Giving a Voice to Aboriginal People: Why Aboriginal People in Australia Need Wills More than Anyone Else

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Aboriginal people in Australia have a very low rate of will-making which means that on death they may either rely on intestacy rules or just ad hoc decision-making. The intestacy rules are mostly unsuitable because of different views about who is in the family, and ad hoc decision-making leaves communities in chaos. Aboriginal people also have a disproportionate level of disputes about disposal of the body. All this and other matters mean that, paradoxically, the best way to protect Aboriginal people's customary law and culture may be to enfold the wishes of the individual into that ancient common law instrument, the will. The will allows the person to speak and authorise the decision-making of the executor in a way which many Aboriginal communities are now embracing.

Death comes to everyone, but most of us prefer not to think about it, which is why many people in Australia do not make a will until quite late in life. Aboriginal people are very unlikely to make a will. This leaves Aboriginal people without the voice that the majority of non-Indigenous people have when it comes to dealing with their property on death. In many communities the passing of property happens ad hoc and creates chaos.

The regime which governs inheritance in Australia comprises three parts. First, there is the law of wills, based on the idea of testamentary freedom. In Australia, unlike some European countries, a person can make a will which disposes of their entire estate. Australians generally have quite a high rate of will-making. In particular, most people over the age of 70 in Australia die leaving a will.[1] But Aboriginal people have a very

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1. The 2013 survey by Newspoll for the NSW Trustee & Guardian showed 59 per cent of adults over 18 had made a will: Imelda Dodds, 'Annual Report 2012–2013' (Annual Report, NSW Trustee and Guardian, 2013) 5. In 2012, 79 per cent of Queenslanders over the age of 35 and 98 per cent of those over 70 had a current will: Jill Wilson and Cheryl Tilse, 'Will Making in Queensland' (Report, Office of the Public Trustee of Queensland, 2012) 16. The rates of grants of letters of administration on intestacy were 6 per cent of grants in New South Wales in 2003 and 13 per cent in Tasmania in 2005: New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report

low rate of will-making,[2] so that very often when they die the second major part of our succession law, the law of intestacy, applies to them.[3] The third part of succession law is called family provision or testator's family maintenance. If after the death of a person their relatives or close connections can show that they have not been adequately provided for, a court can alter the distribution under the will or intestacy to ensure that that person is provided for. Family provision is important, but its disadvantage is that, unlike wills and intestacy, people must go to court to use the family provision legislation.

These three areas of law together comprise the law of succession or inheritance operating in Australia. There are, of course, a number of other ways property is passed to another generation or passed on death which, strictly speaking, are not part of the law of succession – these include joint tenancy, some inter vivos trusts which operate beyond death, and superannuation.

For those of us whose circumstances fit the Australian intestacy laws having the estate distributed on intestacy may cause inconvenience but no real problems as the intestacy laws in Australia pass the majority of property to the spouse and the children of the deceased. Only if there is no spouse and children (in most jurisdictions) do other people inherit and this is done through tracing blood and (now) adoptive relationships. In most cases, this means that the right people inherit and are protected from financial hardship. By 'right people' here I mean the people that the deceased person would have been most concerned to pass their property to.

However, for Aboriginal people[4] in Australia the intestacy laws may

No 116 (2007) 5 [1.13]–[1.14]. The Victorian Law Reform Commission reported 7.75 per cent of grants involved total intestacy in 2010–11: Victorian Law Reform Commission, *Succession Laws Consultation Paper – Intestacy*, Consultation Paper No 13 (2012) 21 [2.23]. There are also a significant number of people who die for whom no grant either of probate (validity of the will) or intestacy (where there is no will) is made. They are the uncounted intestate, many of whom are Aboriginal.

2. The Aboriginal will-making rate is estimated at approximately 2–6 per cent. See, eg, Chris Cunneen and Melanie Schwartz, 'The Family and Civil Law Needs of Aboriginal People in NSW' (Final Report, Legal Aid NSW, 2008).
3. *Administration and Probate Act 1969* (ACT); *Succession Act 2006* (NSW) ch 4; *Administration and Probate Act 1969* (NT); *Succession Act 1981* (Qld) pt 3; *Administration and Probate Act 1919* (SA) pt 3A; *Intestacy Act 2010* (Tas); *Administration and Probate Act 1958* (Vic) pt I div 6; *Administration Act 1903* (WA) ss 12A–16.
4. Although much of what I am saying applies also to Torres Strait Islanders, in this article I focus on Aboriginal people because I did my research in NSW. I also refer mostly to NSW law to illustrate the issues I am discussing, although many also apply to Aboriginal

not fit at all well. There are a number of problems which may arise. The first and most important problem is that our intestacy laws are based on a view of who is included in a family which may not fit the patterns in Aboriginal culture. It is important here to recognise that the fact that an Aboriginal person lives in the city or appears to live a 'non-traditional' life does not mean that she or he has changed their idea of who counts in their family. For example, in some Aboriginal groups, person A may think of persons B and C as their children. However, the common law may think of person B as the 'child' of A while person C is a 'niece' or 'nephew' of A. So if the intestacy rules apply there will be people whom the deceased thinks of as their children who will not be entitled to inherit it from them. This is not an insignificant matter of terminology, because just as non-Aboriginal Australians expect a parent to look after a child, so do kinship relationships import obligations for Aboriginal people. This is just one example of the many Aboriginal ideas about kinship which do not fit the kinship structure the common law uses. So the kinship structures in the intestacy legislation,[5] which are generally focused very much on bloodlines and nuclear family structures, may be inappropriate for Aboriginal people whose kinship views are less concerned about blood relationships and are often more complex than those contemplated by the common law.[6] Extra complexity is added to this problem by the fact that not all Aboriginal communities will have the same kinship or other customary law rules. It is worth remembering that Australia is a country larger than Europe and that Aboriginal people represent many nations within that area.

Guardianship of children may also be rendered problematic by a failure to understand different kinship structures and child-rearing practices. For example, in many Aboriginal cultures, traditionally the mothers went out to find food while the grandmothers looked after the children. This pattern continues today in some urban settings. When guardianship of children is being decided in courts the person most obvious to the Aboriginal people concerned, the grandmother, may not be regarded as obvious by the court who may misunderstand both who is the grandmother, and that this is the proper default carer for children.

people across Australia.

5. For example, in *Succession Act 2006* (NSW) pt 4 refers to 'children' and 'issue'. This assumes the common law definitions of those relatives, which are blood-defined; see definitions under the *Status of Children Act 1996* (NSW) ss 5(1), 14 and its equivalents.
6. Ian Keen, 'Kinship' in Ronald Murray Berndt and Robert Tonkinson (eds), *Social Anthropology and Australian Aboriginal Studies* (Aboriginal Studies Press, 1988) 80.

A further problem for Aboriginal people on intestacy is the greater possibility of burial disputes. There are a disproportionate number of burial dispute cases involving Aboriginal people compared with the general population.[7] This is an indication of the importance of burial in the right place for Aboriginal people. This reflects the importance of land and the connection to land in Aboriginal people's lives. As older dispute resolution patterns have fallen into disuse a gap has arisen in mechanisms for resolving disputes about burial. Many disputes have gone to court for resolution, and that resolution has often been difficult because there are no rules about who has the right to deal with the body on intestacy. The issue has often been decided by the courts on the basis of convenience,[8] so that no consistent rule has been produced. By contrast where a will has named an executor, the executor is the person with the right to deal with the body.[9] Because it is not clear who has this right when a person dies intestate, people are forced to take the matter to court, which is expensive and time-consuming. Making a will and appointing a person as executor may prevent disputes arising in Aboriginal communities because it is clear who is the person who is entitled to decide. In the communities I consulted,[10] there was enormous interest in this fact.

In the Northern Territory, New South Wales and Tasmania, the relatives of Aboriginal people who die intestate may apply for a grant of distribution on the basis of Aboriginal customary law.[11] However, this requires the relatives to agree on what the customary law is and that can be very onerous. It is a useful corrective to the normal intestacy laws, but it is easier and more efficient to make a will.

Making sure that the correct people inherit property, act as guardians and make decisions about the body can be done by a will in a way that is culturally appropriate for Aboriginal people when intestacy may not be appropriate.

Ritual knowledge or objects may also be passed by a will and it may be possible for this to be done secretly. Secrecy is extremely important

7. Prue Vines, 'Consequences of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights' (2004) 8(4) *Australian Indigenous Law Reporter* 1, 5.
8. See, eg, *Jones v Dodd* (1999) 73 SASR 328.
9. *Williams v Williams* (1882) 20 Ch D 659.
10. Prue Vines, 'The NSW Project on the Inheritance Needs of Aboriginal People: Solving the Problem by Making Culturally Appropriate Wills' (2013) 16(2) *Australian Indigenous Law Review* 18.
11. See, eg, *Succession Act 2006* (NSW) pt 4.4; *Intestacy Act 2010* (Tas) pt 4.

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for many Aboriginal customary law matters. In many Aboriginal groups matters must only be known to the people who are qualified to know them. To everyone else the matter is unknown. It is possible to use a will to create a secret or half-secret trust. Such a trust arises where a gift is given to a person who is to hold it for another person. The secrecy arises because either the existence of the trust or its terms are secret and known only to the testator or will-maker and the trustee and possibly the beneficiary.[12] When the will is published these matters will therefore not become public with the rest of the will. Aboriginal customary law which is committed to a will is protected by the common law insofar as it is the expression of the testator's intention to which his or her executors are expected to give effect.

What a will can do is give the person making it a voice that they leave behind them. In their will a person can express what they want and have much of this gain the force of law. If we think about this for a moment the truly remarkable nature of the will becomes apparent. Because the will is an individual document it allows the testator to ensure that the people the testator wishes to inherit do so; the testator can place conditions and express their wishes about the property they pass on. There is no requirement that a person own substantial real estate. Any property at all will be sufficient for a will to be made. By appointing an executor, the testator chooses a person who has virtually all the rights and powers that the testator had when he or she was alive, including the right to decide how to deal with the body. For the Aboriginal people I consulted in my research this was one of the most attractive things about making a will.

It is significant that there is a burgeoning Aboriginal middle class. In 2006, there were 14 000 Aboriginal professionals, comprising 13 per cent of the Indigenous workforce in Australia.[13] An Aboriginal person living a totally traditional life (rare in NSW) may not need to pass on any property at all. But the majority of Aboriginal people in NSW live a mixed traditional and urban or rural life. This creates concerns for lawyers

12. *Voges v Monaghan* (1954) 94 CLR 231.
13. Julie Lahn, 'Aboriginal Professionals: Work, Class and Culture' (Working Paper No 89/2013, Centre for Aboriginal Economic Policy Research); Marcia Langton, 'The Quiet Revolution: Indigenous People and the Resources Boom' (Speeches delivered at Boyer Lecture Series, The University of Melbourne, 18 November–2 December 2012) <http://www.abc.net.au/radionational/programs/boyerlectures/2012-boyer-lectures/4305696>; also available as Marcia Langton, *The Quiet Revolution: Indigenous People and the Resources Boom* (Harper Collins, 2013).

drafting wills. As wealth accumulates, Aboriginal people are more likely to perceive the need for wills and to feel that they can afford to have a will made, but lawyers may not be trained to draft culturally appropriate wills, and indeed may not recognise at all that there are reasons to draft wills differently for Aboriginal middle class testators as well as for poorer Aboriginal testators. This is a significant issue which I sought to address by developing the *Aboriginal Wills Handbook.*[14]

Over the last four or five years, partly because of increased recognition of the need created by work like mine, there has been a significant increase in the making of wills by Aboriginal people. This has been facilitated by pro bono lawyers, community legal centres and private practitioners who are interested in ensuring that the wishes of Aboriginal people are given effect so that chaos does not ensue when somebody in the Aboriginal community dies. This is a significant way of giving a voice to people whose voices have not been heard in the past in this area of law and life; it needs to be fostered by the knowledge of lawyers, law students and Aboriginal people themselves so that the disastrous state of affairs which has often existed in the past, after an Aboriginal person died, will be replaced by the clear voice of the deceased in the form of their will and their executor managing their estate in the way that the deceased person thought best.

14. Prue Vines, *Aboriginal Wills Handbook: A Practical Guide to Making Culturally Appropriate Wills for Aboriginal People* (NSW Trustee and Guardian, 2nd ed, 2016).