

University of New South Wales
University of New South Wales Faculty of Law Research Series
2011

Year 2011

Paper 33

Making Wills for Aboriginal People in NSW

Prue Vines*

*University of New South Wales, p.vines@unsw.edu.au

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/unswwps-flrps11/art33>

Copyright ©2011 by the author.

Making Wills for Aboriginal People in NSW

Prue Vines

Abstract

Aboriginal people in NSW have even more need to make wills than non-Aboriginal people. A burgeoning middle class continues to have traditional family and customary law obligations, while taking on mainstream property and obligations. The standard intestacy regime is inappropriate including because it uses an inappropriate idea of family and the high rate of burial disputes involving Aboriginal people means the role of executor is even more important than usual. A will can also be used to protect certain aspects of customary law. The article considers the issues arising in drafting the most culturally appropriate and effective wills.

MAKING WILLS FOR ABORIGINAL PEOPLE IN NSW

Prue Vines¹

I. Introduction

The need for Aboriginal² people to make wills has never been greater than it is today. At present a very small proportion of Aboriginal people in New South Wales, possibly as low as 6 %, make wills.³ There are many reasons why Aboriginal people should make wills.⁴ These include all the reasons one would normally advise a person to make a will, but also some others, including the fact that intestacy is unlikely to be satisfactory in its distribution pattern; that disputes about burial are at extremely high rates in the Aboriginal community and that the appointment of an executor with the right to dispose of the body may assist with such disputes,⁵ and that the special nature of the will makes it possible to use it to protect some customary law matters. Not least, a growing Aboriginal middle class in New South Wales may have estates including houses, businesses and other property while still maintaining their cultural traditions which may affect how wills should be drafted. Thus solicitors drafting wills need to consider a somewhat different range of issues for these clients than for non-Aboriginal clients.

II. The need for Wills

There are three main problems with intestacy for Aboriginal people. First, kinship ideas mean the wrong person may take. Second, it can make it more difficult to settle burial disputes and third it cannot deal with complicated customary law issues. Apart from this where there is intestacy, quite often the family just meanders along in an ad hoc, messy way leaving many issues unresolved.

The intestacy regime of New South Wales, like other Australian intestacy regimes is based on a view of kinship familiar to the western world. This view emphasises blood ties over collateral ties, and takes a very linear view of kinship, starting in time immemorial and running to the present and into the future. The property of the intestate is passed to spouse (s) and/or issue, and only if there are no such people does it go to parents and then to collateral relatives. First cousins are the most

¹ Professor, Faculty of Law, University of New South Wales

² In this paper I use the word Aboriginal rather than Indigenous because in NSW the majority of Indigenous people are Aboriginal. Many of the principles set out in this article apply to Indigenous people in Australia in general.

³ C Cunneen and M Schwartz, *The Family and Civil Law Needs of Aboriginal People in New South Wales* (2008) Report commissioned by Legal Aid NSW. (May be found at www.legalaid.nsw.gov.au).

⁴ I have led a research project carried out in conjunction with the NSW Public Trustee (now NSW Public Trustee and Guardian) which has investigated the needs of Aboriginal people across a range of communities in NSW and expects to publish a report and set of Instruction Protocols and Wills Precedents by the end of 2011. See also Cunneen and Schwartz, note 3 above.

⁵ These points have been made in more detail in a series of previous articles by me including: '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; 'Making Wills for Indigenous People: some pitfalls and considerations' (2007) 6(25) *Indigenous Law Bulletin* 6-9.

remote relative who can take.⁶ By contrast many Aboriginal people have a view of kinship which de-emphasises blood ties and takes a wider view of who is related to whom. Just as an example, in some Aboriginal kinship groups the people westerners would regard as nieces and nephews of X would be regarded as X's children because they are the children of Y who is X's same-sex sibling. What needs to be appreciated by solicitors is that even though an Aboriginal person may live an urban middle-class lifestyle their ideas of kinship (and therefore their ideas of obligation) may not alter from traditional. Thus the general intestacy rules will normally pass property to the 'wrong' family members. Although the Succession Act 2006 now has a special provision (Part 4) to allow Aboriginal people to put in a special plan for the purposes of intestacy, this remains a complex and relatively difficult process. Making a will is simpler and easier.

Burial disputes are very common in the Aboriginal community. Indeed it seems that a large proportion of such disputes which are reported involve Aboriginal people. In consultations carried out in the Aboriginal community of NSW⁷ this was a major issue of concern, most consultees reported being affected by such disputes, and that such disputes often result in long-standing ruptures in community relationships. Consultees suggested that the loss of clear decision-makers due to disruption of Aboriginal communities contributes to this problem. The problem tends to arise where the deceased died intestate.⁸ Although a direction in a will to deal with a body a certain way (apart from a direction not to cremate a body) is not binding,⁹ the advantage of appointing an executor is that the executor's duty of disposal of the body gives them the right to the body¹⁰ and the testator can appoint an executor who is willing to carry out his or her wishes. This means there is someone with the right to decide in the person of the executor. Where the person dies intestate it is far harder to determine who has the right to decide because there can be no presumption that a particular party will be granted administration rights *before* the grant has actually been made, and it is not clear that administrators have the same rights in relation to the body as executors do anyway.¹¹ Further where the estate is very small (quite common for Aboriginal people) there may not be any application for letters of administration at all. This means that, unlike the position where a will has named an executor, on intestacy it may be very difficult to determine who has the right to decide how to dispose of the body, thus necessitating expensive court action.

⁶ Succession Act 2006 (NSW) Chapter 4.

⁷ Vines and NSW Public Trustee Project. See n 4.

⁸ See for example, *Calma v Sesar* (1992) 106 FLR 446; *Jones v Dodd* (1999) 73 SASR 328; *Dow v Hoskins* [2003] VSC 206; (2003) 8(2) AILR 37; *Burrows v Cramley* [2002] WASC 47; *Meier v Bell* [1997] VSC (Ashley J, 3 March 1997); *Burnes v Richards* (1993) 7 BPR 15. In England, see *Buchanan v Milton* [1999] 2 FLR 844.

⁹ A direction not to cremate is legally binding in the ACT and NSW: Cremation Act 1966 (ACT); Public Health Regulations (NSW), Sch 15; 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 1983 (NSW). The rights of the coroner concerning the body appear in the coronial legislation: *Coroners Act* 1997 (ACT) s 13; *Coroners Act* 1980 (NSW) s 13. See P Vines, 'The Sacred and the Profane: the role of property in disputes about post-mortem examination' (2007) 29(2) *Sydney Law Review* 235-261.

¹⁰ *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*, (1992) 7 BPR 15101.

¹¹ *Brown v Tullock* (1992) 7 BPR 15101

One misapprehension which our research and that of Cunneen and Schwartz has uncovered is that many Aboriginal people think that one can only make a will if one has substantial amounts of property.¹² Correcting this misapprehension has been one goal of the NSW Trustee and Guardian project.

Aboriginal people, even those who live in cities and live urban lives, often continue to have customary law obligations which may need to be protected. Intestacy cannot deal adequately with all customary law obligations, possibly even where Part 4 of the Succession Act 2006 (NSW) is used. Many of these will be obligations arising out of kinship, which we have already discussed. But there may be other customary law obligations which might be protected by wills, in particular secret knowledge which should be passed on. Normally this should happen *inter vivos*, but if it does not happen in life, a will might be drafted to operate as a vehicle in equity which will both protect and keep secret the knowledge itself. This might be done by using equitable doctrines including confidentiality and secret and half-secret trusts.¹³ The question of whether such knowledge can be regarded as property may be answered by the argument that equity retains flexibility so that it can accommodate a wider view of property than pertains at common law.¹⁴

Aboriginal artwork is often a significant issue for wills to deal with,¹⁵ and the issue may go further than it would for a non-Aboriginal person's artwork. 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 recognises and which can be passed on to other people. That raises no great 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. There may be some question of how the artist was supposed to use this knowledge.¹⁶ If the ritual knowledge is something which the artist is supposed to pass on then a will may be helpful. The ritual knowledge itself cannot be passed on as copyright because copyright protects the *expression* of an idea rather than the idea itself. It may be possible to do this by means of a secret or half-secret trust or by using some aspect of confidentiality to pass it on by will. Thus, carefully drafted wills can operate to ensure that customary law obligations spelt out in the will (or even as half-secret trusts to ensure confidentiality) will be recognised and given legal force by the common law.

¹² Cunneen and Schwartz, note 3, above pp 100-101; NSW Public Trustee & Guardian Project, report forthcoming.

¹³ *Brown v Pourau* [1995] 1 NZLR 352; *Blackwell v Blackwell* [1929] AC 318; *Voges v Monaghan* (1954) 94 CLR 231.

¹⁴ *Burns Philp Trustee Co Ltd v Viney* [1981] 2 NSWLR 216

¹⁵ See the Arts Law Centre who have specialist advice on wills for Aboriginal artists:

<http://www.artslaw.com.au/legal/artists-in-the-black>.

¹⁶ *Bulun Bulun v T & R Textiles Pty Ltd* [1998] FCA 1082; (1998) 157 ALR 193; (1998) 86 FCR 244 at 263. speaks of fiduciary duties between an Aboriginal artist and his clan, such that the artist was obliged 'not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganjalbingu People'.

Wills can deal precisely with a range of property and obligations. They can deal with property¹⁷ by giving it away or organising for it to be held in trust for persons to whom there are obligations. They can deal with custodianship of property (often a particular concern of Aboriginal people) as well, by creating trust relationships, and, for example, 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 medicines secret and pass it on.

Wills may also, once admitted to probate, be able to operate as evidentiary material for future claims.

III. Drafting wills for Aboriginal people

All the reasons why making a will is a good idea for everyone apply to Aboriginal people, as well as the matters discussed above. In this section I discuss some of the things to keep in mind when drafting a will for an Aboriginal client.

Identifying beneficiaries should be done by name rather than by class. The kinship example above shows why the word 'children' could be problematic. The same applies to other kinship terms. This will also apply if guardianship of children is provided for in the will. Any children to be wards should be named. This is likely also to mean that class gifts should be avoided because of the difficulties created by the lack of names. It also means that it is extra-important to keep wills updated.

Appointing an executor needs to be done very carefully. Although wills are usually not the best place to put directions about disposal of the body, it may be wise to do so for Aboriginal clients, while ensuring that the Executor is told what the directions are. The Executor may need to be briefed about disposal of the body and the client needs to be informed of the importance of this.

Appointing multiple executors will need to be done very carefully if at all because the need for a final decision-maker is even more important in the Aboriginal community than elsewhere. Where a trustee company is used (who usually will act as executor) it may be important to have a clause which asks them to consult a particular person in the Aboriginal community as to disposal of the body. This will not be binding, but may be highly persuasive, and have the effect of creating a person with the ability to make a final decision and thus end disputes.

In drafting wills for Indigenous people, (and indeed for non-Indigenous people) a strong understanding of trusts and equitable doctrines is absolutely essential. A badly drafted will can be a slow-ticking timebomb, which only explodes long after the drafter thought about it.

IV. Conclusion

It is submitted that the case for increasing the rate of will-making for Aboriginal people is unanswerable; and that it is quite possible to do so by paying attention to the cultural

¹⁷ Note that in NSW there is very little native title land (which would, of course, not be amenable to being passed by will), but many Aboriginal people hold land in fee simple in common socage because they have bought it, including through land bought through the Aboriginal Land Fund which was set up to buy land for dispossessed Aboriginal people.

appropriateness of the will and by ensuring that instructions are taken so as to avoid the wrong beneficiaries inheriting and considering some of the possibilities. It is hoped that the development of instruction-taking protocols and culturally appropriate wills precedents will substantially assist solicitors in this task. There is a great need for ongoing education about the particular benefits for Aboriginal people of making a will. There is also an urgent need for solicitors to be aware of the mistakes they might make doing standard drafting for Aboriginal clients and of the possibilities of making a will which goes beyond avoiding mistakes and operates in a culturally appropriate way, protecting the cultural traditions of the first owners of our land.

