CPNS Current Issues Sheet 2008/No 10

Practical Guide for Bequest Officers:
Family provision and bequests in wills

1. Wills

- A will is a revocable disposition of property, in writing, intended to take effect on death.
- The will-maker can also be referred to as a testator.
- A person who makes a will is a person who dies testate.
- A person who dies without a will dies intestate, and their property is disposed of according to the intestacy rules in the relevant legislation in your state. A charity will never receive a bequest on intestacy.
- A personal representative has the responsibility to manage the affairs of the will-maker after death and ensure that the terms of the will are adhered to.
- If the personal representative is named and appointed in the will document itself, that person is called an executor.
- An executor can obtain probate of a will, if that is a necessary requirement of the relevant state law. Probate is a certificate granted by the court declaring the validity of the will and identity of those administering the estate.
- Sometimes there is no executor named in a will, or the person named as executor in the will is unable or unwilling to act in that capacity. In that case, a personal representative – called an administrator – is appointed by the court to administer the estate.
- An administrator can obtain letters of administration of a will, if that is a necessary requirement of the relevant state law.
- A personal representative can also be a public official. This will be the Public Trustee in your state. The Public Trustee can administer a will until another administrator, if any, is appointed by the court.
- A person who receives a benefit under a will, including under any intestacy rules, is called a beneficiary.

2. Gifts in wills

- The term gift is used to refer to all types of gifts in wills. Gifts in wills can be categorized as follows:
  - A gift of real property (land, buildings) is called a devise.
  - A gift of personal property (money, shares, books, furniture) is called a legacy or bequest.
- These terms can be further subdivided into categories of gift. Devises can be either:
  - A specific devise e.g. ‘my house at 100 Suburban Street, Suburbia Downs, Capital City’.

Note: This guide is intended to inform the lay staff and volunteers of charitable organisations about the basic concepts and processes of wills and estate law in order that they can better instruct their advisors. It is neither intended as, nor can it replace professional advice which should be sought promptly in matters involving wills or bequests.
A residuary devise e.g. a residuary gift of real property is what is left in the estate after all other obligations for payment of debts and specific gifts of all kinds have been met e.g. if a will-maker states ‘and I leave the residue of my estate to the Society for the Preservation of Ancient Flora Inc.’ and there is real property in the residue of the estate, this would be a residuary devise, if otherwise valid.

- Legacies or bequests can be either:
  - A specific gift (usually referred to as a bequest) e.g. ‘the green antique vase in the hall and the table it stands on’.
  - A general gift (also referred to as a bequest) e.g. ‘all my shares’ or ‘all my shares in General Steel Limited’.
  - A pecuniary legacy (a gift of money) e.g. ‘and I leave $5000 to…’.
  - A demonstrative gift (usually a gift of money which is from a specified fund) e.g. ‘$5000 from my account at the Commonwealth Bank’.
  - A residuary legacy or bequest e.g. ‘and I leave the residue of my personal property’ or ‘I leave the residue of my estate to…’ but the residue contains only money or other personal property.

- These classifications are important legally because assets can be sold, given away, or stolen before the will-maker dies, or there may be insufficient assets in an estate to satisfy all the gifts made in a will. In the case where an asset is no longer part of the estate for whatever reason, and it was a specific gift, the gift will fail. This is called **ademption** of the gift.

- Where there are insufficient funds in the estate to satisfy all the gifts, there is a rule that specific gifts in a will must be satisfied before general gifts. If there is then insufficient in the estate to satisfy any or all general gifts, these gifts will fail.

### 3. What is a valid gift in a will?

- For a gift in a will to be valid, certain **formalities** must be observed. Though there can be slight variations from state to state, these formalities are:
  - The will must be in writing.
  - The will must be signed by the testator or his/her authorized agent.
  - There must be an intention to sign the document and make that signature operational.
  - There must be two witnesses to the making or acknowledging of the testator’s signature, both of whom must be present at the same time.
  - The two witnesses must attest and sign the will in the testator’s presence, but they do not need to both be present at the same time for this stage of the process.

- An important aspect of ensuring a valid gift in a will is whether the will-maker has sufficient **testamentary capacity**. This requires:
  - That the person is of sufficient age to make a will.
  - That the will-maker must be of sound mind, memory and understanding.

### 4. What are the legal bases for invalidating a gift in a will?

#### 4.1 Is there lack of testamentary capacity?

- The test to be applied is one of ‘sound mind, memory and understanding’.¹

- Testamentary capacity of a testator must be **present at the time of execution** of the will, or at least at the time that instructions were given for the preparation of a will.

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¹ *Banks v Goodfellow* (1870) LR 5 QB 549; *Bailey v Bailey* [1924] HCA 21; (1924) 34 CLR 558; *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698; *Re Estate of Griffith (deceased; Easter v Griffith* NSWCA 7 June 1995, unreported; *Read v Carmody* NSWCA 23 July 1998, unreported; *Perpetual Trustee Company Ltd v Baker* [1999] NSWCA 244; *Grynberg v Muller: Estate of Late M Bilfeld* [2001] NSWSC 532.
If the testator has left a bequest to charity which a family is opposing, either in a family provision application or otherwise, this common law test of testamentary capacity must be met.

The onus of proof will be on the charity. However, in the absence of ‘suspicious circumstances’, the court will presume the necessary capacity.¹

Suspicious circumstances would include the omission of a beneficiary who would have a natural claim on the estate, such as a family member, or where it seemed that the charity had exercised undue influence on the testator while he or she was alive.

The legal basis of testamentary capacity has been stated to be:³

- that the will-maker is aware, and appreciates the significance of, the act in the law which he or she is about to embark upon
- that the will-maker is aware, at least in general terms, of the nature, and extent, and value, of the estate over which he or she has a disposing power
- that the will-maker is aware of those who may reasonably be thought to have a claim upon his or her testamentary bounty, and the basis for, and nature of, the claims of such persons
- that the will-maker has the ability to evaluate, and to discriminate between, the respective strengths of the claims of such persons.

Therefore, if the will-maker is later found to suffer from a mental illness, dementia, or other deterioration in mental functioning, the testator will, more probably than not, be held to lack testamentary capacity.

4.2 Is there any possibility of insane delusion?

- Family members opposing a charitable bequest may claim that the testator was suffering from an insane delusion.⁴

- However, in the case of insane delusions, lucid intervals may intervene to render the will provisions valid, a legal principle which may favour a charity in retaining a bequest.

4.3 Has any undue influence been applied to the will-maker?

- In will cases, fraud and undue influence must be proved as a matter of fact.

- This differs from the use of undue influence and duress to invalidate inter vivos gifts (gifts while alive), which does not require this level of proof.

- Therefore, it is important to note that there are distinct differences in the principles relating to undue influence in will cases, and the equitable doctrine of undue influence which only applies in cases of inter vivos giving.⁵

- The influence which must be shown to avoid a will must amount to force or coercion destroying free agency.

- Thus, the presence of undue influence in will cases is traditionally much more difficult to prove, since it must amount to coercion.⁶

- However, the tendency to apply the principles of the doctrine of unconscionable bargains to will cases may be argued to have brought the equitable doctrine of undue influence which applies in inter vivos giving closer to the notion of undue influence in will cases.⁷

- This is of particular importance in family provision cases because if an inter vivos gift is held to be an unconscionable bargain in equity, it will be brought back into the estate of the testator, and will be available for a subsequent family provision claim. This can greatly disadvantage charities left a bequest in the will, or affect severely the reputation of the charity benefiting from the unconscionable bargain.

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² Bailey v Bailey (1924) 34 CLR 558.
⁴ See Bull v Fulton (1942) 66 CLR 277.
5. How else can a gift in a will be lost to your charity?

5.1 Family provision claims

- In Australia, family provision applications can be made by family members and a wide range of dependants who feel that they have not been adequately provided for in a will.
- Such applications will be successful if:
  - the person applying is an appropriate applicant and
  - the person has not been, in the court’s discretion, adequately provided for.
- Current legislation describing adequate provision varies from state to state, and there are variations in wording in the legislation.
- Queensland, Tasmania and Victoria refer to ‘proper maintenance and support’.
- New South Wales, South Australia, the Northern Territory and the Australian Capital Territory use the term ‘proper maintenance, education and advancement in life’.
- Western Australian legislation has the term ‘proper maintenance, support, education or advancement in life’.
- Despite these differences, the High Court has encouraged uniformity of interpretation in its decisions.

5.2 Do family provision applications affect bequests to charity in wills?

- A survey of 46 major reported cases involving bequests to charity in Australia and New Zealand shows that the charities involved lost the entire bequest in six of the cases, had their bequests substantially reduced in 35 of the cases, and prevailed against the family claimant in only five of the cases.
- Of the successful family provision claimants, 34 cases involved spouses and/or adult children (including step children and adopted children), four cases involved other family members, two cases had non-family claimants, and one case had a same sex partner claimant.
- The trend to the support of the concept of family, and a broadening concept of family, in case law is clear, and is grounded in public policy in both countries.
- Most family provision applications are settled at mediation or by private arrangement. However, settlements almost always result in a reduction in the bequest left to the charity.

5.3 Who can be an applicant for family provision?

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Spouse</th>
<th>De facto (or similar and in some states, same sex partner)</th>
<th>Child (includes adopted or step children)</th>
<th>Grandchild (if dependent)</th>
<th>Parent (if dependent or if there is no spouse, partner or child)</th>
<th>Other dependant (may include same sex partner)</th>
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<tbody>
<tr>
<td>New South Wales</td>
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<td>Victoria</td>
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<td>‘Person for whom the deceased had responsibility to make provision</td>
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8 Succession Act 2006 (NSW) section 57; previously, Family Provision Act 1982 (NSW) sections 7, 8, and 9(2); Administration and Probate Act 1958 (Vic) section 91; Succession Act 1981 (Qld) section 41; Inheritance (Family Provision) Act 1972 (SA) section 7(1); Inheritance (Family and Dependants Provision) Act 1972 (WA) section 6(1); Testator’s Family Maintenance Act 1912 (Tas) section 3(1); Family Provision Act 1970 (NT) section 8(1); and the Family Provision Act 1969 (ACT) section 8(1).
9 Succession Act 1981 (Qld) section 41(1); Testator’s Family Maintenance Act 1912 (Tas) section 3(1); Administration and Probate Act 1958 (Vic) section 91.
10 Succession Act 2006 (NSW) section 59(1)(c); previously, Family Provision Act 1982 (NSW) sections 7, 8, and 9(2); Inheritance (Family Provision) Act 1972 (SA) section 7(1); Family Provision Act 1970 (NT) section 8(1); Family Provision Act 1969 (ACT) section 8(1).
11 Inheritance (Family and Dependants Provision) Act 1972 (WA) section 6(1).
12 In Coates v National Trustees Executors and Agency Co Ltd (1956) 95 CLR 494, Dixon CJ made this clear, stating that: ‘The legislation of the various States is all grounded on the same policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided...’ (at 506-507). In the same case, Fullagar J, at 517, said that ‘...the searching out of nice distinctions is to be deprecated, and the approach which presumes uniformity of intention is the correct approach’.
### Jurisdiction

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<td>x (includes brother or sister entitled because of care given to deceased)</td>
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6. **What legal precautions should you have in place when soliciting bequests?**

6.1 **General precautions to take**

- Charities need to ensure that they have appropriate legal precautions in place, and that their public image is trustworthy. The first step in this journey is to have a professional relationship with a reputable legal firm which holds itself out as having expertise in wills and estates.

- From a family provision law perspective, the issues to be considered when making a will which contains a bequest to a charity include:
  1. having independent legal advice for the will-maker making a bequest to charity.
  2. having an arms length relationship between the charity and the will-maker, without any undue influence, harassment, intimidation or coercion from the fundraiser to the donor while the donor is alive.
  3. in appropriate situations, having a family member or legal personal representative present during bequest negotiations to avoid any allegations of undue influence or coercion;
  4. if the testator is near death, or is elderly, or is incapacitated physically or mentally, the measures in 1-3 above are absolute requirements;
  5. stating the full legal name of the organisation that will receive the bequest, and using appropriate words to indicate the type of bequest, including use of a recommended form of bequest clause – this will avoid the need for an application to the court to clarify the bequest, or for a cy-près application, which may fail in the light of a family provision application.

- These sorts of precautions have been included in the **Standard of Bequest Fundraising Practice** published by the Fundraising Institute Australia. One of the clauses in the Standard recommends that a potential donor seek independent legal advice. 13 Clause 7 of the Standard deals with the necessity for an arms length relationship, without the presence of undue influence, harassment, intimidation or coercion from the fundraiser to the donor. Clause 7.3(e) refers to the important matter of having a family member or legal personal representative present during bequest negotiations. Clause 5.1 of the Standard recommends that a donor must state the full legal name of the organisation that will receive the bequest, and use appropriate words to indicate the type of bequest.

- While these matters can never guarantee that a family provision claim will not succeed as against a charity, they may assist a court to balance the many factors which need to be taken into account.

- Indeed, there are few reported cases in Australia where the integrity of the charity in question is impugned during a family provision application case.

- Therefore, the cases rarely revolve around the nature and style of the charities concerned, but are wholly concerned with whether the will-maker has made proper provision for the applicants before the court.

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13 **Standard of Bequests Fundraising Practice**, Clause 4.1 (c) regarding the use of promotional materials.
In addition, family provision cases rarely involve considerations of undue influence, either in the probate law sense of coercion on the testator’s deathbed, or in the law of equity sense of the exercise of unconscionable influence on a donor.

6.2 Other hints for dealing with family provision claims

Subject to professional legal advice:

- Stand up for your bequests using a professional but commercially realistic approach by filing an affidavit defending the bequest at the least. Although this is not free (unless legal advice is given pro bono), it often represents a better position than adopting a wait and see attitude to obtaining something from a will.
- Always appear personally at mediations, with your lawyers. Instruct your lawyers clearly what the money is to be used for, and the public benefits of your organisation.
- Show your lawyers a demonstrable connection to the testator making the bequest. Did that person have a prior connection with your charity? A prior history of donations? Or of a history of services provided by or to the charity?
- Show your lawyers a history of previous connection which is both strong and provable via good file notes of contact and discussions, a record of regular donations, a record of regular contact via membership or receipt of newsletters, and preferably continuous contact from the time the bequest is made in the will until the time of death.
- If more than one charity is involved in the bequest (e.g. each has been left an equal share of the residual estate), those charities should consider adopting a common stance.
- It may be desirable for groups of charities to place a law firm on retainer for the purpose of ensuring that bequests are obtained by the group, thus sharing costs and obtaining better quality legal advice. This and other types of concerted action puts the pursuit of bequests on a more ‘business-related footing’.

7. What can be done about costs?

- It is usually the case that no costs order will be made in a family provision case, and most of the costs of the parties will be borne by the estate. This has a negative effect on bequests left to charity since the costs are usually taken from the charity’s share of the estate.
- The issue of costs in family provision claims has come increasingly into focus since the 2005 New South Wales case of Re Sherborne Estate. In that case, the claimants were two adult daughters and one adult granddaughter of the testatrix. The granddaughter’s claim was dismissed, but the two adult daughters had their provision increased from $20,000 each to $300,000 and $100,000 respectively. Thus a total of $360,000 extra had to be paid from the estate to the adult daughters. The judge ordered that this be paid from notional estate, a house which had been transferred to their half-brother under a joint tenancy agreement with the testatrix, valued at $490,000. This may appear uncontroversial on the facts, but the costs incurred by the granddaughter and the adult daughters were more than $400,000. The defendant half-brother, who had inherited the bulk of the estate, had costs of $205,000, so that total costs of the action were more than $605,000. Palmer J described these costs as ‘enormous’, stating that ‘one might wonder whether anything has changed since Dickens’ Bleak House.’
- The outcome of this case caused the New South Wales Attorney General to announce that he would introduce new legislation to cap legal costs in family provision cases. The Succession Amendment (Family Provision) Bill 2008 (NSW) was passed by the Legislative Council on 24 September 2008, and sent to the Legislative Assembly for concurrence on the same date. This amendment replaces the previous Family Provision Act 1982 (NSW), and introduces new Chapter 3 on family provision into the Succession Act 2006 (NSW). Section 99 provides that the court will have power to order costs as it thinks fit, and that regulations can be made to cap costs and control advertising for family provision claimants.
- Section 99 and regulations made under it will prevail to the extent of any inconsistency with the Legal Profession Act 2004 (NSW) as to costs. Presumably this will discourage applications made in the belief that the estate will always bear the costs of the application, making litigation no longer virtually risk-free. Moreover, the new legislation also allows for regulations to be made to encourage settlement of family provision claims, and to control advertising by lawyers looking for family provision work. There is a general perception that the latter issue has greatly exacerbated the frequency of family provision applications in New South Wales in recent years. Whether correct or not, the issue was identified by the Attorney-General in his speech on the new legislation.

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Costs can be capped already in New South Wales under the Uniform Civil Procedure Rules 2005 rule 42.4(1) and the Civil Procedure Act 2005 (NSW) section 98(4)(c), but as evidenced by the Sherborne Estate case, these cannot always be used since they are not retrospective.

Rather than similarity, there are differences in each state in dealing with costs issues. The attempt to normalise legal costs throughout the jurisdictions of Australia has not been an easy task. Despite the model legislation resulting in Legal Profession Acts in each state except South Australia there are difficulties in implementation which make some Acts more effective than others. This is despite the common requirement in each Act that costs be disclosed to clients before, or as soon as possible after, the retainer.

In Queensland, the Legal Profession Act 2007 (Qld) requires that costs of an action be assessed by an independent accredited assessor, a requirement which has caused some difficulties in finding sufficiently experienced assessors. However, since early mediation is compulsory in family provision cases in Queensland, relatively few family provision cases proceed to trial.

In South Australia a Master deals with applications in small estates on the papers, but Victoria, Western Australia and Tasmania have not done anything specific to date to control costs escalation in court cases relating to wills.

The costs issue is definitely problematical in every jurisdiction. It has been suggested that truly uniform costs disclosure rules would be an advantage in Australia, but the means of achieving these, given that there has already been a model bill adopted in each state, is not clear. Another round of ‘uniform model bill’ adoption is the only way forward if states are really committed to uniformity on this issue.

Judges have made comments on the costs issue in each state jurisdiction, and in rare cases have made a costs order against an applicant, but in general, it is still true that costs in defending a bequest will be high, and will have a detrimental effect on a charity’s share of an estate.

Subject to legal advice, the best defence is often early settlement, whether by mediation or other alternative dispute resolution mechanism. This requires charities to take a commercially realistic view of the probable outcome when a family provision application is made. Again, seek professional advice.

This information sheet is part of a series of research projects on bequests and planned giving funded by the E F and S L Gluyas Trust and the Edward Corbould Charitable Trust under the management of the Perpetual Trustees Company. Many issues require further investigation, including practical considerations for charities in pursuing bequests in wills, and a further report will be forthcoming from CPNS on this topic.

This Information Sheet was issued on 07 November 2008. Events, policies and laws alter rapidly – you should take independent advice before acting on any matter raised in this publication.

17 Legal Profession Act 2004 (NSW); Legal Profession Act 2004 (Vic); Legal Profession Act 2006 (ACT); Legal Profession Act 2006 (NT); Legal Profession Act 2007 (Qld); Legal Profession Act 2007 (Tas); Legal Profession Act 2008 (WA). The Legislative Council of South Australia passed the Legal Profession Bill 2007 on 26 February 2008, but it is subject to a deadlock in the South Australian Parliament as at July 2008.