Wills, Drafting Them, and Things to Look Out For

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1. The purpose of this paper is to provide more general overview of issues that may arise for will drafting for solicitors should take to deal with the legal issues that arise.
2. When this paper was conceived it was planned as a broad and detailed introductory session with some drafting tips thrown in the mix. I hope it has achieved that goal.

The Inverse Case: Intestacy

3. When a person dies with a will they are said to die testate. In such cases they have left a document that gives their family and loved ones some direction. In it, they may have:
    a. appointed an executor or executors who will organise their funeral and dispose of their body and defend any claims made against the estate;
    b. taken steps to ensure the care of their pets;
    c. decided who ought to receive their estate and when and how they ought to take;
    d. provided for backups beneficiaries to their preferred beneficiaries; and
    e. given their executor various powers to administer their estate tax-effectively.
4. When someone dies without a will they are said to die intestate. In those cases, they will not have taken any of the above steps and the estate will pass in accordance with an inflexible statutory scheme that will vary with the circumstances of the deceased as at the date of death.
5. Generally, the laws of all Australian states and territories favour the following people:
    a. *de jure* spouses and domestic partners/*de facto* spouses (the latter after 2 years);
    b. children (with substitution to grandchildren);
    c. parents;
    d. siblings and half-siblings (with substitution to niblings);
    e. grandparents;

f. aunts/uncles (with substitution to cousins); and

g. the State or Territory.

6. There are significant differences between jurisdictions that could result in considerably different outcomes. For example, in NSW the spouse will receive the whole estate if the children of the deceased are also the children of the spouse but in the ACT the spouse will share the estate with the children irrespective of whether the children are also their children. Another example is in WA, where if there are no children then the estate will be split between the spouse and the parents.

7. The are situations where the parents or siblings may share the estate. It is not difficult to imagine a situation where the client is estranged from one or both parents or from one or more siblings.

8. In many cases this may not be an obvious problem for a particular client on a particular day. However, when considering intestacy timing is everything. For example, you do not get a letter in the mail to advise that you have passed the threshold of being in a de facto relationship for two years and nor are you advised about the effect of marriage on intestacy regimes.

9. Even if that is not a problem, it may be that a person that the client would not want to become the administrator of the estate will become the administrator and they will do so without the benefit of a range of additional powers that could be provided within a will but are entirely absent from the *Trustee Act 1925* or the *Administration and Probate Act 1929* (and their equivalents in other states or territories).

10. It follows that for a person without a will, the intestacy formula will almost certainly apply in a way at some point in a person's life such that the outcome will be suboptimal at best and devastating at worst.

11. It is fair to say that everyone needs a will at some point in their life. You just hope that everyone gets one before those circumstances arise.

Testamentary Capacity

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

13. 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. Examples of open questions in this context include "Tell me about your family", "What kind of assets do you own?", or "What do you want your will to achieve?" Questions that lend themselves to a yes or no answer ought to be avoided.

14. There is no reason you could not record the interview, provided the client consents and you are otherwise comfortable.

15. It is not adequate to ask questions about what year it is or who the current prime minister is: see *Dickman v Holley; Estate of Simpson* [2013] NSWSC 18 at [44] and [49].

16. 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."*

17. 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:*
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> *(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.*

18. 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.

19. 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.

20. Where you are unable to take actionable instructions, you should not prepare or execute the will. All jurisdictions permit a person to apply to the court to have a statutory will made on behalf of the person without testamentary capacity. That is a topic for a paper of its own.

21. In this area more than any other practitioners should avoid the temptation to make assumptions about clients or their instructions. This is because your notes will be relied upon as evidence of the person's capacity. If your notes make assumptions about a person's name where the name can be spelled multiple ways (such as Alister/Alastair, Lawrence/Lawrance, Anne/Ann, Stephen/Steven, or Thomas/Tomas) then it may end up forming part of the case to undermine the will that you otherwise carefully drafted.

22. If you want to take effective instructions from clients you should prepare a clear, easy-to-follow fact-finder. A good structure is one that first obtains details of the person or their family, then obtains complete details of their estate assets and liabilities, and then ascertains their wishes for their estate planning. It is only after you have all this information that you can give the client complete advice.

Estate Assets

23. 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.

24. 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.

25. 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.

26. Common non-estate assets are:

    a. assets held in joint names;

    b. assets owned by a trustee of a trust;

    c. property owned by a company;

    d. life insurance; and

    e. superannuation.

27. There may be circumstances where equity intervenes to alter this position. Equity follows the law though may intervene to create an estate asset of all or part of a non-estate asset.

Jointly-owned Property

28. 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.

29. 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.

Practice Tip: Solicitors should seek instructions to undertake a title search where real property is being dealt with in a will. If the client refuses to give the solicitor those instructions then this should be confirmed in writing.

Property held by a Trust

30. 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.

31. In *Ballantyne v Ballantyne &* Ors [2010] SASC 273 at [84] Whit J held:

> *[84] First, the beneficial interest in the assets of the Trust could not have been the subject of a will of either Robert or Valmai. Such an interest is not within the description of property which may be passed by a will of Robert or Valmai.*
>
> *[…]*
>
> *The beneficial interest in the Trusts' assets which had not yet vested in Robert or Valmai was not an interest of that kind.*

32. It is necessary to pause to make a distinction here. There is a critical difference between the interest of a willmaker in particular items of trust property held by the trustee of the trust and amounts the trustee of the trust might owe to the willmaker

33. While the willmaker has no interest in *particular* items of trust property, they have an absolute, indefeasible interest in the *dollar value of loans* that they have made to the trust. These could take the form of capital loans made to the trustee or distributions from the trust that have been vested in the willmaker but have not been paid to them yet.

34. A willmaker may therefore dispose of an interest they have in loans they have made to the trust, but they cannot dispose of the assets of the trust themselves.

35. 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.

36. 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.

<u>*Practice Tip:*</u> When a client has an interest in a trust the solicitor should seek copies of and review the trust deed and the most recent financial statements. That review should establish the nature of the client's interests and whether any loans exist that need to be considered as part of the estate planning.

The deed review should be comprehensive. It should establish, among other things, vesting dates, trustee, power of appointment, beneficiaries, rules that apply to amending the deed, and how the office of trustee or power of appointment might be passed.

Superannuation

37. 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.

38. The nature of the superannuation fund and the rules that apply to succession to the assets of those funds depends on the type of fund. There are four types of superannuation funds:

    a. government funds (CSS/PSS/PSSap/StateSuper/QSuper);

    b. industry funds (LegalSuper/AustralianSuper/HESTA);

    c. retail funds (MLC/AMP); and

    d. self-managed superannuation funds (SMSFs).

39. Each superannuation fund will operate according to a set of governing rules – most often a set of rules made subject to a trust deed. This is not the case for some government funds that are creatures of legislation (most notably CSS and PSS). The rules are the most variable when it comes to SMSFs.

40. Superannuation accounts are held on trust for the account holder until they meet a condition of release. The death of the member is a condition of release. When a member of a superannuation fund dies the death benefits must be paid out to someone promptly: see regulation 6.21 of *Superannuation Industry (Supervision) Regulations 1994* (Cth).

41. 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.

42. 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.

43. 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.

44. Regulation 6.17A of the SISR deals with the validity of BDBNs. A form may be prescribed by the relevant deed, which most industry or retail funds do. The prescribed form and any rules set out on it must be strictly followed.

45. All BDBNs made according to section 59 and regulation 6.17A 'ceases to have effect' after 3 years. They are referred to as lapsing nominations. Some industry and retail funds purport to offer non-lapsing binding nominations. Government funds and SMSFs can use their own rules for the form and term of BDBNs without reference to 6.17A.

46. The act of joining a superannuation fund or signing a BDBN is not a testamentary act. 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.

47. 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.

48. The implications of making an error in preparing a BDBN can be significant. In *Munro & Anor v Munro & Anor* [2015] QSC 61 Mullins J held that a nomination in favour of 'Trustee of my Estate' was not a valid nomination since it did not name a 'dependant'. She further relevantly held at [45] that:

> *"There is no power given to the trustees under the trust deed or otherwise* [in the legislation or elsewhere] *to dispense with compliance with the conditions ... for a* [valid] *binding death benefit nomination."*

49. The *Munro* case dealt with a self-managed superannuation fund, but the lessons as to strict compliance with the requirements of the legislation extends equally to interests in retail and industry superannuation funds.

50. Where a BDBN is in place in an SMSF it is important to then consider who controls the trust. In *Wooster v Morris* [2013] VSC 594 a recalcitrant surviving trustee (in a blended family, naturally) decided not to follow a BDBN in favour of the children of the deceased (from a previous relationship) and instead favour herself. The Deceased died on 27 February 2010 and judgement was handed down on 1 November 2013. While the children were ultimately successful and costs orders made against Mrs Morris personally, by then almost 4 years had elapsed and not all costs were recovered from Mrs Morris.

51. Where a member leaves no BDBN the trustee has the discretion (subject to the terms of the trust deed) to decide who receives the superannuation death benefits. This means that the superannuation death benefits may not go to the person(s) the member intended to receive it.

52. The person the willmaker wants to receive their superannuation may not receive 100% of the superannuation death benefits. This is because the recipient of superannuation death benefits will have to pay some tax if they are not a 'dependent' for the purposes of the *Income Tax Assessment Act 1997 (Cth)*. Note that if funds are received by the estate and paid to a non-dependent, then the estate is liable to pay the tax on behalf of the recipient. This may leave the executor personally exposed.

Practice Tip: Take care when preparing BDBNs. The solicitor should be sure to prepare and execute them correctly and advise their client that there may be tax consequences.

The Retainer

53. The instructions define the scope of the retainer and therefore the scope of a solicitor's duty of care.

54. If you are instructed to prepare a valid will then your retainer should be expressed to go that far and no further.

55. The duty of care of a solicitor extends to the intended beneficiaries: *Hill v Van Erp* [1997] HCA 9. In that case the solicitor permitted the testator's wife to witness his will, which (at the time) resulted in the failure of that gift. The High Court held that the solicitor's duty of care extended to the intended beneficiary and she had to reimburse the plaintiff $163,471.50 plus interest and costs.

56. The pace at which solicitors are being sued by disappointed beneficiaries seems to be increasing in recent years. Solicitors have been sued for not appreciating that they could

sign on behalf of a client (*Summerville v Walsh* [1998] NSWCA 222), for not preparing a will promptly in circumstances of urgency (*Maestrale v Aspite* [2012] NSWSC 1420), for being slow in the preparation of the will (*Queensland Art Gallery v Henderson Trout* [2000] QCA 930), for failing to procure an informal will (*Fisher v Howe* [2013] NSWSC 462 (solicitor found negligent); *Howe v Fisher* [2014] NSWCA 286 (appeal by solicitor successful) *Fisher v Howe* [2015] HCASL 35 (application for special leave to the HCA refused)), and, most recently, for failing to advise the willmaker of the opportunities to minimise exposure to the risk of a family provision claim (*Calvert v Badenach* [2014] TASSC 61 (solicitor not negligent); *Calvert v Badenach* [2015] TASFC 8 (solicitor negligent); *Badenach v Calvert* [2016] HCA 18 (appeal by solicitor successful)). Though a minority of these cases were successful, there is punishment in the procedure so the final victory may well be hollow.

57. The above cases should give you some comfort, but they are all examples of a relatively narrow retainer. If a solicitor breaches their duty of care where the instructions and retainer are broad then there is a greater risk of liability to a disappointed beneficiary.

58. In *Badenach v Calvert* [2016] HCA 18, Gaegler J relevantly held that:

> *[61] Taking reasonable care in carrying the testator's instructions into effect might on occasions require a solicitor retained to prepare a will to do more than merely draft and ensure the proper execution of that will. An example is where taking steps to sever a joint tenancy is integral to carrying into effect a testator's intention that specified property be given by the will such that the taking of those steps can properly be seen to form part of the will-making process.*

[62] ... Where the testator's instructions stop, so does the solicitor's duty of care to the intended beneficiary.

59. In *Howe v Fisher* [2014] NSWCA 286, Barrett JA relevantly held:

[75] On the formulation of the retainer that I consider to be required by the evidence, however, any duty to call attention to the possibility of making an informal will would have arisen only if the appellant was aware that some factor was at work that, as a matter of reasonable foresight, might cause to be frustrated Mrs Fischer's objective of making effective testamentary dispositions by means of a formal will in about two weeks time. The only such factor that could have been relevant was awareness, entertained as a matter of reasonable foresight, that Mrs Fischer might be expected to die or lose testamentary capacity in the relevant period of about two weeks.

[76] ... I am of the opinion that there was no basis on which the appellant should have been held to be so aware, as a matter of reasonable foresight. There was accordingly no breach of retainer.

60. Solicitors should only accept retainers that they – or their firm – are capable of discharging.

Drafting wills

61. Once we have established (or perhaps validly presumed) capacity, understand the estate assets, and the scope of the retainer we can get to drafting.

62. The *wills Act 1968* and equivalent legislation in other jurisdictions contain presumptions that will ordinarily apply unless a contrary intention is expressed in the will. It can be tempting to rely on these presumptions. However, the best approach is to adopt what the client wishes to and to express a contrary intention where the client

wishes to. It is essential to understand the effect of the statutory presumptions and appreciate that they may vary significantly from jurisdiction to jurisdiction.

63. There are some essential matters that should form part of all will drafting. They are:

    a. General revocation clause;

    b. Institute and Substitute Executors;

    c. Enquire after specific gifts (particularly consider personal effects);

    d. Gifts of residue (including backups);

    e. Substitution and accrual; and

    f. Executors powers.

Revocation clause

64. A general revocation clause will ensure that the only testamentary document that the client signs will be the only will that needs to be had regard to.

65. The omission of a revocation clause will result in the will only revoking the previous will to the extent of any inconsistency. This leaves room for argument.

66. It is good practice to consider the terms of a previous will when drafting a new will. This is one reason why the writer does not destroy old wills.

67. An example clause is as follows:

    (1) I revoke all previous testamentary acts.

Institute and Substitute Executors

68. It does not matter if an executor is also a beneficiary.

69. Generally, an executor should be someone who has an interest in the residue. This is because they have an interest in the efficient administration of the estate.

70. The institute executor is the first named executor. The substitute executors are appointed if the appointment of the institute executor(s) fails.

71. It is important to consider the terms upon which the appointment of any executor ought to fail. If the will is expressed only to fail if the person fails to survive then what happens if that person survives but has impaired capacity? Is the client comfortable with the statutory presumptions relating to the chain of executors?

72. Consistent with the principle that the will should – as far as possible – contain all the information required to execute the will, we draft it to ensure that the role of executor remains under the control of the client.

> (2) (a) I appoint my wife Amy Morton (Amy) to be my executor and trustee.
>
> (b) If Amy refuses or is unable to act or continue to act as my executor and trustee then I appoint my son Alister Morton (Alister) to be my executor and trustee.

73. The language 'refuses or is unable to act or continue to act' is broadly accepted to cover death, divorce, forfeiture, incapacity, and avoid the application of presumptions that apply to the chain of executors.

Specific Gifts

74. Specific gifts of any kind (e.g. gifts of a house or shares) should be discouraged.

75. Where a person does not own property that they specifically give away in the will the gift is said to 'adeem' and the beneficiary does not receive the gift.

76. However, a gift will not fail if the subject matter of the gift has only changed in form and not substance but this can be a hard test to make out: *McBride v Hudson* [1962] HCA 5 (subdivision of shares in family company) and *Cobcroft v Bruce* [2013] NSWSC 774 (St George shares that became Westpac shares).

77. Personal effects are a common flashpoint. Clients should be advised that they can always give away personal items during their lifetime or consider having conversations with their family as to how personal effects should be divided.

78. It may be practical to avoid disputes to give all personal effects (and define that term) to a trusted person for distribution or disposal as they see fit.

79. If the whole estate is given away by specific gift such that no residue remains then it can cause significant problems with meeting estate expenses as part of the administration: see *Administration and Probate Act 1929*, Schedule 4.

Gifts of Residue

80. Residue is most often the largest part of the estate. It represents everything that is left after estate expenses have been paid and specific gifts have been transferred.

81. All estate expenses (including tax, accounting and legal costs, rates, insurance, repairs, and other such expenses) are paid from the residue unless the will provides otherwise: *Administration and Probate Act 1929*, Schedule 4. In some circumstances you may wish to provide otherwise.

82. Generally, this is simply drafted and very easy to understand. The wording of the backup gifts is where problems may arise.

83. For example:

> (3) My Executors hold my estate on trust:
>
> (a) to give it to my wife Amy;
>
> (b) subject to the preceding trust, to:
>
> (i) divide it equally among those of Alister, Lawrence Morton, Theodore Morton, and Madeleine Morton who survive me;

(ii) if a child of mine has already died or does not survive me or dies before attaining a vested interest, leaving children who survive me and have attained or attain the age of eighteen (18) years, then those children having attained or on attaining the age of eighteen (18) years take equally the share which their parent would otherwise have taken;

84. Regard should be had to the words 'before attaining a vested interest'. Those words 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: *Kinloch v Manzione* [2022] ACTSC 76; *Application by Elizabeth Marie Robinson* [2015] NSWSC 1387. 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.

Substitution and Accrual

85. Substitution and accrual should be considered in all cases.

86. Substitution is a concept that deals with who should benefit if an intended beneficiary dies before the client. So if A dies, B should take what A would have received.

87. Substitutional gifts are implied by legislation where a gift is made to issue unless a contrary intention appears in the will: *wills Act 1968*, section 31C.

88. Statutory substitution was considered in *In the Estate of Koppie* [2019] ACTSC 106. The clause in that matter read:

> 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.

89. The outcome of *Koppie* would likely be very different if it occurred in another jurisdiction: *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

90. 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. It is critical that you provide for accrual to avoid perverse outcomes: see *Mortenson v State of New South Wales* [1991] NSWCA 207 and section 42 of the *Succession Act 2006* (NSW) [note section 42 is not replicated elsewhere].

91. Accrual and substitution can arise in different forms, so it is important to recognise them when they do come up.

92. The following common clause is an example of both **accrual** and <u>substitution</u>:

> I DIVIDE my estate equally between **those of** my children who survive me and if more than one as tenants in common in equal shares and <u>I DIRECT that if any of my children die before me leaving children who survive me and attain or have attained the age of eighteen (18) years then those children will take the share their parent would otherwise have taken as tenants in common in equal shares</u>.

93. Substitution would ordinarily apply before accrual.

<u>Executors Powers</u>

94. The State or Territory *Trustee Acts* and *Administration and Probate Acts* give executors and administrators a range of default powers. However, they are inconsistent, potentially incomplete, and may cause problems where estates span multiple

jurisdictions. It is accepted best practice to include a broad range of executors powers and exclude those powers on instructions from the client.

95. A sufficiently broad range of executors powers can be found in Hutleys.

Further Drafting Tips

96. You will most often be relying on precedents when you are drafting wills. However, you will (and indeed should) almost certainly be amending it to fit the circumstances.

97. When drafting wills for a couple that include specific gifts in both (for example, a couple that both want to give $50,000 to a niece), you should consider how to avoid double-gifting. An easy way to do this is to provide that the gift only applies if the spouse is not alive when the willmaker dies. After all – one will have to survive the other as a matter of law (see for example, *Re Estate of EI* [2022] ACTSC 55) or fact.

98. It is essential that you read and understand the precedent you are using and why you would use particular words. If you do not understand why you use a particular clause you should ask why it is there. A clause that you include or omit without thinking about it could frustrate the willmaker's intentions.

99. It is possible to mitigate errors by having another solicitor check the draft wills. However, you should never rely on that solicitor as a safety net. Your goal should be to have the other solicitor make no changes. Consider printing the draft out before having it checked – sometimes errors are not apparent until printed.

Executing wills

100. A will must be freely executed and any other people being present may give rise to suspicions that need to be (expensively) litigated.

101. It is generally only necessary for the willmaker to sign at the 'foot or end' of the will and the witnesses to sign near that signature. Best practice is to sign each page so that the document cannot be later changed.

102. No specific form of attestation clause is required, though the attestation ought to reflect exactly what happened during the signing. For example, it should explain unique circumstances and how they were overcome.

103. The client should also read the will and it should be explained to them before they sign. This ensures that affirmative evidence can be lead to the effect that the person knew and approved the contents of the will.

104. If you ask any questions in this context you should ensure that they are open questions and are in no way leading.

105. A client should execute the will in the presence of two independent adult witnesses. Failing to do so may give rise to suspicious circumstances and ultimately lead to the failure of the will: see for example *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.*

106. The witness-beneficiary rule has been abolished in the ACT. However, similar rules exist in other jurisdictions and it may still give rise to suspicious circumstances. A beneficiary should therefore never be a witness to a will and should generally not be present when a will is executed.

107. If properly executed and rational on its face, the willmaker is presumed to have had capacity. This presumption does not apply if the will is not properly executed.

108. If a will is not formally executed, then it is still possible to have the document admitted to probate: *wills Act 1968*, section 11A.

After Execution

109. Once executed you should store the will in safe custody and confirm that you have the original in writing.

110. Clients need to understand how their will can be affected by things they later do – particularly how they may accidentally revoke or alter the will.

<u>Revocation</u>

111. A will can be revoked intentionally or unintentionally.

112. Intentional revocation occurs by:

    a. signing a new will;

    b. in writing executed with the usual formalities (leaving the person without a will); or

    c. destruction by the willmaker or a person in their presence and at their direction with the intention by the willmaker of revoking (destruction *animo revocandi).*

113. Unintentional revocation occurs by marriage or, in some jurisdictions, divorce: see *wills Act 1970* (WA), section 14A. There are significant differences between the jurisdictions and where the effect of the will is in question the law of the domicile will apply.

Amendment

114. A will can be amended by codicil. This should be generally avoided because it is trivially easy to prepare a fresh will for signing having incorporated all the necessary amendments.
115. Where a willmaker is frail or has diminished capacity it may be best to sign a new will and a codicil giving effect to the desired changes. This is because a codicil is a relatively simple document and a lower threshold is necessary for essential validity.
116. A will can be amended by writing on the original or a copy formally or perhaps informally re-executing and re-dating it. This should be avoided.

Storage of wills

117. Wills should be stored with the solicitor who drafted it.
118. If a person held their will themselves and it cannot be found when they died there is a rebuttable presumption that the will was destroyed *animo revocandi*. The strength of the presumption will vary with the circumstances. Courts may take strict approaches to the presumptions.
119. Probate can be obtained of a lost will, but it is not always easy. See for example *Cahill v Rhodes* [2002] NSWSC 561, *Whiteley v Clune* (No 2), unreported, NSWSC, 13 May 1993, Powell J, *Sugden v Lord St Leonards* (1876) 1 LR 1 PD 154.
120. It is possible for the presumption not to arise at all if the court is not convinced that the will is even lost: *Finch v Finch* (1867) LR 1 PD 371.

Wills, Drafting Them, and Things to Look Out For
CLE Presentation for the ACT Law Society

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14 March 2024

Extracts from Legislation

Superannuation Industry (Supervision) Regulations 1994 (Cth)

Regulation 6.17A – Payment of benefit on or after death of member (Act, s 59(1A))

(4) …if the governing rules of a fund permit a member of the fund to require the trustee to provide any benefits [on the death of a member], the trustee must pay a benefit in respect of the member, on or after the death of the member, to the person or persons mentioned in a notice given to the trustee by the member if:

- (a) the person, or each of the persons, mentioned in the notice is the **legal personal representative** or a **dependant** of the member; and
- (b) the proportion of the benefit that will be paid to that person, or to each of those persons, is certain or readily ascertainable from the notice; and
- (c) the notice is in accordance with subregulation (6); and
- (d) the notice is **in effect**.

…

(6) … the notice:

- (a) must be in **writing**; and
- (b) must be **signed, and dated**, by the member **in the presence of 2 witnesses**, being persons:
  - (i) each of whom has turned 18; and
  - (ii) neither of whom is a person mentioned in the notice; and
- (c) must **contain a declaration** signed, and dated, by the witnesses stating that the notice was signed by the member in their presence.

(7) Unless sooner revoked by the member, a notice … ceases to have effect:

- (a) **at the end of the period of 3 years after the day it was first signed**, or last confirmed or amended, by the member; or
- (b) if the governing rules of the fund fix a shorter period--at the end of that period.

Superannuation Industry (Supervision) Act 1993 (Cth)

Section 10 - Definitions

"**dependant** " … includes the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship.

…

"**legal personal representative** " means the executor of the will or administrator of the estate of a deceased person…

…

"**spouse**" of a person includes:

(a) another person (whether of the same sex or a different sex) with whom the person is in a relationship that is registered under a law of a State or Territory prescribed for the purposes of section 2E of the Acts Interpretation Act 1901 as a kind of relationship prescribed for the purposes of that section; and

(b) another person who, although not legally married to the person, lives with the person on a genuine domestic basis in a relationship as a couple.

Succession Act 2006 No 80 (NSW)

Section 42 – Construction of residuary dispositions

(1) A disposition of all, or the residue, of the estate of a testator that refers only to the real estate of the testator, or only to the personal estate of the testator, is to be construed to include both the real and personal estate of the testator.

(2) If a part of a disposition in fractional parts of all, or the residue, of the testator's estate fails, the part that fails passes to the part that does not fail, and, if there is more than one part that does not fail, to all those parts proportionally.

(3) This section does not apply if a contrary intention appears in the will.

Wills Act 1968 (ACT)

Section 16A – Court may authorise will to be made, altered or revoked for person without testamentary capacity

(1) The Supreme Court may, on application, make an order authorising—

(a) a will to be made or altered, in the terms approved by the court, for a person who does not have testamentary capacity; or

(b) a will, or part of a will, to be revoked for a person who does not have testamentary capacity.

Section 31 – Gifts to issue

(1) If—

(a) a testator by will devises or bequeaths property to, or appoints property in favour of, a person (the original beneficiary) (whether individually or as a member of a class) who is a child or other issue of the testator for an estate or interest not determinable before or on the death of the original beneficiary; and

(b) the original beneficiary dies in the lifetime of the testator and is survived by issue; and

(c) any such issue survive the testator for a period of 30 days (the specified period);

then, unless a contrary intention appears from the will or from evidence admitted under section 12B, the will has force and effect as if the devise or bequest were to, or the appointment were in favour of, any issue of the original beneficiary who survive the testator for the specified period, to be distributed—

(d) if only 1 issue of the original beneficiary survives for that period—to that issue; or

(e) if 2 or more issue of the original beneficiary survive for that period—in accordance with subsection (2).

…

(4) A general requirement or condition in a will that an original beneficiary survive the testator or attain a specified age shall not be taken to be an expression of a contrary intention for this section.

(5) This section does not apply if an original beneficiary has not fulfilled a contingency required by the will as a condition of attaining the vested estate or interest, other than a contingency of surviving the testator or attaining a stated age.