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Drafting Wills for Indigenous People: Pitfalls
and Considerations

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Abstract

Intestacy laws in Australia are grossly inadequate to deal with the inheritance issues of Indigenous people. This paper sets out some of the considerations which are important if wills are to be drafted to meet these needs. The article considers dealing with kinship issues, guardianship and the disposal of the body, but in particular focuses on the use of equitable vehicles to protect customary law obligations and secret knowledge.

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In a series of previous articles¹ I have argued that the intestacy laws in Australia are grossly inadequate to deal with the inheritance issues of Indigenous people, and that it is desirable to increase the rate of will-making amongst Indigenous people. I have also argued that the lack of wills is likely to exacerbate arguments about the disposal of bodies for Indigenous people as well. These problems can have profound effects on the well-being of Indigenous communities. Where property does not pass on death with certainty or where it goes to culturally inappropriate beneficiaries a community can be profoundly dislocated, making it difficult to care for children and to maintain stable environments in which people flourish.

In this paper I suggest some of the issues that should be in the mind of the drafter when an Indigenous person is the testator. Although all wills are made for individuals, and a careful consideration of the context in which that individual lives and dies is always required, it is important to be aware that some of the drafter's usual assumptions may cause problems in the context of will-drafting for Indigenous people.

Care with kinship

The first and most obvious point is that because words used to indicate kinship in many Indigenous groups do not exactly match the legal meaning of those words, extreme care needs to be taken in determining exactly who is meant by words such as 'children', 'auntie', and even 'mother'. In many Indigenous groups more people are designated by such terms than the common law generally recognises². The common law's view of kinship is limited by blood³ and a linear view of time which may not be

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¹ 'When Cultures Clash: Aborigines and Inheritance in Australia' in Miller, G (ed) *Frontiers of Family Law*, Ashgate Press, 2003; 'Consequences of Intestacy for Indigenous People in Australia : the passing of property and burial rights' (2004) 8(4) *Australian Indigenous Law Reporter* 1-10; '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.

² I Keen, 'Kinship' in RM Berndt and R Tonkinson (eds) *Social Anthropology and Australian Aboriginal Studies*, Aboriginal Studies Press, Canberra, 1988; Peter Sutton, *Native Title and the Descent of Rights*, National Native Title Tribunal, Perth, 1998.

³ And where adoption applies it approximates blood ties – see for example the provisions of the Adoption Act 2000 (NSW): s 99(2) 'An adopted child is taken to be related to another person, being the child or adopted child of his or her adoptive parent or parents: (a) if he or she was adopted by 2 persons who are the spouses of each other jointly, and that other person is the child or adopted child of both of them, as brother or sister of the whole blood, and (b) in any other case, as brother or sister of the half blood.'

matched in an Indigenous person's conception of kinship. So in drafting it will normally be necessary to identify by name every person who is designated by a kinship term, to ensure that the will reflects the real intentions of the testator. This is all the more important because in customary law kinship determines obligations more strongly than it does in non-Indigenous Australia.

A mix of traditional and non-traditional lifestyles and property

Research shows that the population of Indigenous people is not divided into traditional and non-traditional people, but rather any particular Indigenous person is very likely to be living either or both lifestyles at different times in their life.⁴ At the time of death Indigenous people may own property which is significant to both the traditional and non-traditional aspects of their lives. For example, they might own common-law real property (which can be passed by will) and native title property (which cannot be passed by will). They may have superannuation from a job since superannuation is now compulsory (and this may or may not be capable of being passed by will). They may own other property such as cars and other chattels recogniseable to the common law. They may also own and have obligations to ritual objects or knowledge less familiar to the common law.

Considering obligations vs property as a commodity – using equity

One of the most striking things about dealing with Indigenous people's view of property (both land and other property) is the extent to which it is thought of in terms of obligation rather than alienability or commodification.⁵ For a long time the common law has considered property much more in terms of its status as a commodity, freely alienable. This raises one of the most important considerations for taking instructions from Indigenous people, particularly Aboriginal people. That is, that rather than simply asking the testator what he or she owns (which is standard practice amongst will-drafters), the drafter should also ask the testator what obligations he or she is concerned about and how they want those obligations dealt with. The normal practice of simply asking the testator what he or she owns is based on an assumption that the drafter will understand what to do with those items. That assumption is likely to be incorrect in respect of an Aboriginal person, who may be more concerned about the obligation than the commodity aspect of property. The question to ask about a commodity is, 'Who do you want to give that to?' The question to ask about obligations is slightly different because it may or may not concern what is easily regarded as property under common law.

Although it may be said that common law does not deal with obligations well, this is certainly not true of equity. This suggests that for wills for Indigenous people, a strong understanding of trusts and equitable doctrines is absolutely essential and reliance on common law views of property may not be sufficient. For example, a person may have done an artwork which is based on ritual knowledge. The artwork itself may be copyright and therefore be an item of property which the common law

⁴ E. Johnston, *Royal Commission into Aboriginal Deaths in Custody, National Report*, Volume 1, AGPS, Canberra, 1991 p 39.

⁵ This caused problems in the leadup to the recognition of native title in land as shown in *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* [1971] 17 FLR 141 at 272.

recognises and which can be passed on to other people. That raises no legal difficulty, except that the fact that it is based on ritual knowledge may mean that it is important to place conditions on the gift in the will. However, the ritual knowledge itself may not amount to property at common law. It certainly will not be copyright because copyright protects the *expression* of an idea rather than the idea itself. If the testator is the person who has done the artwork their major concern may be to ensure that the knowledge itself is protected and passed on. This may happen in life, in which case there is no need for the will to do it. But if it does not happen in life, can we create a vehicle in equity which will both protect and keep secret the knowledge itself? For example, can we by the use of secret or half-secret trusts, set up a situation where a person is entitled to keep cultural information such as traditional medicine secrets and pass it on? Can such information be recognised as property in equity? And can it be kept secret?

What is property sufficient to be the subject of a trust? The argument in Australia has been that equity retains flexibility so that it can accommodate the range of situations where equity can be applied.⁶ The High Court has recognised that property rights are extremely varied.⁷ It was held in *National Trustees Executors & Agency Co of Australasia Ltd v FCT*⁸ that even where a particular interest does not seem to include all the characteristics of property it may still be recognised as property and Kitto J observed:

'It may be said categorically that alienability is not an indispensable attribute of a right of property according to the general sense which the word "property" bears in the law....'

Ritual knowledge is more in the nature of confidential information or perhaps a chose in action. Some choses in action are clearly property in that they are chattells personal. Thus it is arguable that things like ritual knowledge may be sufficiently property-like to be the subject of a trust.

Can we use a secret trust or a half-secret trust to pass on things like ritual knowledge which under customary law should remain secret? Would a discretionary trust be better, or should we simply make gifts with conditions?⁹ Secret trusts arise where property is passed apparently absolutely to another person and there has been an undertaking or agreement by the holder of the property that the benefit is to be applied for the benefit of some other person or object. Such a trust with conditions is binding.¹⁰ Fully secret trusts involving gifts of land are regarded as constructive trusts and therefore do not need to be in writing.¹¹ Half secret trusts arise where the fact that

⁶ *Burns Philp Trustee Co Ltd v Viney* [1981] 2 NSWLR 216

⁷ *Yanner v Eaton* (1999) 201 CLR 351 at 365-366

⁸ (1954) 91 CLR 540 at 583 per Kitto J at 583

⁹ One problem is that the person we want to pass it on to may be one or two generations distant and this may create a perpetuities problem. Most of these problems have been solved in Australia by Perpetuities Acts which have wait-and-see provisions: Perpetuities and Accumulations Act 1985 (ACT) s 9; Perpetuities Act 1984 (NSW) s 8; Perpetuities Act 1994 (NT) s 10; Property Law Act 1974 (Qld) s 210; Perpetuities and Accumulations Act 1958; SA Law of Property Act 1936, s 61; (Vic) s 9; Perpetuities and Accumulations Act 1992 (Tas) s 11; Property Law Act 1969 (WA), s 103.

¹⁰ *Brown v Pourau* [1995] 1 NZLR 352; *Blackwell v Blackwell* [1929] AC 318; *Voges v Monaghan* (1954) 94 CLR 231.

¹¹ *Dixon v White*, unreported, SC (NSW) Holland J, 14 April 1982; *Brown v Pourau* [1995] 1 NZLR 352

the trust exists is made clear in the will but its terms are secret. Half secret trusts have been held to be express trusts and therefore where they concern land must be in writing.¹² Under the equitable doctrine of breach of confidence it may not be necessary to show that ritual knowledge is property at all,¹³ although it has been held that information can be property.¹⁴ Certainly secret knowledge of Aboriginal people has been held able to be protected as confidential information.¹⁵ This would apply to secret information which is passed by will, as there is no necessity for the receiver of the information to have consented to the information or that there must have been a contract or other basis for it.¹⁶ However, in order to keep the secret secret – that is not to express it in the will, the use of the secret or half-secret trust may be more useful. As a will is a public document, the use of a secret or half-secret trust in combination with the doctrine of confidential information may be a useful way to protect the passing of ritual or secret knowledge.

Another obligation which is important is guardianship. Given the differences between Indigenous views of kinship and adoption and the common law's views of them, appointing a person as guardian of children on the basis of customary law views of kinship makes a great deal of sense. Although ultimately the appointment of a guardian by a will does not bind the court,¹⁷ the court is more likely to consider a person named as guardian than they would if there were no such provision made. Otherwise the person who would be regarded under customary law as the proper guardian might well be ignored by a court or by the welfare authorities, thus causing further disruption.

All these constructs provide ways of protecting information or other matters when they need to be passed to other people. They may be far easier to protect if they are established by will than by *inter vivos* gifts, particularly when what is being passed has a customary law context, which is otherwise not enforceable. The need to maintain secrecy under customary law raises particularly difficult issues, but secret and half secret trusts can be enforced. To the objection that this may expose the secret it can be answered that at least there may be some control over the secret and whether it is communicated to a judge alone or all the world if the issue of enforceability arises. Where secrecy is less important, gifts with conditions may be useful.

Dealing with the body

¹² *Brown v Pourau* [1995] 1 NZLR 352; *Re Baillie* (1886) 2 TLR 660.

¹³ *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 at 322. See also *Prince Albert v Strange* (1849) 1 Mac & G 25; 41 ER 1171.

¹⁴ For example, *GD Searle & Co Ltd v Celltech Ltd* [1982] FSR 92 at 108 per Brightman J; *Smith, Kline & French laboratories (Australia) Ltd v Secretary Department of Community Services and Health* (1991) 28 FCR 291; 99 ALR 679.

¹⁵ *Foster v Mountford* (1977) 14 ALR 71.

¹⁶ *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50.

¹⁷ ACT Testamentary Guardianship Act 1984, ss 4-7; NSW Testators Family Maintenance and Guardianship of Infants Act 1916 ss 13, 14; NT Guardianship of Infants Act ss 15,16; Qld Succession Act 1981 Pt 5A; SA Guardianship of Infants Act 1940 ss 12,13; Tas Guardianship and Custody of Infants Act 1934 ss 4-6; Vic Marriage Act 1958 s 135; WA Family Court Act 1997 s 71.

Although a direction in a will to deal with a body a certain way (apart from a direction not to cremate a body) is generally not binding,¹⁸ it is quite clear that the executor of a will is a person with the authority to deal with a body,¹⁹ whereas this does not necessarily apply to administrators on intestacy.²⁰ Therefore, encouraging a person to appoint an executor and then to discuss with the executor how they want their body dealt with can prevent the arguments which have been so prevalent amongst the survivors of some intestate Indigenous people.²¹

Conclusion

This short article only skims the surface of some of the issues which need to be addressed in order to comprehensively ensure that the inheritance needs of Indigenous people are addressed properly in wills. Complex wills may need to be drafted in order to deal with both traditional and non-traditional property and obligations, and a better will for an Indigenous person may well be one which extensively uses trusts and conditions to best protect the various obligations which customary law creates, as well as the kinds of property with which the law of wills is more familiar.

¹⁸ A direction not to cremate is legally binding in the ACT and NSW: Cremation Act 1966 (ACT); Public Health Regulations (NSW), Sch 15; A direction to cremate will be binding in the other jurisdictions: Cemeteries Act (NT); Burials Assistance Act (Qld)s 3(3); Cremation Act 2000 (SA); Cremation Act 1934 (Tas) s 5; Cemeteries Act 1958 (Vic) s 77(2); Cremation Act 1929 (WA) s 8A(b); but otherwise funeral directions and directions about disposal of the body (other than directions about dissection and body parts) are regarded as merely precatory, the executor having the right to decide this. The right to burial was extensively discussed in *Smith v Tamworth City Council* (1997) 41 NSWLR 680. Directions about dissection, post-mortem examination and body parts are governed by the Human Tissue Act regimes in each jurisdiction: Human Tissue Act (hereafter 'HT') 1983 (NSW); Transplantation and Anatomy Act 1979 (Qld); T & A Act 1983 (SA); HT Act 1985 (Tas); HT Act 1982 (Vic); HT and Transplant Act 1982 (WA); T & A Act 1978 (ACT); Human Tissue Transplant Act 1979 (NT). The rights of the coroner concerning the body appear in the coronial legislation: *Coroners Act* 1997 (ACT) s 13; *Coroners Act* 1996 (WA) s 17; *Coroners Act* 1995 (Tas) s 19; *Coroners Act* 1980 (NSW) s 13; *Coroners Act* 1993 (NT) ss 12,13; *Coroners Act* 1985 (Vic) ss 3,15; *Coroners Act* 2003 (SA) s 21; *Coroners Act* 2003 (Qld) s 19. This is discussed in P Vines 'The Sacred and the Profane: the role of property in disputes about post-mortem examination' in (2007) *Sydney Law Review*, forthcoming. See also P Vines, 'Consequences of Intestacy for Indigenous People in Australia: the passing of property and burial rights' (2004) 8(4) *Australian Indigenous Law Reporter* 1-10; R Croucher, 'Disposing of the Dead: objectivity, subjectivity and identity' in I Freckleton and K Petersen, *Disputes and Dilemmas in Health Law*, Federation Press, 2006.

¹⁹ *Williams v Williams* (1882) 20 Ch D 659; *Robertson v Pinegrove Memorial Park Ltd* (1986) 7 BPR 15,097; *Burrows v Cramley* [2002] WASC 47; *Brown v Tullock*, (unreported, NSWSC Eq Waddell CJ in Eq, 18 Oct 1992).

²⁰ See cases in next footnote.

²¹ For example, *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 3 March; *Burnes v Richards*, unrep, Cohen J, 6 Oct 1993 (noted in 68 ALJ 67); and in England, *Buchanan v Milton* [1999] 2 FLR 844 (dispute over the remains of an Aboriginal man who had been adopted and moved to England).