That presumption may be displaced by any circumstance which creates a well-grounded suspicion or doubt as to whether the will expresses the mind of the testator.

99. Suspicious circumstances were addressed in Tobin v Ezekiel; Estate of Lily Ezekiel [2011] NSWSC 81by Brereton J where he explained:

> [98] The proponent bears the onus of establishing that the testator knew and approved the contents of the will. Ordinarily, knowledge and approval is inferred from proof of testamentary capacity and due execution: unless suspicion attaches to the document propounded, a capable testator's due execution of a will that is rational on its face is sufficient evidence of his or her knowledge and approval of its contents [Re Hodges; Shorter v Hodgers (1988) 14 NSWLR 698; Guardhouse v Blackburn (1866) LR 1 P&D 109]. But where there are "suspicious circumstances" - typically, but no means uniquely, where a beneficiary is involved in giving instructions for the will - there is no such presumption, and the proponent must remove suspicion by affirmatively proving, "by clear and satisfactory proof", that the testator knew and approved the contents of the will, so as to "judicially satisfy the Court that it contains the real intention of the testator". This is a heavy onus, as was made clear by Burchett AJ in Vernon v Watson; Estate Clarice Quigley [2002] NSWSC 600 (5 July 2002), which contains a summary of cases on the impact of suspicious circumstances, and the proof required to overcome them.

100. Practitioners should ensure – so far as possible – that no suspicious circumstances arise. This involves similar steps to avoiding suggestions of undue influence though there are questions of degree. It may be relatively easy to dispel a minor suspicion with reference to file notes. A larger suspicion may prove too difficult.

101. On larger suspicions see: *The Estate of Juliana Voros; Cooney & Ors v Cherry* [2016] NSWSC 1603 where Hallen J held:

> *[164] Proof that the 2007 will was read over to the deceased does not, necessarily, establish "knowledge and approval". The evidence of those Plaintiffs and Kim, who is closely related to them, must be approached with caution because of its self-serving nature. The evidence from the Defendant and his witnesses provide additional reasons to doubt the reliability of the evidence of the Plaintiffs and Kim.*
>
> *[165] The Plaintiffs have failed to discharge the burden of showing that the deceased knew and approved of the terms of the 2007 will, and there must be an order pronouncing against its validity.*

Management of Non-Estate Assets

102. It is a fundamental statement of succession law a willmaker can only dispose of property that they owned absolutely and indefeasibly when they pass away.

103. In *Russell v Scott* [1936] HCA 34 Dixon and Evatt JJ:

> *[W]hat can be accomplished only by a will is the voluntary transmission on death of an interest [in property] which up to the moment of death belongs absolutely and indefeasibly to the deceased.*

This property is referred to as an 'estate asset'. It follows that estate assets can be disposed of by will; non-estate assets cannot be.

104. Assets that do not meet this definition are non-estate assets. The client may very well have a substantial interest in such assets but may nevertheless be unable to pass those assets directly by will.

Jointly-owned Property

105. Property (such as real property or bank accounts) held by a person as joint tenants are non-estate assets. Any gifts of jointly-held property in a will must fail because the surviving joint tenant is entitled to that property by right of survivorship: see for example *Palmer v Bank of New South Wales* [1975] HCA 51.
106. The same is not true of property held as tenants in common, where the tenants in common own their interest (whether it be one half, one third, three-quarters, etc) absolutely and indefeasibly. If a client wants to deal with jointly-owned property in their will they must sever the joint tenancy.

Property held by a Trust

107. Property held by the trustee of a trust is legally owned by the trustee while the beneficial interests in the trust property depend on the terms of the trust deed.
108. Control of the trust may be a significant question that needs consideration as part of the will drafting process. Where a trustee has discretion the question of who is the trustee becomes a central question as they may be in a position to exercise their discretion to favour their own interests.
109. In *Katz v Grossman* [2005] NSWSC 934 the Deceased appointed his daughter as the other trustee of the self-managed superannuation fund (which is just a special kind of discretionary trust) and left no valid BDBN. Following his death the trustees made a decision to pay the superannuation death benefits out to the daughter to the exclusion of

the son. The son, Danny Katz (Fairfax's 'Modern Guru'), challenged the decision but his application was dismissed but, fortunately, his costs were paid from the estate.

110. A similar issue arose in *Ainsworth v Davern* [2018] VSC 80 but the trustee was removed from office before a decision could be made.

Superannuation

111. It is not uncommon for a willmaker's superannuation account to be the most significant asset that they have an interest in. This means that the willmaker is likely to have strong views about who should receive their superannuation death benefits.

112. The member of the superannuation fund may be able to control to whom their superannuation is paid. They can do this by leaving a valid binding death benefit nomination (BDBN) nominating someone who meets the definition of dependent. While not all superannuation funds permit BDBNs (notably PSS/CSS), those that do are bound to follow any valid BDBN given to them.

113. A BDBN can nominate someone who meets the definition of 'dependant' or the 'legal personal representative'. Thes terms are defined Section 10 of the SISA. If a nomination is made in favour of someone who does not meet either of these definitions at the date of the member's death then the nomination will not be valid and may well not be followed.

114. The governing legislation is the *Superannuation Industry (Supervision) Act 1993* (**SISA**). Generally, section 59 of SISA provides that the trustee may permit BDBNs provided the trust deed establishing the trust complies with the *Superannuation (Industry) Supervision Regulations 1994* (Cth) (**SISR**). Section 59 and regulation 6.17A does not apply to government funds or SMSFs: see Self Managed Superannuation Funds Determination SMSFD 2008/3.

115. The act of joining a superannuation fund or signing a BDBN is not a testamentary act. This means that attorneys may – from first principles – be able make or renew a nomination for their principal.

116. In *McFadden v Public Trustee for Victoria* [1981] 1 NSWLR 15 Holland J held:

> *In my opinion, the submission that the deceased's act of joining in the scheme was testamentary is to be rejected because his act, shortly stated, was an act of participation in the setting up of a trust inter vivos as to the subject property. Therefore, the deceased did not have to execute the deed in the manner required for a valid will in order to make the deed effective. The submission that the exercise by the deceased of the right to nominate a beneficiary given by cl 26 (1) (a) was testamentary must, in my opinion, also be rejected. Viewed as a term of a subsisting trust, the right is of the nature of a power of appointment inter vivos reserved or given by a trust instrument to the settlor or some other donee.*

117. It is possible to gift superannuation by will provided the member first made a BDBN in favour of their 'legal personal representative' and includes a clear gift in the will.

118. In *Hill v Zuda Pty Ltd* [2022] HCA 21 it was held that regulation 6.17A does not apply to SMSFs.

119. In *Re Narumon Pty Ltd* [2018] QSC 185 the court held a BDBN by an attorney was an effective nomination in the circumstances. A similar outcome occurred in *Re Rentis Pty Ltd* [2023] QSC 252.

120. Express powers in the enduring power of attorney to update BDBNs will be of great use and the case law appears to indicate that they are effective.

121. In the context of companies and trusts, it is critical to focus on control and a comprehensive review of the governing documents. If the intention is to pass the whole of the estate – including trusts – equally then we need to look into the contents and powers of the officeholders to ensure the settings are right and cannot be abused.
122. This may require regular estate planning maintenance but it is essential if the estate plan is to work.

Conclusions

123. Proactivity and estate planning context requires that you really get into the client's circumstances and instructions. We need to provide solutions to problems that they client never knew they had and we never knew they had until we carefully consider their instructions and the legal implications.
124. It can be uncomfortable and you need to be alert but the rewards the client will see will speak for themselves.

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CLE Presentation for the ACT Law Society

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