SPEAKERS NOTES

Length of presentation:

The Elder Law & Succession Committee ("Committee") suggests the Will Awareness Day talks run for no longer than 30-40 minutes. Speakers might adopt the approach of providing information about wills in the body of the talk, and then address issues of Powers of Attorney, Enduring Guardianship and other estate planning matters as they arise in questions.

Suggested form of introduction:

The Committee suggests starting the talk by introducing yourself, and your practice. Your introduction might also include something to the effect of the following:

This presentation is an initiative of the New South Wales Law Society. Solicitors in New South Wales are concerned that there have been, in the past five years, significant changes in the law which affect wills, but more importantly, laws affecting how people's estates are divided up if they die without having made a will, or die without a valid will.

Many people don't think a will is necessary, for many reasons. However, it is better to have even a simple will than no will at all.

This presentation intends to deal with wills in general, including information on:

- What is a will, do I need one and what are the contents of a will?
- How do I make a valid will?
- What happens if I don't get it right?
- Can a will be challenged?
- What happens if I don't make a will?

I intend to speak for about XX minutes, and leave time at the end for your questions.

Background information for the talk

The information provided below is intended to be basic information, and the Committee leaves it up to you to determine the exact content and style of presentation that will be appropriate for your audience. You may not be able to cover all of the material provided below in a 30-40 minute talk.

1. MAKING A WILL

What is a will?

A valid will is a document that distributes the deceased's property to people or to organisations upon the death of the testator. That document must meet certain formal requirements under the Succession Act 2006 (NSW).

Do I need a will?

A will is required when a person wants his or her property to be dealt with in a particular way upon his or her death. In the event that a person dies without a valid will, his or her property is distributed according to the legislative rules of intestacy, and the order in which next of kin take may not be the way that person would have liked his or her estate distributed. This is particularly a problem if the person who dies without a valid will leaves dependants who are not covered by the intestacy provisions,

although de facto spouses have certain rights under the Succession Act. However, even if family members or dependants, such as a de facto spouse, are not provided for in the deceased's will, they may still have a claim against the estate under the Succession Act or if the rules of intestacy do not adequately make provision.

Under section 5 of the Succession Act, a will made by a minor (person under the age of 18) is not valid except in two specified circumstances:

- A minor who is married or about to be married can make a will in contemplation of marriage or after marriage; however a will made by a minor in contemplation of marriage is of no effect if the marriage contemplated does not take place; and
- The court authorises a will by or for a minor under either section 16 (whether minor has testamentary capacity) or section 18 (whether minor lacks testamentary capacity).

Do I have to have a solicitor?

It is advisable to consult a private solicitor for advice when making a will. Your solicitor should be qualified to handle the intricacies involved in making a valid will. It is usually not an expensive service, and will be far less costly than having a "home-made" will interpreted by the Court. Your solicitor will ensure that your wishes are translated correctly into a valid will that will be accepted by the Court. Your solicitor will also consider and advise you as to the potential consequences of your will in respect of taxation, pension and the protection of vulnerable beneficiaries.

I will talk later about the case of Peter Brock which shows the complications and difficulties caused by using "home-made" wills.

Contents of the will

It is first necessary to choose one or more persons to be nominated as the executor(s) of your will. The executor stands in the shoes of the deceased person and attends to or oversees the administration of the estate in accordance with the will. There are a number of trustee companies that will accept appointment as executor, as well as the NSW Trustee & Guardian. A trustee company will charge a commission for carrying out its duties as executor. Private trustee companies charge varying commissions based on the total gross value of the estate, as well as a commission on income collected during the administration of the estate.

It is usually more common to appoint a member of the family or a close friend as executor because they would not normally apply for commission (which by statute they can do), in relation to discharging their duties as an executor, and would be unlikely to be awarded much commission if they were also significant beneficiaries. Furthermore, the award of commission can be circumvented by leaving the executor(s) a legacy in lieu of commission or making the appointment conditional on not seeking commission.

In the case that you have business interests, it is advisable that you choose an executor with commercial experience who will know how to deal with any problems that may arise.

After appointing an executor(s), it is then necessary to nominate those who are to benefit from your estate. You are able to make specific bequests of assets, or to leave the whole of your estate, or particular assets, to classes of beneficiaries in nominated shares. It is also possible to grant a life interest in particular assets to someone with the capital assets being left to another person. An example would be allowing your spouse to have the use of the family home during his or her lifetime, with the house then becoming the absolute property of your children upon the subsequent death of your spouse.

You should be aware however that the Court has often taken the view in family provision proceedings or proceedings under the Succession Act that a life estate (including retirement accommodation) is an inadequate provision for a spouse. I will discuss family provision proceedings later in the talk when talking about how a will can be challenged.

Another example would be leaving the income received from shares or an investment property to a particular person during his or her lifetime, with the asset passing absolutely to some other beneficiary on that person's death. The creation of limited or life interests or the disposal of particular assets may however involve possible liability for capital gains tax and should be discussed carefully with your solicitor. There are some limited exceptions to the liability for capital gains taxes, and your solicitor should be able to advise you in relation to these exceptions.

Property left to a child under 18, or at some later specified age, is held in trust on the child's behalf until the child reaches 18 or the specified age respectively. In such circumstances, it is necessary to nominate a competent person or company to act as trustee for the minor beneficiary to manage the entitlement of that beneficiary in accordance with the laws applying to trustees until the minor beneficiary reaches the applicable age. It is possible, and often prudent, to allow advances to a minor from his or her entitlement for education, maintenance and benefit, and particularly so if the child suffers from a particular disability or dependency.

It is also possible to provide in your will for any number of contingencies in the event that the beneficiaries you have chosen do not survive you.

Property owned by the deceased jointly with a spouse or any other person passes automatically to the survivor by virtue of the right of survivorship, not by operation of the will, and such property does not form part of the deceased's estate.

The trustee of the superannuation fund will make that decision in accordance with the terms of the trust deed of the fund. However, it is possible for a person to make a binding death benefit nomination on the trustee of the superannuation fund prior to death. Most binding death benefit nominations must be renewed every 3 years. Super may be paid to the estate or to beneficiaries or in accordance with a binding death benefit nomination but can be taken into account if there is a claim by a family member for greater provision.

Digital Assets

In this day and age many of us have "digital assets". These assets can include Facebook and Twitter accounts and any other electronically held or communicated information. These assets may include important and very personal information. They may not be actually held or controlled by you. You may wish to consider what happens to this information including passwords after your death. Your Will can provide an intention or direction to your Executors saying how you would like these assets dealt with and finalised. You will need to ensure that your Executors are provided or have access to passwords and other relevant information so that your wishes can be complied with. Your will could provide who has the ownership of this information and/or how you wish these digital assets to be dealt with upon your death.

2. HOW DO I MAKE A VALID WILL?

Formal Requirements

The formal requirements for a valid will are set out in the Succession Act. If these requirements are not met, the effect would be the same as a person dying without leaving a will (dying "intestate"), and the estate would be distributed as on intestacy. The formal requirements for a will are the following unless the Court declares that the informal document operates as a will:

a) The will must be in writing;

b) The will must be signed by the person making the will (the "testator") with the intention of executing the will;

c) The signature of the testator must appear on, and preferably at the end, of the will. (Where the will is longer than one page, the testator should sign at the bottom of each of the will's other pages. Although this is not a legal requirement, it is a matter of prudence);

d) The signature and initials of the testator should be witnessed by two witnesses. Both of these witnesses must be present at the time the testator signs at the end of the will and initials the pages; since 1 November, 1989 they do not need to be in the presence of one another when they sign as witnesses, merely to be both present when the testator acknowledges the will or signs it, and for them to sign in the presence of the testator.

Witnesses

The person making the will (the "testator") and witnesses should note that a beneficial disposition under a will to a person who witnessed the testator's signature could be void.

A witness who attests the execution of a will that makes a beneficial disposition to that witness is an "interested witness" under the Succession Act. Section 10(2) of the Succession Act voids a beneficial disposition of that will to the extent that it concerns the interested witness or a person claiming under that interested witness. Testators and witnesses should be aware of this as it may frustrate the testator's intentions.

There is however relief from this rule under section 10(3) of the Succession Act. An interested witness is not disentitled if there were two other witnesses who are not beneficiaries, or if all of the other beneficiaries consent, or if the Court makes an order confirming that the testator made the gift freely and voluntarily.

Validity of a Foreign Will

If the will of the deceased was made overseas, and is valid according to the law of the country where the deceased then lived, or where the deceased was at the time of making the will, it may be accepted in NSW under sections 47 to 50 of the Succession Act despite the fact that such a will may not be valid according to NSW law. In other words, if an immigrant person's will is valid in the country where it was made, probate may be granted in NSW.

Use of Legal Jargon

A will does not have to contain any particular words or legal jargon, and ideally, it should be in plain language. The document should however state that it is the will of the testator, that previous testamentary documents or wills are revoked, and that the testator's property is to be distributed in a certain way upon his or her death. Although the omission of special words or phrases by no means renders the will invalid, it is advisable to insert particular wording for the "attestation clause".

In the event that there is no attestation clause in the will, or no sufficient attestation clause, the Probate Rules require an affidavit of one or more of the witnesses to the will to establish the due execution by the testator of his or her will.

An example of a simple attestation clause which can be used is the following

"Signed by the testator in our presence and attested by us in the presence of him/her and each other".

By using such a clause, no affidavit of an attesting witness is required, where the will was prepared by a solicitor.

Additional wording should be used in an attestation clause where the testator has an impairment such as a condition affecting eyesight, hearing or language comprehension. An affidavit will be required in these instances.

Informal Wills

Despite the formal requirements for wills, there is provision under the Succession Act for testamentary documents (which do not have to be paper) or parts of testamentary documents that do not conform to the formal requirements to be admitted to probate. Under section 8 of the Succession Act, the Supreme Court can dispense with the formal requirements of a will. To do so, the Court would have to be satisfied that the deceased intended for documents that purport to embody the testamentary intentions of a deceased, although not executed in accordance with the formal requirements, to constitute his or her will (or alteration to or revocation of his or her will).

In forming this view, the Court may have regard to any other evidence (i.e beyond the document) as to the deceased's testamentary intentions, and this includes statements that were made by the deceased. Of course, whilst this exception to formal validity is available, it not advisable that a testator execute an informal testamentary document. Unless there is consent to a section 8 document, contested applications to the Court are nearly always costly, and they are also not guaranteed to be successful.

3. WHAT HAPPENS IF I DON'T GET IT RIGHT?

The effect may be that even if you have made a will, it may be found to be invalid, or partially invalid.

For example, sometimes people draw their own wills using as a guide a will kit which they purchase from newsagents or over the Internet. Obviously this may be better that than having no will at all, but in a lot of cases home-made wills do not achieve what the deceased person intended and can cause expensive court proceedings to be commenced in order to determine the meaning of the document and whether or not the document is a valid will.

Take, for example, the famous case of Peter Brock: the Supreme Court of Victoria had to sort out the mess which Peter had caused by having no fewer than three wills competing for recognition as the expression of the wishes of the man who lived by the name "Peter Perfect."

Without going over the whole of these court proceedings, essentially Peter Brock made three "wills". The first was in 1984 with his solicitor, the second in 2003 using a will kit, and the third in 2006 (6 weeks before he died), also using a will kit. At the time of his death, Peter Brock's "family" included his de facto wife of about 15 months, Julie Bamford, his previous de facto wife of about 18 years, Bev Brock, his biological children (son Robert and daughter Alexandra) and Bev's son James, whom Peter treated as his own child.

The 1984 will left the bulk of the estate in shares to Mr Brock's parents, Bev and the three kids. The 2003 will was silent on how the estate was to be divided, and the 2006 will left the bulk of the estate to

Ms Bamford and the three kids.

The 2003 and 2006 wills did not meet all the formal requirements of a will (including the requirements that a will be signed by the testator and by two witnesses). The 1984 will did. It was argued that the later wills could still be valid. The court was asked to decide.

The court found the will made in 2006 invalid.

The 2006 will was prepared by Brock's personal assistant, Ms Denman, using a will kit. Ms Denman wrote the will up at Brock's direction while he sat next to her. The will appointed two of Brock's friends as executors, left his superannuation and some shares to the three kids, and left the remainder of the estate to Ms Bamford. The will also gave directions for cremation and expressed a wish for no flowers at the funeral.

The will was signed by Ms Denman as a witness, but was not signed by Brock. Ms Denman said that during the preparation of the will, Brock was interrupted by a phone call and left the room, and that, on his return and afterwards, the will was not mentioned.

The court said that the 2006 will probably expressed at least some of Brock's wishes about his estate at the time of his death. It based this conclusion on the evidence of several witnesses, including Peter's brother. The court, however, was not satisfied that Brock intended the 2006 will to be his last will, especially because he had not signed it.

The will was held to be invalid.

The court found the will made in 2003 valid but incomplete.

The 2003 will was also prepared using a will kit, although on this occasion Brock hand-wrote the details himself, in the presence of Bev and his then personal assistant, Ms Williams. The will revoked all earlier wills and again appointed Brock's friends as executors, and gave directions for cremation.

However, the part of the will form that was designed to say who was to get the estate was left blank. Brock told Bev that he trusted her completely and that she should fill up the form at the time of his death, with whatever she thought fitting. Brock then signed the will in the presence of both Bev and Ms Williams. Ms Williams signed as witness. Bev did not sign.

The court said that the 2003 was valid, despite the fact that it was signed by only one witness, instead of two. It said that it was satisfied that Brock did intend the will to have immediate effect as his will, and therefore it revoked the 1984 will.

The court also said that it validly appointed executors despite the fact that Brock mistakenly assumed that he could give Bev the task of deciding who was to receive his estate. The law would not let Brock delegate his will-making powers.

So, who gets what?

The court's ruling means that the 2003 will stands as Brock's final will, and that the 1984 and 2006 wills are irrelevant.

Because the 2003 will made no provision for how the estate should be divided, the law interprets it as if Brock had died intestate; that is, without having made a will. The legal effect of this is that the estate will be divided equally between Brock's two biological children, and Bev, Ms Bamford and James will receive nothing. So you can see from this case, as briefly summarised, how many problems can arise because Peter, for whatever reason, failed to attend to the very basic requirements to ensure that there was a proper passing of his assets.

4. CAN A WILL BE CHALLENGED?

The area of change in the law that seems to create the most controversy is the situation where a deceased person has in fact left a will which fulfills all the legal requirements for a binding will but someone in the family of the deceased believes that they have not been left a sufficient share of the estate. This is where a claim under the Family Provision section of the Succession Act comes into consideration.

On 1 March 2009 extensive changes were made to the law to broaden the category of people who could challenge a deceased's will and try and get for themselves a greater share of the deceased's property as a result of such a challenge.

Essentially what happens is that the Court must be satisfied that the person making the claim comes within the category of an eligible person and the Court also has to be satisfied that adequate provision for proper maintenance, education and advancement in life of that person has not been made by the will of the deceased or by the operation of the laws of intestacy.

The matters which the Court can take into account are very wide and designed to offer a lot of flexibility in the nature of the orders that the Court may make, taking into account, for example, the character and conduct of the applicant before and after the date of death of the deceased person; any other matter the Court considers relevant, including matters in existence at the time of the deceased's person's death or at the time the application is being considered.

Family provision claims under the Succession Act 2006

The Succession Act 2006 enables the:

- husband or wife of the deceased;
- child of the deceased;
- de facto spouse with whom the deceased was living at the time of death;
- former spouse of the deceased;
- grandchild of the deceased who was wholly or partly dependent upon the deceased at sometime during the lifetime of the deceased person;
- any other person who was wholly or partly dependent upon the deceased at sometime during the lifetime of the deceased person and was a member of the deceased's household; and
- any person with whom the deceased was living in a close personal relationship at the time of death.

to apply to the Court for an order making adequate provision for their maintenance, education or advancement. Any entitlement to be provided for is calculated as at the date of hearing of the application, based on their needs and circumstances at that time.

The Court needs to be made aware of the applicant's relationship to the deceased and to the existing beneficiaries, the circumstances giving rise to the applicant's claim for relief and the comparative claims of the existing beneficiaries as well as particulars of any acknowledgment by the deceased as to the applicant's claims on the deceased's bounty.

Is there a time limit to make a family provision claim?

Yes - the period within which a claim is required to be made is 12 months from the date of death of the deceased. The time can be extended if sufficient cause for the delay can be established and provided the beneficiaries under the will would not be unacceptably prejudiced by such extension and depending on whether there has been any unconscionable conduct on either side which is relevant to the claim.

How do you determine that a person can claim as a "de facto" spouse?

The person has to establish to the satisfaction of the Court that he or she was living with the deceased at the date of death as the spouse of the deceased on a bona fide domestic basis. The definition is not restricted to heterosexual couples. Points that the Court takes into consideration in deciding whether a "bona fide domestic" relationship exists are essentially taken from section 4 of the Property (Relationships) Act 1984 and include:

- conduct in the manner of husband and wife
- sexual relationship
- joint parents of a child
- the exclusiveness of their living arrangements and sexual activity
- permanence of the relationship
- pooling their resources
- sharing their expenses
- carrying on a joint social life
- a subjective belief in their relationship being akin to that of husband and wife
- the legal right to enforce each other's obligations.

What are the rights of a former spouse?

Apart from establishing the existence of the married relationship the former spouse will need to establish factors warranting a claim and need. Points that the Court will take into consideration include:

- Where a spouse has died after divorce but before property orders have been made by the Family Court.
- Where the husband and wife have not settled all their property dealing at the time of death.
- Where maintenance being paid to a former spouse is inadequate for his/her provision after the death of the paying ex spouse.
- Where after divorce the deceased ex spouse was, because of special circumstances or a residue of affection, providing money for the former spouse's medical treatment or living expenses.

It should also be noted that under s.15A of the Wills, Probate & Administration Act 1898, a final divorce decree (a decree of dissolution of marriage or of nullity) revokes any gift by the deceased's will to a former spouse and any appointment of the former spouse as Executor and Trustee or otherwise. The only exception is where there is a specific provision in the will saving the gift or a subsequent writing by the deceased confirming the gift and/or such appointment. In the absence of any such provision or subsequent confirmation, the former spouse will not receive anything under the will in respect of the deceased's NSW property and his or her entitlement (if any) will depend on the ability to make a successful family provision claim.

What about other dependants?

Apart from the need to establish a claim and need at the date of hearing any such applicants must have been wholly or partly dependent upon the deceased at some time during the deceased's lifetime.

How is the application made?

Action is commenced by a Summons in the Supreme Court (or in the District Court, where the court can make an order up to $750,000), and the applicant is required to file a detailed affidavit setting out his/her age, occupation and marital status, particulars of the deceased's death and age at the time, particulars of any will, or other testamentary instrument, and of Probate or Letters of Administration, a brief statement of the estate assets, and details of the applicant's relationship to the deceased and of the circumstances establishing his or her claim to be provided for. The making of an order for costs of the application, is a matter for the Court to decide. The costs of the application are not automatically payable by the estate. The important thing is to consult a solicitor so that you can be properly advised and protected, since the costs of unsuccessful claims may be and often are, awarded against the applicant.

Your solicitor will be able to advise you about alternative dispute resolution (ADR) and explain that it can be used instead of, or at the same time as, litigation, and will generally cost less. Your solicitor will be able to advise you of the different ADR processes, which include mediation, conciliation, negotiation, independent expert appraisal and various forms of arbitration. If there is a need the Law Society can assist in the appointment of an independent Mediator.

5. WHAT HAPPENS IF I DON'T MAKE A WILL?

The Succession Act, which affects any person who dies intestate or partially intestate after 1 March 2010 has brought about a significant change to previous intestacy law. The significant change is that when a person dies intestate, the preferred person entitled to receive his or her estate is the intestate's spouse. If there are no persons entitled, the estate passes to the State as bona vacantia (that is, property which does not have an owner). In that event, persons who believe that they should benefit from the deceased's estate may petition the Crown for the property that passed as bona vacantia. The Crown's decision is naturally of a purely discretionary nature.

The Succession Act has expanded the definition of "spouse" to include not only a person married to the intestate immediately before the intestate's death, but also a person who was in a domestic partnership immediately before the intestate's death.

The order in which person's entitled share in the deceased's estate depends upon them surviving the deceased by 30 days, this period of time applies in all cases as set out in Parts 4.2 and 4.3 of the Succession Act. The order is fixed and no special account can be made of particular wishes of the deceased which are not expressed in a will. It should however be noted that the expression "domestic partnership" includes a "de facto relationship". Under the Succession Act, this means that persons who were in a "domestic partnership" for a continuous period of not less than 2 years immediately prior to death, or resulted in the birth of a child (this includes children born within nine months of the death of the intestate and survived 30 days), are defined in the Succession Act as a spouse. The criteria for establishing the existence of a "de facto relationship" is set out in section 4 of the Property (Relationships) Act 1984 and extends to same sex couples.

The statutory order follows:

First

If the deceased leaves a spouse or a domestic partner and even if there is issue of either of them and the deceased, the whole of the estate passes to the surviving spouse or domestic partner, provided there are no other children of the deceased from another relationship.

The Succession Act introduces a new concept of "multiple spouses" where the intestate is still married and also has a domestic partner. In these circumstances, there is a complicated process by which the whole of the estate is to be shared solely between the multiple spouses, even if there are issue of the deceased and the spouse or domestic partner.

Second

If the deceased leaves a spouse AND a domestic partner (multiple spouses) and issue of either the deceased and the spouse or domestic partner, the situation is more complicated.

The spouse and domestic partner share the whole of the estate either:

(a) in equal shares, or

(b) by agreement or court order.

NOTE: A spouse, if there is only one, is entitled to elect to acquire property from an intestate estate and in certain circumstances, requires the Court's authorization. There is a procedure to be followed by the spouse and the deceased's personal representative.

Third

However, if the deceased has a child or children other than to the spouse or domestic partner, the spouse and domestic partner lose their priority position and share the estate as follows:

(a) the statutory legacy $350,000,

(b) CPI adjustment from December 2005,

(c) interest on the legacy, if outstanding, 1 year after the death of the deceased on the amount due from the 1 year anniversary,

(d) personal effects

(e) one half of the residue, if any

Spouse and domestic partners share either:

(a) in equal shares, or

(b) by agreement or Court Order.

If all children survive 30 days after the death of the deceased, they will all share the remaining one half of the residue (if any).

Fourth

Where there is no surviving spouse and no domestic partner, but there are children of the deceased, those children get equal shares of the estate. (See commentary below).

Fifth

Where the deceased leaves no spouse and no children, the parents of the deceased get equal shares of the estate, or if only one is alive, the whole estate goes to that surviving parent.

Sixth

If the deceased does not leave any spouse, children or parents, the members of one of the following classes receive the whole estate. If no one falls within the first class, the whole estate will be given to the second class or to the next class of which there is a member, and so on. Once there is a person qualifying in the particular class, the whole estate passes to that class. No classes lower in the order would then receive any of the estate. The order of classes is:

(a) brothers and sisters (see commentary below),

(b) children of brothers and sisters (nieces and nephews),

(c) grandparents,

(d) uncles and aunts (or any child of a deceased uncle or aunt).

The relationship stated is to a direct relationship to the deceased only, and not to relationships to a "spouse" or "domestic partner" of the deceased.

Seventh

If no one satisfies this order of distribution, the estate passes to the State of NSW. There is an important qualification to this - if the deceased left any dependants who are not members of the family, they may nevertheless be awarded some of the deceased's estate. This applies to persons for whom the intestate might reasonably have been expected to provide; such persons could be, e.g. a foster child or a "houseguest" or a "companion" who, was, dependent on the deceased s.137 or for whom the deceased might reasonably be expected to have made provision. Such an award, which is purely discretionary, is only granted after the making of a petition to the Crown.

Commentary on the Statutory Order

The word "issue" (meaning "children") is used in the Succession Act where a child of the deceased has died but other children of the deceased are still alive, the children of the deceased child (i.e. the deceased's grandchildren) get their dead parents' share of the intestate's estate. If there are no children of the dead child of the deceased, the other living children of the deceased take the dead child's share in equal shares. This principle extends to the categories of the family referred to in (a) and (b) above. Thus, children of brothers and sisters may be able to share in the estate of the deceased. Adopted children qualify as legal children of his/her deceased parent.

Indigenous Person's Estates

The definitions used by both state and federal governments are used in the Succession Act to identify indigenous persons.

The provisions of the Act allow for claims of distribution to be made under laws, customs, traditions and practices of an indigenous community, as well as the general rules of intestacy.

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