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Will Drafting from a Litigator's Perspective

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About the author

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He is a co-author of C Birtles and R Neal, Hutley's Australian Wills Precedents 8th Edition (LexisNexis Butterworths) 2013, 9th Edition 2016 and C Birtles, R Neal and C Sims 10th Edition 2020.

Craig was named in the Doyle's Guide as a leading New South Wales Estate Litigation Junior Counsel in 2019 – 2023. He was also recognised in the 2024 Best Lawyers Lawyer of the year in the Trusts & Estates practice area.

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Introduction

Estate planning is a service which many in the community do not want to pay a high price for. Precedents and checklists can assist to keep the expense of taking instructions for and drafting a will at palatable levels for clients.

But there are many issues which can lead to litigation after the will-maker's death, some which might be avoidable, others which might be ameliorated and still others which might be inevitable.

The purpose of this workshop is to establish a framework for the taking of instructions and drafting of a will – from the simple to the circumstances where complexity is warranted – to identify the issues that can arise, and how they should be addressed. And hopefully not fall down too many rabbit holes.

1. Table of Contents

1. TESTAMENTARY CAPACITY

Principles

1.1. In *Banks v Goodfellow* (1870) LR 5 QB 549 at 565, Cockburn CJ set out the locus classicus test for testamentary capacity, in the following terms:

> "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."

1.2. In *Carr v Homersham* (2018) 97 NSWLR 328 at [5] – [6] Basten JA (with whom Leeming JA agreed) said that the concept is sometimes divided into component parts with affirmative and negative elements, the affirmative elements being:

a. The capacity to understand the nature of the act of will making 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.

1.3. The negative elements ("disorder of the mind which poisons testamentary affection" and/or "insane delusions") identify conditions which might be understood to interfere with testamentary capacity and are only relevant to the extent that they are shown to interfere with the testator's normal capacity for decision making.

1.4. In *Chant v Curcuruto* [2021] NSWSC 751 at [658] – [660] and [663], Hallen J said:

[658] "…it is convenient to remember, by way of preamble, what was written in *Croft v Sanders* [2019] NSWCA 303 at [126] (White JA, Bathurst CJ and Gleeson JA agreeing):

> "…Capacity to make a will is to be assessed having regard to the particular will made. While the test of capacity remains the same, the application of that test will vary according to the complexity and the officiousness or inofficiousness of the will … As the High Court said in *Gibbons v Wright* (1954) 91 CLR 423 at 438; [1954] HCA 17 the mental capacity required in respect of any instrument is relevant to the particular transaction which is being effected by means of the instrument."

[659] ("Inofficious" in this context means where no provision, or an apparently inadequate, or unfair, provision, is made for those who ought to be the objects of the will-maker's bounty: Brown v McEnroe (1890) 11 NSWR Eq 134 at 138 (Owen CJ in Eq); McNamara v Nagel [2017] NSWSC 91 at [263] (Robb J)).

[660] The retrospective task of the Court is to assess whether a will is valid; the test for testamentary capacity being understood in the context that it is time, situation, person, and task, specific. That is to say, whether the particular will-maker, suffering from his, or her, particular medical, or mental, conditions, in the particular situation, was able to make the particular will, at the time it was made. As has been written, the test of capacity is not monolithic, but is tailored to the task in hand: Hoff v Atherton [2005] WTLR 99; [2004] EWCA Civ 1554 at 109."

1.5. In *Kerr v Badran; Estate of Badran* [2004] NSWSC 735, Windeyer J said at [49]:

> "In dealing with the *Banks v Goodfellow* test it is, I think, necessary to bear in mind the differences between life in 1870 and life in 1995. The average expectation of life for reasonably affluent people in England in 1870 was probably less than 60 years and for others less well off under 50 years: the average life expectation of males in Australia in 1995 was 75 years.
>
> Younger people can be expected to have a more accurate understanding of the value of money than older people. Younger people are less likely to suffer memory loss. When there were fewer deaths at advanced age, problems which arise with age, such as dementia, were less common. In England in 1870, if you had property it was likely to be land or bonds or shares in railway companies or government backed enterprises. Investment in ordinary companies was far less common than now. Older people living today may well be aware that they own substantial shareholdings or substantial real estate, but yet may not have an accurate understanding of the value of those assets, nor for that matter, the addresses of the real estate or the particular shareholdings which they have.
>
> Many people have handed over management of share portfolios and even real estate investments to advisers. They may be quite comfortable with what they have; they may understand that they have assets which can provide an acceptable income for them, but at the same time they may not have a proper understanding of the value of the assets which provide the income. They may however be well able to distribute those assets by will. I think that this needs to be kept in mind in 2004 when the requirement of knowing "the extent" of the estate is considered. This does not necessarily mean knowledge of each particular asset or knowledge of the value of that asset, or even a particular class of assets particularly when shares in private companies are part of the estate. What is required is the bringing of the principle to bear on existing circumstances in modern life."

1.6. In *Revie v Druitt* [2005] NSWSC 902 Windeyer J said at [34]:

> "As I have pointed out quite recently in Kerr v Badran, lay evidence of the activities, conversations, family circumstances and relationships of the deceased and evidence from doctors, often general practitioners

> who were treating doctors during the lifetime of the deceased, usually is of far more value than reports of expert specialist medical practitioners who have never seen the deceased."

1.7. The most compelling evidence of understanding is reliable evidence of a detailed conversation with the deceased at the time of making of the Will displaying understanding of the deceased's assets, the deceased's family and the effect of the Will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation: *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 at [65]; [89].

1.8. The evidence of a solicitor taking instructions for and attending on the execution of a Will is important, because solicitors become attuned to recognising when the capacity of a client may be suspect: *Drivas v Jakopovic* (2019) 100 NSWLR 505; [2019] NSWCA 218 at [52] per Macfarlan JA (with whom Bell P and McCallum JA agreed).

Delusions

1.9. The issue of delusions was considered by Hallen J in *Chant v Curcuruto; Chant v Curcuruto* [2021] NSWSC 751 at [704] – [718]. His Honour said:

> "[704] Delusions are a hallmark of psychotic disorders, for example in schizophrenia, delusional disorders, psychotic depression, delirium and organic psychosis. Thus, a delusion (in the clinical sense) is not itself a medical disorder, but it will be evidence of one.
>
> [705] There are numerous definitions of delusions. For example, in the fifth edition of the 'American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders' ("DSM V") at p 819, a delusion is defined as:
>
> > "A false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary. The belief is not one ordinarily accepted by other members of the person's culture or sub-culture (i.e. it is not an article of religious faith). When a false belief involves a value judgment, it is regarded as a delusion only when the judgment is so extreme as to defy credibility."
>
> …
>
> [709] Thus, a delusion is an idiosyncratic belief, held firmly by a person, at a particular point in time, and not supported by known facts, and not shared by other members of the person's cultural and/or religious community. It may be distinguished from an "overvalued idea", this being a psychiatric expression meaning not a delusion, but an irrational idea. Although irrational, an overvalued idea is "sufficiently

attached to the initial worry to be understandable". Thus, while an overvalued idea may be irrational, the logic is obvious and there is no breach from the shared reality, referring to beliefs shared by other members of the person's cultural and/or religious community.

[710] A delusional belief is one that involves a clear break from reality (as the concept of reality is understood by the community of which the patient forms part). Mere irrationality, even extreme irrationality, is not delusional if it has some connection with reality: *Schultz v Bailey* [2007] NSWCA 110. Nor is a mistaken belief a delusion: *Du Maurier v Wechsler* [2001] NSWSC 4 at [40] (Windeyer J). Thus, the relevant false belief must not be a simple mistake that could be corrected. It must be irrational and fixed in nature.

…"

Process

1.10. The Law Society of NSW published "When a client's mental capacity is in doubt: a practical guide for solicitors" in 2016. Part 2 of the guide suggests that solicitors make a preliminary assessment of mental capacity – looking for warning signs or 'red flags' using basic questioning and observation of the client.

1.11. In *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007, Kunc J set out at [107] some basic rules of thumb:

"[107] It seems to me that the following is at least a starting point for dealing with this increasingly prevalent issue:

1. The client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.
2. A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.
3. In all cases instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way? The questions and answers should be carefully recorded in a file note.
4. In case of anyone:
   (a) over 70;
   (b) being cared for by someone;
   (c) who resides in a nursing home or similar facility; or
   (d) about whom for any other reason the solicitor might have concern about capacity,

   the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as a result of any diagnosis, behaviour, medication or the like. Again, full file

notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.

5. Where there is any doubt about a client's capacity, then the process set out in sub-paragraph (3) above should be repeated when presenting the draft will to the client for execution. The practice of simply reading the provisions to a client and seeking his or her assent should be avoided."

1.12. Whether or not there should be hard and fast rules as to the steps to be taken with clients of a particular age or circumstances, the preliminary assessment should be undertaken:

a. With detailed file notes recording conversation and direct observation relevant to testamentary capacity; and

b. Excluding outside influences.

1.13. Reliable records of the testator giving direct instructions as to his or her understanding of the function of a Will, what he or she wants to achieve in his or her Will and the nature and estimated value of his or her assets, and the persons who might be expected to benefit from his or her testamentary bounty will satisfy the positive elements of testamentary capacity referred to by Basten JA in *Carr v Homersham*, with one qualification which overlaps with the negative elements.

1.14. Solicitors are not medical practitioners. You will not always be told about medical conditions suffered by a will-maker, and such conditions may not be apparent from direct observation.

1.15. Enquiry as to the terms of prior Wills, and the reasons for the making of the gifts in the new Will and for any changes, can assist to prove the will-maker's capacity to comprehend and appreciate objects of their testamentary bounty.

1.16. Reasons for testamentary dispositions or changes can also assist to expose a doubt as to testamentary capacity – if the reasons demonstrate a deficiency in memory or reasoning which can connect an underlying medical condition to the act of will making.

1.17. The solicitor's role is to take all appropriate steps to ask the right questions, faithfully record the instructions, and refer the client for medical opinion (or seek information about any underlying diagnosis) where the instructions and direct observation give rise to a concern about capacity.

1.18. Delusions are a separate issue which will rarely arise. But where statements are made by a will-maker which suggest a false belief relevant to the act of will

making – the solicitor might test whether the false belief could be reasoned out of. Many people who are capable of making a Will might be said to have false beliefs. But apart from that it is a matter of referring the client for medical opinion or seeking information about the underlying diagnosis.

1.19. Upon receipt of a medical opinion (or information about any underlying diagnosis), the Law Society of NSW capacity guidelines suggest that the solicitor make a final judgment on whether in the solicitor's opinion the client is capable of making the Will.

1.20. Circumstances of urgency, such as where a will-maker is suffering from a life threatening medical condition, or if there are any other reasons to suggest that a will-maker might not make it to a second conference, create a particular issue as delay for the purpose of obtaining a medical opinion about capacity may not be possible.

1.21. Failure to act on instructions for a Will in circumstances of urgency can give rise to claims in professional negligence by the disappointed beneficiary against the solicitor – eg *Maestrale v Aspite* [2012] NSWSC 1420 (first instance); *Maestrale v Aspite* [2014] NSWCA 182 (appeal); *Fischer v Howe* [2013] NSWSC 462 (first instance); *Howe v Fischer* [2014] NSWCA 286 (appeal).

1.22. I do not subscribe to the view 'when uncertain, make the will'. Life is rarely so simple. Acting on instructions for a will when capacity is in doubt deprives the will-maker of the opportunity to make a statutory will. And if the solicitor's evidence is that he or she had unresolved doubts about the testator's capacity to make the Will but went ahead without medical evidence anyway, that may have a particular impact on the outcome of contested probate proceedings.

1.23. I take the view that the process needs to be stripped right back. My suggested framework is:

a. Consider whether you are sufficiently satisfied from direct observation and instructions, faithfully recorded in file notes and other records, that the will-maker gave direct instructions for the terms of the Will, and satisfies the positive elements referred to by Basten JA in *Carr v Homersham* (noting the leniency as to knowledge of the nature and estimated value of assets referred to by Windeyer J in *Kerr v Badran*);

b. If so, consider whether direct observation and instructions give rise to a sufficient concern (which cannot be resolved) about memory, reasoning or delusions, to require further enquiry before Will instructions are acted upon;

c. Explain any concern, and any recommendation that medical opinion or information about an underlying diagnosis, be obtained, and record the instructions in response. If you are sufficiently satisfied that the will-maker has capacity to understand the conversation and to give instructions in response, act on the instructions in light of any perceived urgency;

d. If medical opinion is obtained which is suggestive of a lack of capacity, consider a Statutory Will, and the process which might then be followed subject to instructions from a person able to provide them.

2. KNOWLEDGE AND APPROVAL

2.1. To establish knowledge and approval is to establish that the Will represents the deceased's testamentary intentions (*Robertson v Barker* [2021] NSWSC 1682 at [494]).

2.2. In *Gill v Woodall* [2010] EWCA Civ 1430; [2011] Ch 380 at [71], Lloyd LJ said that it must be established that the testator understood (a) what was in the Will when he or she signed it; and (b) what its effect would be.

2.3. In *Lim v Lim* [2022] NSWSC 454 at [353] Hallen J said:

> [353] "In comprehending the nature of what the deceased was doing, and its effects, it is not necessary to establish the she, or he, was capable of appreciating the legal effect of all the clauses of the disputed will. However, it does need to be shown that the deceased understood that she, or he, was executing a will and the practical effect of the central clauses in that document…"

2.4. The presumptions as to knowledge and approval were described by Meagher JA (with whom Basten and Campbell JJA agreed) in *Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285 at [44] – [48].

2.5. Upon proof of due execution (at least one affidavit of attesting witness) there is a presumption the will-maker knew and approved of the contents of the Will. If there are suspicious circumstances, the person propounding the Will must positively prove that knowledge and approval. This is often done by evidence that the Will was read by, or to, the testator.

Suspicious circumstances

2.6. In *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 704-704, Powell J set out principles relevant to testamentary capacity and knowledge and approval. The tenth principle was:

> "Facts which may well cause suspicion to attach to a document include:
>
> i. That the person who prepared, or procured the execution of, the document, receives a benefit under it;
>
> ii. That the testator was enfeebled, illiterate or blind, when he executed the document;
>
> iii. Where the testator executes the document as a marksman when he is not".

2.7. In A Learmonth QC, C Ford, T Fletcher, Master Clark and Master Shuman (eds), *Theobold on Wills 19th Edition*, Sweet & Maxwell 2021, the following were also referred to as examples of suspicious circumstances at [4-049]:

a. where a person was active in procuring the execution of a will, by, for instance, suggesting the terms of a will to the testator and instructing a solicitor chosen by that person.

b. A radical departure from testamentary dispositions long adhered to requires explanation, especially if the person in whose favour the change is made possesses great influence and authority with the deceased and originates and conducts the whole transaction. See also A Learmonth, C Ford, J Clark and J Ross Martyn (eds), *Williams, Mortimer & Sunnucks on Executors, Administrators and Probate* (21st ed) 2018 Sweet and Maxwell at [10-36] cited in *Lim v Lim* [2022] NSWSC 454 at [354].

Reading over

2.8. In *Hoff v Atherton* [2004] EWCA Civ 1554, Chadwick LJ set out the following statement of principle at [64]:

> "Further, it may well be that where there is evidence of a failing mind - and, a fortiori, where evidence of a failing mind is coupled with the fact that the beneficiary has been concerned in the instructions for the will - the court will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that the testator did know and approve the contents of his will – that is to say, that he did understand what he was doing and its effect - it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time when he signed the document, but

> needs to be satisfied that he did, in fact, know and approve the contents – in the wider sense to which I have referred."

2.9. *Hoff v Atherton* was referred to by White J in *Estate of Stanley William Church* [2012] NSWSC 1489 at [65] – [67] and by the NSW Court of Appeal in *Church v Mason* [2013] NSWCA 481 at [19], but it was not decided whether the proposition would be accepted in this jurisdiction. The principle was again set out by White J in *Estate of George Aeneas McDonald; Howard v Sydney Children's Hospital* [2015] NSWSC 1610, but again it was not necessary to decide because in that case there was no evidence of a failing mind.

2.10. In *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831, Robb J said at [471]:

> "In my view, where it is shown that a testator suffered from a mental disability at the time he or she made the will, and that the will was read by or read over to the testator before it was executed, so that in that sense the testator knew of the contents of the will, it will not necessarily follow from a finding that the testator had testamentary capacity that the will contains the real intention and reflects the true will of the testator. There may be cases where the testator's mental disability has had the consequence that, by one means or another, the process by which the will was prepared and executed has miscarried, so that, in whole or in part, the will does not reflect the true will of the testator."

2.11. In *Lewis v Lewis* [2021] NSWCA 168 Leeming JA (with whom Meagher JA and Payne JA agreed) at [137] – [188] referred to many authorities in which the importance of the reading over of the Will was considered.

2.12. At [170] his Honour said:

> "There are all manner of ways in which suspicious circumstances may be established, but a familiar instance is where a beneficiary has played a part in the drafting or execution of the will. In such a case, it would be usual for the propounder to seek to establish that the testator knew and approved that the effect of the will was to confer a benefit on that person. Another way of making that point is as follows. It will not much assist a person seeking to propound a will where there are suspicious circumstances merely to establish that the testator knew the contents of the will, in a case where that alone did not carry with it knowledge that the effect of the will was to confer a benefit on that person. The probate court's vigilant and jealous scrutiny will not greatly be allayed by demonstration that a capable testator whose knowledge and approval is in question knew the contents of the will, but failed to understand its effect."

2.13. In addition, his Honour said:

a. At [182] - sometimes knowledge of the words contained in the will without more will be invariably sufficient to discharge the onus of establishing knowledge and approval, and other times it might not.

b. At [185] "…it is not the law that a valid testamentary disposition is effected by a capable testator accepting what is put forward by another, if the testator does not himself or herself understand its general tenor."

c. At [186] – "…it will depend on the degree to which the circumstances are suspicious, the sophistication of the testator, the complexity of the will, and the other facts of the case…"

d. At [187] "Nothing in the foregoing requires a precise legal understanding of the will… It will be sufficient if the testator is shown to know and approve of the gravamen of the will".

2.14. Assuming that a testator has testamentary capacity, what is required to demonstrate actual understanding of a Will may vary according to:

a. Characteristics personal to the testator, such as age, sophistication, capabilities, literacy and language; and

b. The simplicity or the complexity of the Will.

Process

2.15. If instructions are taken directly from a will-maker, without outside influences, suspicious circumstances will rarely arise. Suspicious circumstances, such as the provision of instructions to the solicitor by a beneficiary, create a knowledge and approval evidentiary or persuasive problem because upon that occurring the solicitor will usually not be able to give admissible evidence that the instructions came from the testator.

2.16. In every case the Will should be read out aloud and explained before it is executed.

2.17. The process should be documented in some way, such as by contemporaneous file note.

Recording the process

2.18. It has been suggested elsewhere that solicitors consider procuring a video recording of the Will making process where there is reason to believe that there might later be contested estate litigation.

2.19. The use of listening devices are an offence under s 7 of the *Surveillance Devices Act* 2007 (NSW) without consent, or one of the parties to the conversation consents and the listening device is reasonably necessary for the protection of the lawful interests of that party. Audio and/or video recordings can thus only be used with the consent of the client. (These provisions were considered in *Rathswohl v Court* [2020] NSWSC 1490. If consent was not obtained, the only

means of having the recording admitted into evidence is to either bring the matter within the "lawful interests" exception, or to argue that the recording should be admitted notwithstanding the offence because the desirability of admitting the evidence outweighs the undesirability of admitting the evidence pursuant to s 138 *Evidence Act* 1995 (NSW)).

2.20. Recordings are no substitution for a properly structured interview.

2.21. A stage-managed video recording dealing only with the process of execution of the will is not usually going to add a lot of value to the evidence in contested probate proceedings because due execution is rarely in issue. If video recordings are to be used, with consent, they should faithfully record the whole of the process of taking instructions for the Will, questions and answers directed towards the *Banks v Goodfellow* questions, the reading over and explanation of the will, as well as execution.

3. THE STRUCTURE OF A WILL

3.1. A basic will has a simple structure – revocation clause, appointment of executors and substitute executors, pecuniary legacies, specific gifts of personal property, real estate and shares in private companies, residuary beneficiaries, substitution and accrual provisions, and trust powers.

3.2. The instructions obtained for the will should deal with each of these topics, diving deeper into each where the instructions require it.

3.3. More complex wills - continuing trusts involving rights of residence or life interests, protective and special disability trusts, and discretionary testamentary trusts, require a more searching deep dive.

4. EXECUTORS AND SUBSTITUTE EXECUTORS

4.1. The basic responsibilities of executors are to:

a. Funeral arrangements and arrangements for disposal of the deceased's body.

b. Ascertain and bring in the assets of the estate.

c. Pay the deceased's debts, funeral, testamentary and administration expenses.

d. Distribute the deceased's estate to the persons entitled or to hold those assets on continuing trusts.

4.2. The fundamental considerations in a testator deciding who to appoint as executor are the interests to be protected (by reference to the gits to be made under the Will) and the capacity of the nominated executor(s) to undertake his, her or their functions.

4.3. It is usually preferable that an executor have an interest in administering the estate – either by virtue of his, her or their status as beneficiaries or otherwise a professional person with appropriate arrangements for professional charges included in the Will.

4.4. If a testator wishes to make a simple Will giving the whole of his or her estate to a single beneficiary, the nominated beneficiary should also be named as executor unless there are good reasons (such as capacity) as to why that should not be the case.

4.5. The same considerations apply where the residuary estate is given to a single beneficiary but there are a number of small legacies or specific gifts. The person with the greatest interest in administering the estate should be the given the job to do so.

4.6. Where a testator's residuary estate is divided between two or three beneficiaries, a common approach is to appoint each of them as executors but if there are more than three residuary beneficiaries, practicalities will mean that a different approach should be considered.

4.7. But many testators have more complex family arrangements and testamentary wishes. It is not uncommon for a testator to want to benefit their second or third spouse whilst at the same time maintaining a wish to benefit their children from a prior relationship or relationships.

4.8. In those cases a testator might consider appointing both the spouse and one of the children (assuming they get along) to balance the interests of the respective family groups.

4.9. Where a testator's estate includes assets of a complex nature (a business for example) or beneficiaries with complex (disputed) relationships, a testator might be more inclined to appoint a professional person as executor depending on the circumstances. But there is no reason why an adult able bodied residuary beneficiary cannot administer such an estate with the taking of professional advice.

4.10. Continuing trusts require an executor (if also to be appointed as trustee) to navigate the responsibilities of keeping adequate accounts beyond the administration period, to manage the asset over a longer period, and preferably to outlive the life tenant or principal beneficiary (subject to trustee succession arrangements).

4.11. Where a trustee company or professional person are to be considered for appointment as executor, consideration will need to be given to a clause providing for the executor's remuneration or charges.

4.12. There is no need to appoint more than one executor if that person is capable and willing to carry of the administration. But a substitute executor should always be named.

Issues which can arise

4.13. When deciding upon his or her executor(s) a testator should consider what, if any, issues are likely to interfere with the nominated person(s) ability to administer the estate.

4.14. There are broadly three categories of reasons why estates are not administered promptly:

a. Difficulty in administering the estate in accordance with the Will or due to litigation concerning the estate;

b. Distraction; and

c. Delinquency.

Difficulties in administration

4.15. No testator can have perfect foresight as to the issues that can arise in the administration of an estate. But they can be ameliorated by discussion with the testator as to the steps required to administer the estate, and as to the potential family provision claimants.

Distraction

4.16. Testators should consider whether the proposed executor's other responsibilities will interfere with him or her carrying out his or her functions.

Delinquency

4.17. A bare conflict of interest is not usually a sufficient basis for an application to revoke a Grant of Probate. In *Rutter & Anor v McCusker & Anor* [2008] NSWSC 1289, Palmer J said at [24]:

> "A potential for conflict between duty as an executor and interest as a beneficiary or debtor of the estate is not sufficient on its own to justify revocation of a grant to that executor, particularly if the testator has appointed the executor knowing of the potential for that conflict. An executor is assumed to know the facts existing at the time of appointment and the Court infers that he or she is nevertheless willing to trust in the loyalty and integrity of the appointee in administering the estate."

4.18. But the potential for an executor to allow a conflict of interest to interfere with his or her administration of an estate is an issue to be considered – the testator needs to decide whether he or she trusts the nominated executor to give effect to the gifts benefitting the other beneficiaries.

5. PECUNIARY LEGACIES

5.1. The critical question for pecuniary legacies is the source of funds to pay them.

5.2. The reason for this is that, where an estate is solvent, s46C and the Third Schedule of the *Probate and Administration Act* 1898 (NSW) requires the assets of the estate to be applied towards the funeral, testamentary and administrative expenses, debts and liabilities, first from the residue, then from any fund retained to meet pecuniary legacies, and finally from any specific gifts.

5.3. I have not mentioned in the formula above:

a. Assets undisposed of by will, as ss 31 and 42(2) *Succession Act* 2006 (NSW) means that there will almost never be a partial intestacy for wills made on or after commencement, unless there is a complete failure of a residuary gift.

b. Assets appropriated, charged with or disposed of by will for the payment of debts. It is obvious that assets appropriated, charged with or disposed of by will for the payment of debts should be used to pay debts before the funds retained for payment of legacies and before specific gifts.

c. Assets charged with payment of debts, noting the effect of s 145 *Conveyancing Act* 1919 (NSW).

5.4. As a cross check against the instructions for the will the testator should be asked about the funds he or she has available to pay the total legacies, after payment of debts and administration expenses. Regular review is important where there are significant legacies. If the testator's circumstances change, there may not be sufficient funds to pay the legacies.

6. PERSONAL PROPERTY

6.1. In Fisk, "*Honour thy father*", broadcast on 21 April 2021 Kitty Flanagan's character Helen takes instructions for a Will for a client named Phil. The client attends the conference with a notepad in which he has listed the entire contents of his house and the individual beneficiaries he wished to leave those individual items to.

6.2. Personal property can be important to testators. But apart from the length of time it takes to draft a will containing such specific provisions, a long list of specific gifts of personality can be difficult to administer unless assistance is given to the executor (by the testator) as to how to find and identify each item.

6.3. Valuable or important items can be the subject of individual gifts provided the items are adequately described and easily located. Beyond that testators might consider giving the whole of their personal possessions to the executor or some other beneficiary, with a non-binding request that he or she distribute them between named individuals.

7. REAL PROPERTY

7.1. A solicitor preparing a Will for a client upon the client's instructions to include a gift in favour of particular beneficiaries is under a duty to take reasonable care to give effect to the client's intentions: *Hill v van Erp* (1997) 188 CLR 159; *Miller v Cooney & Ors* [2004] NSWCA 380. The scope of the duty is governed to a large extent by the solicitor's retainer and the nature of the instructions.

7.2. It is arguable that a solicitor's duty when given instructions to prepare a will containing a specific gift of real property is under a duty to obtain, or to seek instructions to obtain, a title search for the property the subject of the gift, to confirm the registered proprietor(s) and to obtain information about any secured debts.

7.3. It is not uncommon for testators to attempt to give away property by their Will which is not owned by them. Gifts which purport to do this raise complications for

the executor, both as to whether he or she can, or with the consent of the affected beneficiaries should, give effect to the gift, but also because such gifts may not obtain the concessional duty and capital gains tax rollover relief which might otherwise be available by gifts made directly from a testator's assets.

Joint tenancies

7.4. If real estate is owned by the testator as joint tenants with another, on the death of the first joint tenant the surviving joint tenant will be entitled to the whole of the joint property, and it will not pass pursuant to the testator's will.

7.5. If the testator wishes to give his or her interest in jointly held property then the joint tenancy will need to be severed before the testator's death.

Real estate owned by companies

7.6. Drafting a will which includes a gift of a property owned by a company not only leads to uncertainty as to whether the gift can (or should) be implemented, but it also leads to capital gains tax, dividend, and stamp duty problems.

Gifts of property owned by companies – uncertainty

7.7. *Re Bowcock (deceased); Box v Bowcock* [1968] 2 NSWR 697 concerned a gift of by a testator of a property known as "Alabama, Kelvinside and The Vale situate near Scone in the State of New South Wales". The testator did not own a property by that description, instead it was owned by a company Alabama Stud Pty Ltd in which the testator was the sole shareholder. Else-Mitchell J determined that:

a. to adopt the view that a gift would be void where the testator did not own any interest in the subject matter would defeat the testator's *manifest intention*; and

b. the question was whether, the testator's intention being *clear*, the executors can be required to give effect to it.

7.8. In *Re O'Callaghan, deceased* [1972] VR 248 the testator by clause 3 of his Will made a number of specific gifts of "flat premises at Sheridan Close" and shares in public companies. At the date of the deceased's death he did not own assets meeting the descriptions in the Will, but there were assets meeting those descriptions by a company, W E O'Collaghan Pty Ltd (referred to in the judgment as "the Name Company"). At the time of his death the testator owned 24,219 shares in the company, with one held by his widow. The widow's share was

determined to be held on trust for the testator. The company's name was not mentioned anywhere in the Will.

7.9. Clause 3 commenced: "*I give devise and bequeath to my trustee all the real and personal estate of or to which I shall be seized possessed or entitled at my death or over which I shall then have any power of disposition or appointment, upon trust*…". The specific gifts then followed by sub-lettered paragraphs, with a concluding sub-paragraph (d): "*for sale conversion and getting in*…". By clause 4 the testator directed the trustee to stand possessed of the proceeds of conversion upon trust to pay debts or other specified costs and expenses, and certain pecuniary legacies, and to divide the reside into six equal parts for distribution among his wife, three nieces and a nephew.

7.10. The structure of the Will was held to be significant. Gowans J said (at 256):

> "Where a testator conveys to his executor a direction to reduce into possession an asset not owned by the testator and the executor is armed by him with the power to get it in, the executor is bound to do so and deal with it by way of disposition in the way the testator directs."

7.11. A similar issue was considered in *Estate Reid; Roberts v Moses & Palmer* [2018] NSWSC 1145. In that case, the plaintiff was given by one of the deceased's many Codicils a gift of income on National Australia Bank and Commonwealth Bank of Australia shares in the sum of $500,000 per annum. At the date of the making of the Codicil and at the date of death, the deceased owned National Australia Bank shares but did not own any Commonwealth Bank of Australia shares in his own name. Instead, a company Vanreid Enterprises Pty Ltd (the shares of which were owned by Vanreid Industries Pty Ltd of which the deceased was the sole shareholder) owned a sufficient number of National Australia Bank and Commonwealth Bank of Australia shares to generate the required amount of income. The Court determined that the plaintiff was entitled, pursuant to the deceased's Will and Codicils, to payment from the deceased's company up to a maximum of $500,000 in any 12 month period, and that the executor/residuary beneficiary was under an equitable obligation to ensure that the plaintiff received the monies referred to in that declaration.

7.12. In *Wheatley v Lakshmanan* [2022] NSWSC 583, the late Dianne Victoria Lakshmanan gave her interest in a property at The Entrance Road (which was owned by a company, Wheatley Investments Pty Ltd) to her daughter Vittoria (Alexis). The deceased was the sole shareholder of Wheatley Investments Pty Ltd. The Court determined that the gift failed, as there was no express provision

in the Will directing the executor to exercise powers available to the deceased, as shareholder, to cause the property to be transferred to the plaintiff. The Court decided that there was force in the submission of the defendants that the Will should not be construed in a fashion that would or might place the directors of Wheatley Investments in a position where their statutory duties (as directors of the company) were in conflict with the deceased's intentions.

7.13. The plaintiff in that case received an award of provision pursuant to Ch 3 of the *Succession Act* 2006 (NSW) of $820,000 which was equivalent to the net proceeds of sale of The Entrance Road property after estimated tax payable on distribution of the proceeds of sale.

Gifts of property owned by companies – work around

7.14. Enquiry should be made as to the other shareholders in, and business conducted by, the property owning company. If there are no other shareholders and no other business conducted by the company the testator might consider making a gift of his or her shares in the company to the beneficiary.

7.15. If that cannot occur or if that is not intended, the testator must face up to the need to pay tax and/or duty, and either obtain financial advice as to how best the real estate might be given to the intended beneficiary, or otherwise reconsider the testamentary intentions.

Charges over real property

7.16. Section 145 of the *Conveyancing Act* 1919 (NSW) provides, subject to contrary intention in the Will, where a person dies possessed of, or entitled to, or under a general power of appointment by his or her Will disposes of, property which is charged with the payment of money, and the deceased has not by Will, deed or other document signified a contrary intention, the property charged shall be primarily liable for the debt.

7.17. Yet the obligations between surviving joint tenant and deceased joint tenant's estate for debts secured by mortgage are frequently the source of dispute.

7.18. There should be no issue that the surviving joint tenant takes the jointly owned property subject to the mortgage debt where the debt was incurred for the purpose of purchase of the jointly owned property.

7.19. But if the deceased joint tenant was in reality the only borrower (with the surviving joint tenant in effect standing as guarantor) then there will be debates as to whether the estate of the deceased joint tenant should exonerate the surviving joint tenant from liability to meet the secured debt.

7.20. In *Official Trustee in Bankruptcy v Citibank Savings Ltd* (1995) 38 NSWLR 116 at 130. Bryson J noted that the doctrine of exoneration supplies a presumed intention to the parties as to who should be principal and who should be surety. His Honour said:

> " … The doctrine serves to illustrate that the intention of a party may establish which is to stand as surety and which as principal even though both appear to incur substantially the same legal obligation. Although contemporaneous agreements, arrangements and expression of intention are the usual sources of evidence about the intentions of parties on such a subject, there is no reason why their intentions may not be inferred from the circumstance in which they acted. Intentions, like other facts, may be proved from circumstances. Circumstances could conceivably furnish very clear proof of intention as to who was to be principal and who was to be surety, and the intended and actual application of funds raised when two persons incur a common liability would often have an important, even predominant part in the proof of the relevant intention".

7.21. The counter argument is that, having received the whole of the jointly held property, the surviving joint tenant should take the burden of any secured debt (in accordance with s 145 *Conveyancing Act* 1919 (NSW), subject to any contrary intention in the Will).

7.22. In reference to the doctrine of contribution (which provides that obligees/guarantors under a co-ordinate obligation must share the burden pro rata), in *Friend v Brooker & Anor* (2009) 239 CLR 129 at 148, French CJ, Gummow, Hayne and Bell JJ said:

> "With a claim to contribution, as is the position generally with the intervention of equity to apply its doctrines or to afford its remedies, the plaintiff must show the presence of "an equity" founding the case for that intervention. The "natural justice" in the provision of a remedy for contribution is the concern that common exposure of the obligors (or "debtors") to the obligee (or "creditor") and the equality of burden should not be disturbed or be defeated by the accident or chance that the creditor has selected or may select one or some rather than all for recovery."

7.23. The solution to these debates is to conduct a title search to ascertain whether there are any secured debts over specifically given properties at the time of taking instructions for a will, and take instructions from the testator as to how any secured debt is to be repaid or otherwise to confirm that the beneficiary of the real estate takes the gift subject to the secured debt.

7.24. If any variation to s 145 *Conveyancing Act* 1919 (NSW) is intended, include a specific clause in the Will providing for payment of secured debts.

7.25. These issues are particularly important where the testator intends to give his or her spouse, de facto spouse or dependent children the matrimonial home. If the matrimonial home is encumbered, the beneficiary may not be able to repay the secured debt or refinance, and failure to make provision for the secured debt to be paid may defeat the testator's intention.

8. COMPANY INTERESTS

8.1. An ASIC search confirming the share and directorship position of testator's private companies should be considered.

8.2. A private shareholder wishing to make a gift of shares in a private company should be asked to provide the company constitution and/or memorandum and articles of association.

8.3. If a testator is the sole shareholder of a private company wishing to make a gift of his or her shares to the one beneficiary, enquiry should be made as to the documents and information the intended beneficiary will require (such as, location of share register and how records of company are maintained). Consideration should also be given to transitional directorship appointments.

8.4. If the testator is one of many shareholders of a private company, the constitution or memorandum and articles of association should be reviewed for the purpose of review of the rights attaching to classes of shares, and any restrictions on the transfer of shares.

8.5. Instructions should be sought as to the company landscape post the testator's death – what benefit does the testator seek to convey to the beneficiary by a gift of private company shares -

a. If the intention is for the beneficiary to have a right to receive dividends, consider whether any special rights attaching to the shares depends on the exercise of a discretion by the directors, and whether any other steps

should be taken to improve the beneficiary's position;

b. If the intention is for the beneficiary to receive a return of capital on winding up, whether any other steps need to be taken before the testator's death;

c. If the intention is to give the beneficiary control, or at least a vote at shareholder's meetings, whether a gift of the shares achieves the intended purpose in view of any rights attaching to the testator's shares, the rights attaching to the shares given to other parties, and the continuing directors.

8.6. If the testator's shares are part of a larger structure, a structure diagram should be obtained. Instructions should be sought as to whether the testator wishes for the solicitor to rely on a summary of the structure provided by the client or the accountant, or to obtain documents and report on the structure.

9. PARTNERSHIP INTERESTS

9.1. If a testator wishes to give his or her interest in a partnership, obtain a copy of the partnership agreement to ascertain the procedure on death of a partner. Subject to the terms of the partnership agreement, s 33 of the *Partnership Act* 1892 (NSW) provides that every partnership is dissolved on the death or bankruptcy of a partner. This may well mean winding up the partnership and distribution of the assets of the partnership (or the proceeds of sale thereof).

9.2. Consideration should be given to the terms of the partnership agreement as to calculation of any exit payment, and as to exit strategies during the client's lifetime.

10. BUSINESS INTERESTS

10.1. Where a testator operates a business through a company, a gift of shares in the company is part of the means by which a testator may enable a beneficiary to receive the benefit of the business after the testator's death.

10.2. Instructions should be sought as to the arrangements for continuation of the business after the testator's death – appointing responsible persons to management positions. But this may be outside the scope of the instructions.

10.3. If a business is operated by a testator as a sole trader it may be difficult for value from the business to be passed on to beneficiary by will. Business succession planning may involve consideration of either transitioning the business to a corporate entity, giving the beneficiary a role in the business during the testator's

lifetime, or wind up or sale of the business during the testator's lifetime.

11. TRUST INTERESTS

11.1. A copy of the trust deed should always be obtained.

11.2. Section 4 of the *Succession Act* 2006 (NSW) provides:

> "(1) A person may dispose by will of property to which the person is entitled at the time of the person's death.
>
> …
>
> (5) A person may not dispose by will of property of which the person is trustee at the time of the person's death."

11.3. The effect of s4(5) of the Act is that trust interests cannot be disposed of by will except where either permitted by s 37 of the Act (exercise of a power of appointment over trust property) or s 4(3) of the Act (where the trust property is paid or transferred to the personal representative after the person's death).

11.4. If a testator wishes to make a gift of the income or capital of a trust consideration should be given to the following options:

a. Causing the trustee to make the capital or income distribution, after consideration of tax consequences, during the testator's lifetime.

b. Appointment of a new trustee.

c. Appointment of new directors of a corporate trustee and a gift of the shares in the trustee company.

d. Succession to any appointor power given in the trustee.

12. SUPERANNUATION INTERESTS

12.1. Section 4(3) of the *Succession Act* 2006 (NSW) provides:

> "(3) A person may dispose by will of property to which the person's personal representative becomes entitled, in the capacity of personal representative, after the person's death."

12.2. The effect of s 4(3) of the Act is that superannuation interests can be disposed of by will where the superannuation is paid to the personal representative after the testator's death.

12.3. Many superannuation trust deeds permit the payment of a member's death benefit to a death benefits dependant, or to a member's legal personal representative.

12.4. If the testator wishes for his or her superannuation death benefits to be paid to his or her estate:

a. He or she should make a binding death benefit nomination, having regard to the requirements of the trust deed for validity of such nominations (including any requirements that they be made within 3 years of death);

b. He or she should state in their wills any intention that the superannuation be paid or applied in a particular way.

12.5. In the absence of a binding death benefit nomination, the beneficiary of the death benefit depends on the exercise of a discretion by the trustee of the superannuation fund, applying the terms of the fund trust deed.

12.6. There is authority in other states that an administrator to whom Letters of Administration has been granted has a fiduciary duty to apply for a deceased person's superannuation to be paid to his or her estate: *McIntosh v McIntosh* [2014] QSC 99; *Burgess v Burgess* [2018] WASC 279 and *Gonciarz v Bienias* [2019] WASC 104.

12.7. The same considerations have been held to apply to an executor: *Brine v Carter* [2015] SASC 205. The rationale for applying such principles to executors (in contrast to administrators) is, with respect, not as clear particularly where a testator names his or her executor with knowledge (express or imputed) that he or she may be entitled to be paid the superannuation death benefit as a death benefits dependent.

12.8. Where a deceased person's superannuation is held by a retail or industry fund, the executor or administrator cannot do anything more than apply for payment of the death benefit to the estate, complete the necessary paperwork, and await the outcome of the fund's decision.

12.9. Where a deceased person's superannuation is held in a self-managed super fund, the executor or administrator will need to consider appointing himself or herself as either a trustee or a director of a corporate trustee of the fund, in order to make a decision as to the payment of the death benefit.

Death benefit nominations

12.10. A copy of the superannuation trust deed should always be obtained before attempting to draft a binding death benefits nomination. Where there is a corporate trustee, an ASIC search should be obtained for the purpose of consideration of the directors and shareholders.

12.11. Any binding death benefit nomination would need to be in accordance with the terms of the fund trust deed.

12.12. The legislative context in which binding death benefits nominations are permitted is as follows.

a. Section 55A of the *Superannuation Industry (Supervision) Act* 1993 (Cth) prohibits the governing rules of a regulated superannuation fund against permitting a fund member's benefits to be cashed after the member's death otherwise than in accordance with the standards prescribed for the purposes of section 31 of the Act.

b. Section 31 of the Act provides that the regulations may prescribe standards applicable to the operation of regulated superannuation funds and to trustees and RSE licensees of those funds.

c. Section 59 of the Act prohibits certain discretions under the governing rules of an entity from being exercised by a person other than a trustee of the entity, except in particular circumstances. But s 59 expressly does not apply to self managed super funds.

d. Reg 6.17A of the *Superannuation Industry (Supervision) Regulations* 1994 (Cth) provides:

> "(1) For subsections 31(1) and 32(1) of the Act, the standard set out in subregulation (4) is applicable to the operation of regulated superannuation funds and approved deposit funds.
>
> (4) Subject to subregulation (4A), and regulations 6.17B, 7A.17 and 7A.18, if the governing rules of a fund permit a member of the fund to require the trustee to provide any benefits in accordance with subregulation (2), 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) For paragraphs (4)(c) and (5)(b), 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."

12.13. The High Court of Australia delivered judgment in *Hill v Zuda Pty Ltd* (2022) 401 ALR 624; [2022] HCA 21 on 15 June 2022. The Court determined that reg 6.17A does not apply to self managed super funds. The Court (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) said at [27] – [32]:

(a) reg 6.17A had two distinct and complimentary purposes:

i. every regulated superannuation fund to which it applies must comply with it (in reference to ss 31, 32 of the Act);

ii. a rule of a regulated superannuation fund to which it applies is invalid if that rule purports to confer a discretion on a member that does not comply with reg 6.17A.

(b) the two purposes of reg 6.17A – enabling members to compel trustees to distribute death benefits in accordance with their wishes and ensuring that members have sufficient information – are inapt to administration of an SMSF.

12.14. Thus, provided death benefits nominations are in accordance with the superannuation trust deed, they will be valid nominations notwithstanding the apparent requirement in reg 6.17A of the SIS Regulations that they be renewed every 3 years.

13. TRUST POWERS GENERALLY

13.1. Almost all Wills contain a suite of general trust powers. They are there to give the executor or trustee additional powers to make the administration of the estate more efficient, to deal with the trust assets, or apply capital or income for the benefit of beneficiaries.

13.2. In the absence of express powers in the Will, an executor trustee has powers given by legislation. The extent to which those powers are or may be adequate depends on what is anticipated or in fact occurs in the administration of the estate and any continuing trusts.

13.3. The *Trustee Act* 1925 (NSW) provides the following powers:

a. Section 14: A trustee may, unless expressly forbidden by the instrument creating the trust, invest trust funds in any form of investment and at any time vary any investment.

b. Section 14D(1): The trustee may concur in any scheme or arrangement where company shares are held by the estate or the trust.

c. Section 14DA: Subject to the instrument creating the trust, the trustee may purchase a dwelling house for a beneficiary to use as a residence or enter into any other agreement or arrangement to secure for a beneficiary a right to use a dwelling house as a residence, but only if to do so would not unfairly prejudice the interests of other beneficiaries.

d. Section 36: The trustee may lease property held on trust (in the absence of a power to manage the land) but for a term not exceeding three years.

e. Section 42A: Where funds are held in trust for an adult beneficiary, the trustee may pay the beneficiary, or otherwise apply the whole or any part of the income of the property for or towards the maintenance, education or advancement of the beneficiary, subject to contrary intention expressed in the instrument.

f. Section 43(1): Where trust property is held in trust for an infant, the trustee may pay to the parent or guardian of the infant, or to the person with whom the infant is for the time being residing, or to apply the income for or towards the maintenance, education or benefit of the infant.

g. Section 44: The trustee may apply capital, not exceeding one half of the value of the property or share of the beneficiary, for the advancement or benefit of the beneficiary or where the person is an infant for the maintenance, education, advancement or benefit of that person but not so as to prejudice any person entitled to any prior life or other interest.

h. Section 46: The trustee may appropriate any part of the property subject to the trust in or toward satisfaction of a legacy or of any share or interest in the property of the estate and to fix the value of the respective parts of the property to be appropriated subject to obtaining a valuation, provided that:

   i. the appropriation shall not be made so as to effect prejudicially any specific gift, devise or bequest;

   ii. the appropriation is made with the consent of the beneficiary and having regard to the rights of any unborn or unascertained beneficiaries.

j. Section 49(1)(d): The trustee may compromise, abandon or settle any debt, account or claim against the estate or made by the estate.

k. Section 53: Instead of acting personally, the trustee may employ and pay an agent, whether a bank, billing society, credit union or an Australian legal practitioner, stock broker or other business, to transact any business or do any act required to be transacted or done in the execution of the trust or in the administration of the estate and to pay all charges and expenses so incurred.

13.4. Executors also have the power under Section 153 of the *Conveyancing Act* 1919 (NSW) to sell or mortgage the real estate of the deceased person for the purposes of the administration.

13.5. The most common powers that are needed in a Will beyond those afforded by statute:

a. The power of sale, where sale might not strictly be necessary for the purposes of administration.

b. To apply income or capital for the benefit of a beneficiary for the maintenance, education, advancement or benefit of a beneficiary beyond the power permitted by the *Trustee Act*, particularly where continuing trusts are involved.

c. To make loans to beneficiaries, with or without security, interest and other terms.

d. To maintain or improve real estate.

e. To maintain accounts in a particular way if that is necessary.

f. To carry on a business or partnership and to use assets of the estate for that purpose.

13.6. Additional powers may be necessary where there are continuing trusts.

13.7. As a comparison, the NSW Trustee has the powers set out in sections 16 and 17 of the *NSW Trustee and Guardian Act* 2009 (NSW).

14. CLASS GIFTS

14.1. In the absence of specific provision in the Will, class closing rules may operate to cause a class gift to close upon either the date of death or the first member of the class obtaining an interest vested in possession: *Andrews v Partington* (1719) 29 ER 610; *Crane v Crane* (1949) 80 CLR 327 at 335-6.

14.2. If the gift is not conditional, subject to contrary provision in the will the class will close at the date of death (or perhaps 30 days after the date of death).

14.3. If the gift is conditional on attaining a particular age, subject to contrary provision in the will, the class will close on the first beneficiary attaining the age.

14.4. If the gift is an interest in the remainder after a life interest, subject to contrary provision in the Will, the class will close on the death of the life tenant.

14.5. However, these rules are not universal, there are sometimes other arguments of construction, and it is usually better not to have to rely upon such unspoken rules.

14.6. A well drafted class gift will state the date upon which the class is to close.

14.7. Accrual or substitution provisions should also be made clear.

14.8. Where there is a gift of all, or the residue of a deceased person's estate, and part of the gift fails, the part that fails passes to the part that does not fail, and if more than one part, to the other parts proportionately: s 42(2) *Succession Act* 2006 (NSW) (provided the will was made after commencement).

15. LIFE INTERESTS AND RIGHT OF RESIDENCE

15.1. The following aspects need to be considered when drafting a life interest or right of residence:

a. Whether a life interest is to be flexible, with the beneficiary having the right to cause the executor trustee to sell real estate and acquire substitute property or direct that funds be used for an accommodation bond or some

other payment to secure accommodation and, if so, how transaction costs are to be borne.

b. Whether the right is to be personal to the beneficiary (a right of residence) or whether the beneficiary is to have the right to vacate the real property and direct the executor to lease it out and pay the income to the beneficiary (a life interest).

c. Responsibility for outgoings, repair and maintenance and insurances.

15.2. If the estate is to have an ongoing obligation to pay outgoings or the costs of repair and maintenance, a fund must be established by the Will to meet those obligations.

15.3. A well drafted right of residence or life interest will make specific provision for these matters. In the absence of specific provision, there may be litigation concerning the rights and obligation attaching to the right of occupation or life interest.

15.4. The law on these issues (absent specific provision in the Will) was summarised by Powell J in *Binetter v Dunkel* (NSWSC unreported 28 May 1993 at 32) cited with approval by Bryson J in *Hatzantonis & Anor v Lawrence; Cox v Lawrence* [2003] NSWSC 914 at [17] and referred to by Lindsay J in *Estate of Gilmore JA, deceased* [2014] NSWSC 1263 at [30] as follows:

> "There appears, over the years, to have developed a rule of construction that, in the absence of a contrary intention, a devise of the "free use" or the "use and occupation" of land passes an estate in the land … whereas a direction to trustees to permit a named person to reside rent free, or an option to reside, is to be construed as a mere personal licence…
>
> The general rule would seem to be that, as a life tenant is entitled to the rents and profits of the subject land, he is also liable to pay the annual charges, as, for example, rates and taxes …but, quaere insurances …but that, in the absence of an express duty to repair …or liability for permissive waste, is not liable to repair …
>
> Although - since, prima facie, a "right to reside" is not to be equated to a life tenancy - one might be disposed to think that, in a case in which there is but a "right to reside", recurrent outgoings would therefore be a charge upon the income of residue, there appears to have developed a practice that, during such time as the right of residence is exercised such outgoings are payable by the person exercising that right …"

15.5. The proposition that a life tenant has an obligation to pay council, water and sewerage rates and taxes in respect of real estate during the tenure of the interest unless there is a contrary intention in the Will was referred to in R Jennings & J C Harper, *Jarman on Wills*, Sweet & Maxwell London 1951 at p1188 and D M Haines, *Construction of Wills in Australia*, Lexisnexis Butterworths 2007 at [23.9]. In the Haines text at [23.11-23.14] it is said that a life tenant has no obligation to repair (but may be liable in the event of waste) or to insure.

15.6. As I have indicated, a well drafted right of residence or life interest will make specific provision for these matters so that determination by a Court in unnecessary.

16. CHARITABLE GIFTS

16.1 If a testator wishes to make a gift to a charity it is important to identify the correct charity in the Will. This information can be obtained in many cases by review of a well known charity's website, or direct contact to the organisation. The Australian Charities and Not for Profit Commission website (www.acns.gov.au/charity/charities) also has a search function.

16.2 Gifts to incorporated associations should be fairly straightforward to administer subject to a receipts clause in the Will.

16.3 Gifts to unincorporated associates are more problematic. Administration is simplified by s 43 of the *Succession Act* 2006 (NSW) which provides that a gift to an unincorporated association is a gift in augmentation of the general funds of the organisation, and that the receipt of the treasurer or like officer, is an absolute discharge for payment.

16.4 A testator can delegate the power to select amongst charitable objects; *Tatham v Huxtable* [1950] HCA 56; 81 CLR 639 at 653 per Kitto JJ; *Lutheran Church of Australia South Australia District Incorporated v Farmers' Co-operative Executors and Trustees Ltd* (1970) 121 CLR 628 at 639-340 per Barwick CJ, 654 per Windeyer CJ; *Ryder v Attorney General (NSW)* [2004] NSWSC 1171.

16.5 The four recognised categories of charitable objects include: relief of the poor aged and impotent, advancement of education, advancement of religion, and other purposes beneficial to the community: *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

16.6 A gift to a named charity is a valid charitable trust (*Coshott v Royal Society for the Prevention of Cruelty to Animals* [1996] 40 NSWLR 446).

16.7 If the text of a Will is capable of a meaning which supports the finding of charity, that construction should ordinarily be adopted: *Taylor v Taylor* (1911) 10 CLR 218 at 225, *Estate Polykarpou; re a Charity* [2016] NSWSC 409 at 63.

16.8 J D Heydon & M J Leeming, *Jacobs Law of Trusts in Australia 8th Edition*, Lexisnexis at [11.05] provides that non charitable purpose trusts have been found to fail because they are too uncertain, because they amount to an attempt to delegate the power of testamentary disposition, or because they infringe the rule against non-charitable trusts of perpetual duration.

16.9 The rationale for the failure of non-charitable purpose trusts has been variously stated – there must be some person to enforce it, or there must be an identifiable beneficiary: *Morice v Bishop of Durham* (1804) 9 Ves 399; (1805) 10 Ves 522.

Cy pres schemes

16.10 There is jurisdiction to apply property given for charitable purposes cy-pres where the original purposes of the trust have become impossible to carry out, if there is a general charitable intention.

16.11 A general charitable intention means an intention which, whilst not going beyond the bounds of the legal conception of charity, is more general than a bare intention that an impracticable direction be carried into execution as an indispensable part of the trust declared: *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1940) 63 CLR 209 per Dixon and Evatt JJ at 225.

16.12 Section 23 of the *Charitable Trusts Act* 1993 (NSW) also provides that a Trust is not invalidated by the inclusion of both charitable and non-charitable purposes.

16.13 The circumstances in which cy-pres schemes may be implemented were extended by the *Charitable Trusts Act* 1993 (NSW) ("the *Act*") which commenced on 15 April 1994. The *Act* applies to a trust created before or after the commencement of the *Act*, except as provided by the *Act*.

16.14 Section 9(1) of the *Act* provides:

> "The circumstances in which the original purposes of a charitable trust can be altered to allow the trust property or any part of it to be applied cy pres include circumstances in which the original purposes, wholly or in part, have since they were laid down ceased to provide a suitable and

effective method of using the trust property, having regard to the spirit of the trust."

16.15 Section 10(2) of the *Act* provides that a general charitable intention is to be presumed unless there is evidence to the contrary in the instrument creating the charitable trust.

16.16 But s10(2) of the *Act* is a statutory presumption that a charitable intention is general, not that there is a charitable intention: *Public Trustee v Attorney-General of New South Wales & Ors* (1997) 42 NSWLR 600 per Santow J.

16.17 Academic texts debate and speculate whether "cy pres" is derived from the Norman French "ici pres" meaning "near here" or "si-pres" meaning "so near" or "as near". Considerations of proximity (to the original purpose), usefulness and practicability have been said to be relevant to the choice of scheme. L A Sheridan & V H T Delaney, *The Cy-Pres Doctrine*, Sweet & Maxwell London, 1959 at p 5; H Picarda, The Law and Practice Relating to Charities 4th Edition, Bloomsbury Professional, 2010, p437, 653; *Re Fitzpatrick* (1984) 6 DLR (4th) 644 at 653.

Cy pres scheme – work around

16.18 Whilst it may be very interesting for lawyers to litigate, an effective substitution clause will remove the need for consideration of a cy pres scheme in the event of failure of a charitable (or non charitable) gift: *Melba Support Services Inc v Bell* [2014] VSC 425 at [59] and the other cases cited in Dal Pont at [15.5].

17. RESIDUE

17.1. Section 31 of the *Succession Act* 2006 (NSW) has the effect that if a disposition of property fails it forms part of the residue.

17.2. This highlights the importance of disposing of the whole of the residue and understanding the accrual and substitution provisions in the *Succession Act* 2006 (NSW).

17.3. Section 41 of the *Succession Act* 2006 (NSW) has the effect that a gift to the testator's issue where the issue do not survive the testator by 30 days passes to the issue of the original beneficiary, subject to contrary intention in the Will.

17.4. Section 41(5) provides that a gift "as joint tenants" is a contrary intention such that the statutory substitution would not operate.

17.5. Section 42(2) provides that in the event of failure of a gift of fractional parts of all, or the residue of the testator's estate, the part that fails passes to the part which does not fail, and if there is more than one part that does not fail, to all those parts proportionately.

17.6. Gifts to a large number of residuary beneficiaries, or to children who have their own issue, are thus likely to be saved by legislation in the event of failure.

17.7. If some other outcome is intended, specific provision must be included in the Will.

17.8. If the residue is given to one or a small number of non-children beneficiaries, substitution clauses should always be considered.

17.9. There have been a number of cases relatively recently dealing with construction of a substitution clause which operates where a beneficiary "has already died or does not survive me or dies before attaining a vested interest": *Application by Elizabeth Marie Robinson* [2015] NSWSC 1387; *Serwin v Dolso* [2020] NSWSC 370 and *Kinloch v Manzione* [2022] ACTSC 76.

17.10. In all three decisions the Court determined that a residuary beneficiary survived the deceased by 30 days but having died before the administration of the estate was complete, had not attained "a vested interest". In those circumstances, the substitute beneficiary named in the respective Wills received the entitlement of the original beneficiary. The arguments in favour of the alternative construction, that survival by 30 days results in a vested interest, are as follows.

17.11. Both *Application of Elizabeth Marie Robinson* and *Serwin v Dolso* appear to have been argued on the basis that the distinction between a gift being "vested in interest" and being "vested in possession" is significant.

17.12. "Vested in possession" means a present right of present enjoyment, whereas "vested in interest" means a present right of future enjoyment: A Learmonth, C Ford, T Fletcher, J Clark, K Shuman, *Theobald on Wills 19th Edition*, Sweet & Maxwell, 2021 at 34-001.

17.13. The word "vest" prima facie encompasses "vested in interest" rather than "vested in possession" subject to the context of the will (*Marks v Trustees Executors and Agency Co Ltd* [1948] HCA 38; (1948) 77 CLR 497 at 507; G E Del Pont Interpretation of Testamentary Documents, LexisNexis Butterworths Australia 2019 at paragraphs 14.4 and 14.5). This principle was also considered in *Austin v Wells* [2008] NSWSC 1266 but in that case the Court decided against the

presumption because to do so would result in a partial intestacy.

17.14. In the context of gifts of residue both interests vested in interest and vested in possession are present rights – a right to have the administration of an unadministered estate completed is no less vested than a right to particular property at the conclusion of that administration: *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 (1964) 112 CLR 12. The right to have an estate administered is a chose in action capable of assignment: *Re Leigh's Will Trusts* [1970] Ch 277. The right is also property which would vest in the Official Receiver on bankruptcy pursuant to the *Bankruptcy Act* 1966 (Cth): *Official Receiver in Bankruptcy v Schultz* [1990] HSC 45; (1990) 170 CLR 306.

17.15. In A Learmonth, C Ford, J Clark and J Martyn, *Williams Mortimer & Sunnucks on Executors Administrators and Probate, 21st edition*, Thomson Reuters 2018 at [35-05] the learned authors wrote: "It should be noted, however, that although a beneficiary does not own or have any interest in any specific asset in the hands of the executor or administrator, the residuary legatee has a composite right to have the estate properly administered and to have the residue (if any) paid to him as and when the administration is complete".

17.16. In T Jarman, A Treatise on Wills (CP Sanger) 7th Edition, Sweet and Maxwell,1930 at Ch XXXVII (I)(iii) p 1327- 1328 the learned authors said the meaning of "vested" is "vested in interest" subject to exceptions including - "If the testator has in other parts of the will treated the property devised or bequeathed as belonging to the devisee or legatee, and spoken of his share therein before the specified period, or if he has given over the property in case the devisee or legatee dies before the time named without issue, from which it is to be inferred that he is to retain it in every other case, the natural conclusion is that the word is to be read as meaning "vested in possession", or "indefeasibly vested", and that the gift is vested, liable only to be divested on a particular contingency. An accruer before the time named, or before attaining a "vested interest", *simpliciter*, although perhaps indecisive by itself, tends strongly to lead to the same conclusion". (The cited passage forms part of the Chapter: Devises and Bequests, whether vested or contingent.)

17.17. Fundamental to *Application of Elizabeth Marie Robinson* and *Serwin v Dolso* was a concern that meaning had to be attributed to the words "dies before attaining a vested interest" (*Application by Elizabeth Marie Robinson* at [28] and *Serwin v Dolso* at [75]). In *Serwin v Dolso* the Court at [74](4) said that the words "before attaining a vested interest" would have been unnecessary if the testator's intention was to vest the gift on the date of death. At paragraphs [75] – [79] the Court set out three alternative meanings for the words "before attaining a vested interest" and concluded that those words meant "before the estate is fully administered and available to be distributed".

17.18. But there are a variety of ways in which a person might survive a testator but fail to attain a vested interest:

(a) Where a testator survives a will-maker but dies before the expiry of a statutory survivorship period such as the 30 day period specified in s 35 *Succession Act* 2006 (NSW).

(b) In the event of forfeiture or disclaimer – although s 139 of the *Succession Act* 2006 (NSW) provides, in the event of intestacy, in the event of disclaimer or disqualification of interest for any reason, a person will be treated as having predeceased an intestate, there is no equivalent provision with respect to gifts made by Wills. There is some authority that a disclaimer operates so that the disclaiming person is non-existent (eg *In the Estate of Simmons (deceased)* (1990) 56 SASR 1 at [14]).

17.19. Accepting that a residuary beneficiary attains after the death of the testator a right vested in interest to have the estate administered, as a matter of general principle, such rights should not be found to be divested absent clear language to that effect: *Kenna v Conolly* (1938) 60 CLR 583 at 596 per Dixon J.

17.20. The drafting problem that the above issue highlights is the tension between being too prescriptive (specifying all of the instances where a gift might fail) against not being prescriptive enough (in case one of the events of failure of a gift is not caught by the substitution provision).

17.21. A matter for discussion is whether a simple substitution clause (eg, "in the event that the gift in clause X does not take effect" or "in the event that the gift in clause X fails") adequately addresses the issue.

18. FAMILY PROVISION

18.1. In New South Wales there are certain categories of eligible persons who may apply to the Supreme Court of New South Wales for an order for provision or additional provision from a deceased person's estate, namely:

(a) a person who was the spouse of the deceased person at the time of the deceased person's death,

(b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death,

(c) a child of the deceased person,

(d) a former spouse of the deceased person,

(e) a person—

(i) who was, at any particular time, wholly or partly dependent on the deceased person, and

(ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member,

(f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

18.2. I have addressed the categories of eligibility and general principles which might apply to each category in an earlier paper "Eligibility to Make a Family Provision Claim" presented for the Succession Law Conference Bowral on 4 March 2023, which is available on my Chambers website.

18.3. Under the *Family Provision Act* 1982 (NSW), the Court applied a "two-stage" process as described in *Singer v Berghouse* [1994] HCA 40; 181 CLR 201 at 208-211 per Mason CJ, Deane and McHugh JJ:

> "The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. [**the jurisdictional question**]
>
> The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. **[the discretionary question**]".

18.4. In *Steinmetz v Shannon* [2019] NSWCA 114:

a. At [40] White JA acknowledged the weight of authority that endorses a Judge's bolstering his or her view as to whether an applicant has been left without adequate provision by reference to what the community would expect. But at [44] His Honour said:

> "But unlike the reasonable man on the Clapham omnibus or the Bondi tram, or the reasonable and fair-minded lay observer asked to consider the impartiality of a judge, there is no utility in invoking a community standard or expectation against which the adequacy of provision is to be judged. I agree with Brereton JA that if one is forced to use concepts of "moral duty" or "community standards", the former is preferable. The indication of either expresses a conclusion about the judge's own evaluative assessment as to whether the provision made for the applicant was adequate for his or her proper maintenance and advancement in life (and, where relevant, education)."

b. At [109] Brereton JA said – "Some of the passages to which I refer use the traditional concept of "moral duty" rather than the more fashionable one of "community standards". For my part, I prefer the former…"

18.5. The *Succession Act* 2006 (NSW) introduced, at section 60(2), a list of matters which the Court may take into account in determining claims, the last of which is "any other matter which the court considers relevant". Some of these matters were drawn from section 9(3) of the *Family Provision Act* 1982 (NSW). As cited in judgments by Hallen J (including for example, *Hinderry v Hinderry* (2016) NSWSC 780 at [241], the s60(2) matters have been described by Basten JA in *Andrew v Andrew* [2012] NSWCA 308; (2012) 81 NSWLR 656 at [37], as "a multifactorial list", and by Lindsay J in *Verzar v Verzar* [2012] NSWSC 1380 at [123], as "a valuable prompt".

18.6. Because of the notional estate provisions in Part 3.3 of the *Succession Act* 2006 (NSW) there are limited steps a testator wishing to prevent an eligible person from making a claim for provision can take.

18.7. Changing domicile and moving all of the testator's assets outside of the jurisdiction is not a realistic (or sensible) option.

18.8. Nor could I ever recommend a testator divest themselves of all of their assets more than three years prior to their death.

18.9. I tend to a more moderate approach:

a. If a testator wishes to make gifts during their lifetime (and more than three

years prior to their death), subject to retaining for themselves sufficient resources upon which to live, there is nothing stopping them from doing that, although the effect of the notional estate provisions in NSW should be explained.

b. A testator may or may not want to make adequate provision for all eligible persons. The solicitor's role is to advise testators of the existence of the family provision legislation, and allow the testator the opportunity to make a decision as to their testamentary dispositions. In many cases it is impossible to provide adequately for all eligible persons. One solution may be discussion between family members about expectations.

c. Where proceedings are inevitable, consider documentation of:

   i. The testator's reasons for making the provision that he or she did, both positive and negative;

   ii. In the event estrangement or other conduct, or eligibility is expected to be an issue, set out factually, chronologically, supported by documents where possible and without exaggeration, the events which occurred;

   iii. The considerations taken into account in coming to a reasoned decision about testamentary dispositions.

19. S 100 SUCCESSION ACT 2006 (NSW) STATEMENTS AND OTHER TESTATOR EVIDENCE.

19.1. Section 100(2), (5) and (7) of the *Succession Act* 2006 (NSW) provide as follows:

> (2) In any proceedings under this Chapter, evidence of a statement made by a deceased person is, subject to this section, admissible as evidence of any fact stated in it of which direct oral evidence by the deceased person would, if the person were able to give that evidence, be admissible.
>
> (5) Where a statement made by a deceased person during the person's lifetime was contained in a document, the statement may be proved by the production of the document or, whether or not the document is still in existence, by leave of the Court, by the production of a copy of the document, or of the material part of the document, authenticated in such manner as the Court may approve.
>
> (7) For the purpose of determining questions of admissibility of a statement under this section, the Court may draw any reasonable inference from the circumstances in which the statement was made or from any other circumstances, including, in the case of a statement contained in a document, the form or content of the document.

19.2. In *Koellner v Spicer* [2019] NSWSC 1571 at [70] – [72], Hallen J set out the principals relevant to such a statement:

> 70 Many years before the inclusion of the section, Gibbs J had written in Hughes v National Trustees Executors & Agency Company of Australasia Ltd (1979) 143 CLR 134, at 150; [1979] HCA 2:
>
> > *"… in Australia for many years the courts have admitted evidence of statements made by a testatrix explaining why she made her will as she did. In taking this course the courts have no doubt been influenced by a desire to be informed of the reasons which actuated the testatrix to make the dispositions she had made, and by the consideration that in cases of this kind a claim is made against the estate of a person who is deceased and can no longer give evidence in support of what she has done. It is doubtful whether, in most cases, such evidence is relevant, but usage justifies its reception. The question is for what purpose it may be used, once admitted. The balance of authority clearly favours the view that it is admissible only to provide some evidence of the reason why the testatrix has disposed of her estate in a particular way, and that it is not admissible to prove that what the testatrix said or believed was true: Re Jones (1921) 21 SR (NSW) 693, at p 695; In re Smith (1928) SASR 30, at p 34; In the Will of Joliffe (1929) St R Qd 189, at p 193; Re G. Hall, deceased (1930) 30 SR (NSW) 165, at p 166; In re Green, deceased; Zukerman v Public Trustee (1951) NZLR 135, at pp 140-141 (a case decided before the amending legislation was enacted in New Zealand). This view was accepted as correct by Taylor J. in Pontifical Society for the Propagation of the Faith v Scales (1962) 107 CLR, at p 24; Taylor J. dissented in the result in that case but there is nothing to suggest that his opinion on this point differed from that of the majority of the Court."*
>
> 71 In the Will, the deceased appears to have weighed the testamentary claims upon her in an apparently sensible way, and by considering the principal persons who may have had a claim on her bounty, being the Plaintiff and the Defendant. It appears to be a case where she did "expose to the world the delicate, and perhaps indefinable, relations that exist[ed] within [her] family circle" and where she "felt quite justified from [her] own standpoint in limiting [her] family benefit, and for reasons which sufficiently appealed to [her], but which no one else could mentally measure or appreciate": Nock v Austin (1918) 25 CLR 519; [1918] HCA 73, per Isaacs J, at 527.
>
> 72 However, whilst the Court will consider any explanations given by the deceased in the Will, or elsewhere, for excluding a particular person as a beneficiary, such explanations do not relieve the Court from engaging in the enquiry required by the Act: Slack-Smith v Slack-Smith [2010] NSWSC 625, per Ball J, at [27]. What an explanation by the deceased may do is cast light on the relationship between her, or him, and that person, at least from the deceased's perspective.

19.3. In *Estate Whiteway* [2019] NSWSC 266, Lindsay J said at [74]:

> "Although a "statement of intention" may have been prepared with a view to impeding a family provision application it can, axiomatically, have a contrary effect: (a) if identified reasons for the making of a will prove to have had an erroneous factual foundation; or (b) if, between the time the will was made and the time a family provision application falls to be determined, circumstances material to a determination of the application have changed."

19.4. In *Slack v Rogan; Palffy v Rogan* (2013) 85 NSWLR 253 at 284 – 285 [127] White J said:

> "In my view, respect should be given to a capable testator's judgment as to who should benefit from the estate if it can be seen that the testator has duly considered the claims on the estate. That is not to deny that s 59 of the Succession Act interferes with the freedom of testamentary disposition. Plainly it does, and courts have a duty to interfere with the will if the provision made for an eligible applicant is less than adequate for his or her proper maintenance and advancement in life. But it must be acknowledged that the evidence that can be presented after the testator's death is necessarily inadequate. Typically, as in this case, there can be no or only limited contradiction of the applicant's evidence as to his or her relationship and dealings with the deceased. The deceased will have been in a better position to determine what provision for a claimant's maintenance and advancement in life is proper than will be a court called on to determine that question months or years after the deceased's death when the person best able to give evidence on that question is no longer alive. Accordingly, if the deceased was capable of giving due consideration to that question and did so, considerable weight should be given to the testator's testamentary wishes in recognition of the better position in which the deceased was placed: Stott v Cook (1960) 33 ALJR 447 per Taylor J at 453–454 cited in Nowak v Beska [2013] NSWSC 166 at [136]. This is subject to the qualification that the court's determination under s 59(1)(c) and s 59(2) is to be made having regard to the circumstances at the time the court is considering the application, rather than at the time of the deceased's death or will."

20. MUTUAL WILLS AGREEMENTS

20.1 If at all possible mutual wills agreements should be avoided. They may be difficult to enforce, and they may bind a testator to a testamentary outcome in the future which is not suitable for their future circumstances.

20.2 In *Hussey v Bauer* [2011] QCA 91, Chesterman JA summarised the principles relevant to mutual will agreements at para [29] as follows:

a. Mutual wills arise when two persons agree to make wills in particular terms and agree that those wills are irrevocable and that they will remain unaltered.

b. Substantially similar, even identical, wills are not mutual wills unless there is an agreement that they not be revoked.

c. The mere making of wills simultaneously and the similarity of their terms are not enough taken by themselves to establish the necessary agreement.

d. A will is, as a matter of probate law, revocable. But the revocation of a mutual will ordinarily results in the imposition of particular obligations (citing Dixon J in *Birmingham v Renfrew* (1937) 57 CLR 666 at 689):

> "It has long been established that a contract between persons to make corresponding wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable. It is true that he cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligation to the property. *The effect is, I think, that the survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will*."

20.3 A mutual wills agreement must be proved by the party asserting it on clear and satisfactory evidence, on the balance of probabilities: *Re Cleaver (deceased); Cleaver v Insley & Ors* [1981] 2 All ER 1018.

20.4 There must be an intention to create legal relations, and determination of that issue requires an objective assessment of the state of affairs between the parties as distinct from the identification of any subjective reservation or intention: *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at [25], cited by Sackar J in *Campbell v Campbell* [2015] NSWSC 784 BC201505378 at [81].

20.5 In *Watson v Foxman* (1995) 49 NSWLR 315, McLelland CJ in Eq said at 319 that:

> "… human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

> Each element of the cause of action must be proved to the reasonable satisfaction of the court, which means that the court "must feel an actual persuasion of its occurrence or existence". Such satisfaction is "not … attained or established independently of the nature and consequence of the fact or facts to be proved" including the "seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding": *Helton v Allen* (1940) 63 CLR 691 at 712."

20.6 In *Hubbard v Mason* (NSWSC, 2037/97, 9 December 1997, unreported, BC9706574), Santow J referred (at p27) to the following factors which may be relevant proof of an oral mutual wills agreement:

a. To how many people the statement was made.

b. Whether there is a statement in writing.

c. The substantial consideration offered for the promise.

d. The number of times the statement was made.

e. The language used by the parties.

f. The context, formal or informal, in which the promise was made.

g. The nature of the relationship between the parties.

h. The certainty of the terms.

20.7 If a mutual wills agreement must be attempted, the agreement must be specific as to the property covered by the agreement, whether either party may revoke the agreement by notice to the other whilst both are alive, and whether there are any restrictions on either party disposing of their assets whilst they are alive (other than for the purpose of meeting ordinary living expenses).

20.8 Oral mutual will agreements should be discouraged because their terms are uncertain.

20.9 Whilst there have been some examples of oral mutual wills agreements, testamentary promises can also be relevant to estoppel claims – see for example *Wild v Meduri* [2023] NSWSC 113; *Daniel v Athans* [2022] NSWSC 1712; *Robertson v Byrne* [2022] NSWSC 1713 and *Horn v GA & RG Horn Pty Ltd* [2022] NSWSC 1519.

21. SPECIAL DISABILITY TRUSTS

21.1 A special disability trust is a trust which can be used to provide for a severely disabled beneficiary in a way which may not affect their social security entitlements.

21.2 The requirements for a special disability trust are set out in Pt 3.18 of the *Social Security Act* 1991 (Cth), essentially -

a. Assets of a value of up to $781,250 (as at 1 July 2023) indexed annually are not counted towards the pension assets test; and income on the exempt asset amount is similarly excluded. Additional assets above the threshold can be settled on the trust, but they will not be exempt.

b. The primary beneficiary must be assessed as “severely disabled” and must be the sole beneficiary (subject to the contributor’s right to nominate a remainder beneficiary). The criteria for a “severely disabled” beneficiary over the age of 16 years is that the beneficiary must have a level of impairment that meets the criteria for a disability support pension or other pension on the grounds of permanent incapacity, have care needs that would qualify a sole carer for a carer payment or allowance, or be living in accommodation for people with severe disabilities, and not be working, or have any likelihood of working, in employment at or above the minimum wage for more than 7 hours per week.

c. For a sole beneficiary under the age of 16 years, the criteria for “severely disabled” is that a treating health professional has certified that because of the disability or condition the beneficiary will need personal care for 6 months or more and the personal care is to be provided by a specified number of persons; the carer is qualified under the Disability Load Assessment (Child) Determination with a rating of intense; and the carer has certified in writing that the beneficiary will require the same care or additional care in the future.

d. The trustee must hold the trust fund for the primary purpose of reasonable care and accommodation needs of the beneficiary. Discretionary spending of $14,000 per year (indexed to CPI increases from 1 July 2023) is also permitted.

e. The terms must incorporate the Model Trust Deed which is available on the Department of Social Security website: www.dss.gov.au/disability-and-carers-programs-services/special-disability-trusts

f. Annual financial statements for the trust must be prepared and audited.

g. The trustee cannot pay any immediate family member for providing care or for services provided to the principal beneficiary. Any paid care or service must be provided by an arms-length employee of the special disability trust, for example, nurse, physiotherapist, cleaning, mechanical services etc.

h. Where another party (not the principal beneficiary) benefits from expenditure that was incurred for the principal beneficiary, the expenditure is allowable where the other party's benefit was of a non-cash nature, minor and provided on a basis that is infrequent and irregular.

22. DISCRETIONARY TESTAMENTARY TRUSTS

22.1 A trust must have a trustee, beneficiaries, trust property and terms of the trust. A testamentary trust will usually contain detailed provisions about the appointment of the initial trustee, the power of appointment and removal (and/or disqualification) of trustee, the identity of the beneficiaries, the power to accumulate income or distribute income amongst the income beneficiaries, the power to distribute capital to the capital beneficiaries at or prior to the vesting date, the power to cause the trust to vest, powers of investment and powers relevant to the administration of the trust fund.

22.2 Whilst there are forms of testamentary trusts which can give the principal beneficiary various degrees of control such as discretionary powers as trustee or powers to appoint and remove the trustee or to veto trustee decisions, at its core, a discretionary testamentary trust is the settlement of the fund to be administered by a trustee in accordance with the trust obligations for the benefit of more than one beneficiary in the trustee's discretion.

22.3 No beneficiary is given an absolute interest in the fund because to give beneficiaries any absolute interests would be to defeat the reasons (asset protection and potential tax benefits) for establishing the trust in the first place.

22.4 Depending on the terms of the trust and the level of control given, an interest in a discretionary trust may be considered to be a "financial resource" for the purpose of either matrimonial property settlement proceedings under the *Family Law Act*

1975 (Cth) or in Family Provision proceedings pursuant to Chapter 3 of the *Succession Act* 2006 (NSW).

22.5 The reference to a "financial resource" in the context of s75(2)(b) of the *Family Law Act* 1975 (Cth) is a reference to "a source of financial support which a party can reasonably expect will be available to him or her to supply a financial need or deficiency": *Hall v Hall* (2006) 257 CLR 490 at 506 – 507 [54] to [55]. Whether a potential source of financial support amounts to a financial resource of a party turns in most cases on a factual enquiry as to whether or not support from that source could reasonably be expected to be forthcoming were the party to call on it.

22.6 The utility of the trustee being able to spread the income tax burden will depend on the availability of discretionary objects with lower marginal tax rates to share that burden. But in order for the structure to work there must be an intention to benefit those beneficiaries by the payment of income.

22.7 A discretionary trust structure is only going to be effective if there are sufficient assets to settle on the trust to warrant the annual accounting costs.

22.8 There would also need to be a degree of acceptance by the intended beneficiary or beneficiaries that they ought to receive testamentary benefits through the mechanism of a trust.

22.9 Disputes between trustee and beneficiaries can be costly and undermine the testator's intention of preserving trust capital.

22.10 As to whether an interest as a beneficiary of a discretionary trust could be considered to be adequate and proper provision for the purpose of Chapter 3 of the *Succession Act* 2006 (NSW), in *Bowers v Bowers* [2020] NSWSC 109, Hallen J said at [268] – [271] as follows:

> 268. "In *Belfield v Belfield* (2012) 83 NSWLR 189 at 206–207 [71]; [2012] NSWSCA 416, Campbell JA (Sackville AJA agreeing) wrote, at [71]:
>
> > "... when the FPA was enacted in 1982, it was common and well known that there were significant advantages for a person with some capital (who I will call the instigator) to arrange the setting up of a family trust, with a structure like that of the present trust deed. Common features of such trusts were that the trust was established by a settlor who was not the instigator or someone the instigator wished to benefit, the eligible beneficiaries were relatives by blood or marriage of the instigator, and there could be a discretionary allocation of income each year amongst eligible beneficiaries and ultimately a discretionary allocation of

> capital amongst eligible beneficiaries. Other common features were that there was power to alter the eligible beneficiaries, certainty achieved by provisions stating where income, and capital respectively would be distributed in default of a specific allocation of income or capital, and distribution of capital delayed for as long as permissible under the rule against perpetuities but with a discretionary power to advance the distribution date: see, for example, I J Hardingham and R Baxt, *Discretionary Trusts* (1975) Sydney, Butterworths. Those discretions were usually conferred on the trustee of the trust. Such trusts enabled an instigator who was concerned to provide for a family, usually a parent or grandparent, to arrange for assets that they had accumulated to be made available to different members of the family as the need for money presented itself. Such trusts also had the effect of lessening the impact of death duties, while death duties remained in force in Australia, and of lessening the impact of income tax on the members of a family unit considered collectively, by enabling income to be appointed to those members of a family who had a lower marginal rate of taxation."

269. In *Gregory v Hudson (No 2)* (Supreme Court (NSW), Young J, 18 September 1997, unrep), it was written, at 10–12:

> "Mr Broun QC puts that the authorities clearly show that a provision in a will that trustees might pay additional moneys out of the estate for the benefit of the applicant is not a proper provision. He cites Re Brown [1972] VR 36. In that case, after citing some decisions from New Zealand and Canada, together with the note of Re WTN C McLelland, CJ in Eq (1959) noted 33 ALJ 240, Norris, AJ said at 39, 'It is true to say that in most of the cases the fact that a discretion to increase a benefit existed was not regarded as rendering adequate a provision which otherwise was inadequate. I think, nevertheless, it is consistent with the authorities to say that such a discretion is not to be excluded from consideration in determining whether or not adequate provision has been made, and that it may in an appropriate case render adequate a provision otherwise inadequate.' He then cites Re Allen [1922] NZLR 218.
>
> Dickey on Family Provision after Death (LBC Sydney 1992) says at p 121,
>
> > 'There is some authority for the proposition that where a person is in need of provision but the quantum of provision made for him or her from a deceased's estate is wholly dependent upon the discretion of trustees, this provision is not adequate. In all probability, however, this is not an inflexible rule. In all probability the question of whether provision of this kind is adequate depends upon the particular facts and circumstances of the case.'
>
> ...
>
> I consider, with respect, that Professor Dickey's comment is close to the mark. Ordinarily, a benefit provided under a discretionary trust is a fairly illusory benefit because it can be terminated

> without reason and there is little likelihood of the discretionary beneficiary being able to force the trustee to pay her a benefit. Hartigan's case shows that even if there is a memorandum of wishes, there is no obligation on the trustee to take that into account. Furthermore, even though the trustees say that they intend to follow the wishes, they are not bound to do so, and indeed, circumstances may change in such a way that they feel it is not proper to continue to follow the memoranda of wishes and carry out the spirit of what the deceased intended.
>
> ...
>
> It seems to me that where a wealthy man, with an estate of at least 11 million dollars, leaves the bulk of the benefits to his widow under a discretionary trust over which she has no control, he has not made proper provision for his widow. The community would expect that the widow of such a man would at least have a home in her own name and some capital to which she could resort whenever she felt like it."

270. I referred to the authorities in *Barbuto, Bradley v Barbuto; Barbuto, James v Barbuto* [2019] NSWSC 1023, where I added, at [335]–[338]:

> "The point raised by these decisions was more recently, and succinctly put, in *Lemon v Mead* (2017) 53 WAR 76; [2017] WASCA 215, in which Buss P wrote, at [188]:
>
> > "In my opinion, a provision under a testator's will may not make adequate provision from his or her estate for the proper maintenance, etc, of a person mentioned in s 7 of the Act if, in all the circumstances, the form of the provision is not adequate or proper. That is, the evaluation by the court of the adequacy or propriety of a provision in a will is not confined to whether, in all the circumstances, the actual or potential quantum of the provision is adequate and proper."
>
> *Mead v Lemon (as Executor of the estate of the late Michael John Maynard Wright) and Leonie Angela Maynard Baldock and Alexandra Odette Burt and VOC Group Ltd* [2018] HCATrans 152, was the subject of a special leave application, which was refused upon the basis that there were insufficient prospects that the appeal would succeed.
>
> More recently, in *Bkassini v Sarkis* [2017] NSWSC 1487, Robb J, before quoting what I had written in *Hedman v Frazer*, wrote, at [304] that a discretionary object's "fate in the present case is an exemplar of the proposition that discretionary testamentary trusts will usually provide an inappropriate mechanism for ensuring that a beneficiary under a will receives adequate provision".
>
> An earlier example of such a view is *Shepherd v Shepherd* [2010] NSWSC 167, at [53]-[55], in which McDougall J concluded that a will had made inadequate provision for an adult beneficiary, a son of the deceased, who had no vested entitlement to income and who was entirely dependent upon the

> trustees (his brother and sister) exercising their discretion in his favour from time to time."

271. In *Taylor v Farrugia*, Brereton J wrote, at [62]:

> "Provision for eligible persons may be inadequate or improper in form as well as, or as distinct from, in quantum. Thus, provision which is dependent upon the exercise of a discretion by the trustee of a discretionary trust will often, though not invariably, be inadequate or improper: *Re WTN* (NSWSC Unreported, 3/7/59, McLelland CJ in Eq); referred to in [1959] 33 ALJ 240 *Gregory v Hudson (No 2)* (New South Wales Supreme Court, Young J, 18 September 1997, unreported)."

22.11 The above passages do that mean that all testamentary trust structures will be found to not provide adequate and proper provision for an eligible person. The answer to that question depends on the terms of the trust, the financial circumstances of the eligible person, and the other relevant s 60(2) *Succession Act* 2006 (NSW) factors.

23. CHECKLISTS

23.1 In view of the matters I have referred to I supply a form of checklist which might be used for the purpose of taking will instructions in appendix A to this matter.

23.2 The checklist is a guide as to the information and documents which might be required in order to obtain instructions in an uncomplicated estate.

23.3 Some clients may be happy to complete such a checklist and provide it to the solicitor in advance of the conference. Provision of a family tree, and a company structure diagram for any complex corporate structures, will always be helpful. Title searches for real estate, and ASIC searches for companies, are recommended, unless the client gives instructions that he or she does not want to spend the money and instructs the solicitor to rely on instructions provided.

23.4 Other clients may wish to go through the checklist in conference.

23.5 Copies of trust deeds, super fund trust deeds, life insurnace policy documents and, for closely held private companies, the company constitution or memorandum and articules of association, should be sought, depending on the client's circumstances and instrutions.

23.6 There is no single approach that can be adopted to taking instructions for a will. Each testator's circumstances will be different, and more or less attention might be required for any one or more of the topics which have been addressed,

depending on the testator's family circumstances, asset structure and testamentary wishes.

23.7 The checklist does not ask the testator to write down their testamentary intentions concerning company interests (part 8 above), partnership interests (part 9 above), business interests (part 10 above), trust interests (part 11 above), class gifts (see part 14), life interests or rights of residence (see part 15), mutual will agreements (part 20 above), special disability trusts (part 21 above) or discretionary testamentary trusts (part 22 above). Nor is information sought about potential disputes. The checklist allows a space for the testator to write down their objectives if they wish to address these matters. They are too complex to be amenable to the recording of instructions through a checklist. Each of those matters should be the subject of separate advice to the testator.

23.8 The checklist contains a statement at the end that it is not intended to operate as an informal testamentary document pending the making of a formal will so that the issue in *Application by Maggie Riman (Estate of Rita Riman)* [2022] NSWSC 872 should not arise.

24. CLOSING REMARKS

24.1 I have endeavoured to set out in writing my views on these topics, but it is impossible to cover the field.

24.2 There are many useful precedent texts such as:

a. C Birtles, R Neal & C Sims, *Hutley's Australian Wills Precedents 10th Edition*, Lexisnexis 2021;

b. V Sundar, *Testamentary Trusts: The Australian Master Guide*, 3rd Edition, Lexisnexis 2021.

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25. APPENDIX A – CHECKLIST

Will Instructions Checklist

CLIENT INFORMATION

1.	**Client Contact Information**		
	Name:		
	Address:		
	Phone:		
	Email:		
	Photo Identification 1 (certified copy):		
	Photo Identification 2 (certified copy):		
2.	**Existing Estate Planning Arrangements**		
	Date of prior Will (provide copy):		
	Existing Appointment of Enduring Power of Attorney:	Date:	
		Appointment:	
	Existing Appoint of Enduring Guardian, if any:	Date:	
		Appointment:	
	Accountant	Name:	
		Company:	
		Contact information:	
	Additional information (optional):		

ASSETS

3.	**Bank Accounts**		
	Bank:		
	BSB/Account Number:	BSB:	A/C:
	Approx. Balance:		
	Bank:		
	BSB/Account Number:	BSB:	A/C:
	Approx. Balance:		
	Bank:		
	BSB/Account Number:	BSB:	A/C:
	Approx. Balance:		
		[repeat as necessary]	

4.	**Real Property**	
	Address:	
	Folio Identifier:	
	Title Search Y/N:	
	Address:	
	Folio Identifier:	
	Title Search Y/N:	
	Address:	
	Folio Identifier:	
	Title Search Y/N:	
		[repeat as necessary]
5.	**Public Company Shares**	
	Stockbroker:	
	List shares and approx. value:	
		[repeat as necessary]
	Stockbroker:	
	List shares and approx. value:	
		[repeat as necessary]
6.	**Other Investments**	
	Describe and estimate value as necessary:	
		[repeat as necessary]
	Describe and estimate value as necessary:	
		[repeat as necessary]
7.	**Private Companies**	
	Name, ACN:	
	ASIC Search Y/N:	
	Memorandum and Articles of Associate or Constitution Y/N:	
	Most recent financial statements Y/N:	
		[Repeat as necessary]
	Structure diagram Y/N:	

	Name, ACN:	
	ASIC Search Y/N:	
	Memorandum and Articles of Associate or Constitution Y/N:	
	Most recent financial statements Y/N:	
		[Repeat as necessary]
8.	**Life Insurance**	
	Company:	
	Policy Number:	
	Amount:	
	Nominated beneficiary:	
	Provide copy of policy Y/N:	
		[repeat as necessary]
	Company:	
	Policy Number:	
	Amount:	
	Nominated beneficiary:	
	Provide copy of policy Y/N:	
		[repeat as necessary]
9.	**Superannuation**	
	Trustee:	
	If SMSF - other members:	
	Provide trust deed Y/N	
	Existing death benefit nomination:	Beneficiary: Date of nomination:
		[repeat as necessary]
	Trustee:	
	If SMSF - other members:	
	Provide trust deed Y/N	
	Existing death benefit nomination:	Beneficiary: Date of nomination:
		[repeat as necessary]
10.	**Other valuable personal property**	
	List item:	
	Location:	
		[repeat as necessary]

List item:	
Location:	
	[repeat as necessary]

List item:	
Location:	
	[repeat as necessary]

11. **Trusts**	
Trustee:	
Type of trust:	
Provide Trust Deed Y/N:	
ASIC search Corporate Trustee Y/N:	
	[repeat as necessary]

Trustee:	
Type of trust:	
Provide Trust Deed Y/N:	
ASIC search Corporate Trustee Y/N:	
	[repeat as necessary]

12. **Business interests**	
Name of business:	
Nature of business:	
Management:	
	[repeat as necessary]

Name of business:	
Nature of business:	
Management:	
	[repeat as necessary]

13. **Partnerships**	
Name of partnership	
Provide partnership agreement Y/N:	
Business/assets of partnership:	
	[repeat as necessary]

Name of partnership	
Provide partnership agreement Y/N:	
Business/assets of partnership:	
	[repeat as necessary]

LIABILITIES

14. **Mortgage debts**	
Lender:	
Amount:	
Security property/properties:	
	[repeat as necessary]
Lender:	
Amount:	
Security property/properties:	
	[repeat as necessary]
15. **Personal loans**	
Lender:	
Amount:	
	[repeat as necessary]
Lender:	
Amount:	
	[repeat as necessary]
16. **Credit cards**	
Lender:	
Amount:	
	[repeat as necessary]
Lender:	
Amount:	
	[repeat as necessary]
17. **Other liabilities**	
Lender:	
Amount:	
	[repeat as necessary]
Lender:	
Amount:	
	[repeat as necessary]

BENEFICIARY INFORMATION

18.	**Spouse / De facto spouse**	
	Name:	
	Address:	
	Phone:	
	Email:	
	Date of marriage or commencement of de facto relationship	
	Family Tree provided y/n	
19.	**Children**	
	Name:	
	Address:	
	Phone:	
	Email:	
	Date of birth:	
	Name:	
	Address:	
	Phone:	
	Email:	
	Date of birth:	
	Name:	
	Address:	
	Phone:	
	Email:	
	Date of birth:	
		[repeat as necessary]
20.	**Other beneficiaries**	
	Name:	
	Address:	
	Nature of relationship:	
	Name:	
	Address:	
	Nature of relationship:	
		[repeat as necessary]

21.	**Will Instructions**	
	Executor 1:	
	Name:	
	Address:	
	Phone:	
	Email:	
	Executor 2:	
	Name:	
	Address:	
	Phone:	
	Email:	
	Substitute Executor 1:	
	Name:	
	Address:	
	Phone:	
	Email:	
	Substitute Executor 2:	
	Name:	
	Address:	
	Phone:	
	Email:	
22.	**Specific Legacies**	
	Beneficiary:	
	Amount:	
	Beneficiary:	
	Amount:	
	Beneficiary:	
	Amount:	
	Beneficiary:	
	Amount:	
		[repeat as necessary]

23.	**Specific Gifts**	
	Beneficiary:	
	Identify gift:	
	Beneficiary:	
	Identify gift:	
	Beneficiary:	
	Identify gift:	
		[repeat as necessary]
		NB: As a cross check review the list of assets and confirm either that all specific gifts are listed, or that the balance of the assets will be used to pay liabilities and expenses, and then form part of the residue
24.	**Superannuation**	
	Beneficiary:	
	Percentage:	
	Beneficiary:	
	Percentage:	
	Alternatively, payment to estate	
		NB: Whether you can bind your superannuation trustee to pay your superannuation death benefit to your estate or to a dependent depends on the terms of the trust deed, and compliance with any relevant form of BDBN.
25.	**Charitable Gifts**	
	Charity name:	
	Gift:	
		[repeat as necessary]
	Charity name:	
	Gift:	
		[repeat as necessary]
26.	**Gifts of Residue**	
	Beneficiary:	
	Share of residue:	
		[repeat as necessary]
	Beneficiary:	
	Share of residue:	
		[repeat as necessary]

27.	**Substitute gifts of residue**	
	Beneficiary:	
	Share of residue:	
		[repeat as necessary]
28.	**Comments:**	
		[Here set out any further instructions not covered by the information set out above]

NOTE: These Will Instructions are not intended to take effect as a Will pending the making of a formal Will.