



Wills and enduring powers of attorney

Community legal education

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First Nations Legal Education Toolkit

Wills and enduring powers of attorney

This toolkit contains legal information only. It is designed to assist in helping Indigenous Australians understand their legal rights in relation to their interactions with police, wills and enduring powers of attorney and discrimination only.

Note that the information is current as of August 2022 and may have changed since release. If you or other users of this guide or the information contained within are concerned about a specific legal problem, YFS recommends that you seek legal advice as soon as possible.

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YFS respectfully acknowledges Aboriginal and Torres Strait Islander people as Australia's first peoples and the original owners/custodians of the land on which we meet and work. We recognise the important role they have within community and country and we pay our respects to the Elders of this land past and present.





This document forms part of the [YFS Legal First Nations Legal Education Toolkit](#) (**Toolkit**).

The toolkit represents a guide on facilitating and delivering community legal education to First Nations people in a culturally appropriate way.

The toolkit is intended to be used by community legal centres and other legal education providers across Queensland. It is also designed to be used by those who work with First Nations peoples in non-legal or education areas.

Although created for legal organisations or education providers, users of the guide do not necessarily have to be lawyers, teachers, social workers or other professionals.

Please note that this information is **not** to be used as legal advice, and facilitators cannot provide legal advice without the necessary qualifications.

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1.1 Background and purpose of this chapter

This chapter focuses on the creation of wills and enduring powers of attorney for First Nations Elders. It serves as a guide for community legal centres and other community organisations on how to deliver that information in a culturally safe and appropriate way.

It was found in the Analysis Project that of Elders in the Logan region surveyed (that is, respondents aged 45 years or older) approximately 88% did not have a valid will.¹ While YFS did not specifically survey Elders on whether they had an enduring power of attorney, YFS was advised by those in the industry that it would be useful to include this information when delivering community legal education to Elders.

By providing information on the purpose of wills and enduring powers of attorney and how to get those documents, it is hoped that more Elders will seek to have these documents completed in not just Logan, but across Queensland.

1.2 Development of this chapter

Development of this chapter has involved significant evaluation and consultation with numerous stakeholders including the Logan District Aboriginal and Torres Strait Islander Elders Group, Unity Australia, Gilbert & Tobin, Indigenous legal practitioners,² other community legal centres other community-controlled organisations, and Burringilly Community Care.

Located in Logan, Burringilly Community Care provides care and support to approximately 230 elderly and disabled people across the region.³ They aim to deliver their services in an effective manner that is culturally appropriate to Indigenous people.⁴

As part of the evaluation stage of this project, YFS spent one week presenting to the different groups of Indigenous Elders at Burringilly. Elders were then surveyed on whether they were satisfied with the presentation, whether the information provided was relevant and appropriate to their needs, and whether they had a better understanding of what a will is, why they are important and what could be included in a will. Elders were also invited to join a pro bono wills creation service facilitated by YFS Legal and Colin Biggers Paisley Lawyers. Of the 28 Elders surveyed, 20 elected to attend the will creation service. However, after advertising and hosting a wills creation clinic at Burringilly, 23 wills were created (with 19 signed) alongside 19 enduring powers of attorney (with 17 signed).

YFS also sought to host sessions at other Indigenous aged care services across the Logan region, however, these presentations were ultimately unable to go ahead due to the ongoing COVID-19 pandemic and associated aged care restrictions.

1.3 How to use this chapter

The chapter is separated into thirteen sections. The first two sections, *Hosting a will creation clinic* and *Opening topic: Opening the presentation and introduction* are introductory topics

¹ Ibid.

² A full list of stakeholders consulted in this project can be found in 'Acknowledgements' section.

³ Burringilly Aboriginal Corporation, 'About Us', (Web Page, 2017) <https://www.burringilly.org.au/about/>.

⁴ Ibid.

providing guidance on how to begin the presentation and how to set up an accompanying will creation clinic. Facilitators should also consult the *Preparing to give community legal education* section prior to this chapter.

The next section titled *Terms and definitions* introduces facilitators to terms that will be frequently used throughout this chapter. It is vital that facilitators consult this section initially as this will assist in understanding the key legal messages and may help in answering questions from the audience.

The nine subsequent sections each focus on a different aspect of wills and enduring powers of attorney. They are:

- Topic 1: What is a will?
- Topic 2: The importance of making a will
- Topic 3: How do I make a will?
- Topic 4: What can/should I include in a will?
- Topic 5: Customary law obligations
- Topic 6: Life changes and updating your will
- Topic 7: Where can a will be kept?
- Topic 8: Can people argue about what I do?
- Topic 9: Enduring powers of attorney

Each of these topics have the following structure:

- **Introduction**
This section provides a brief overview of the topic for the facilitator. It introduces basic concepts and can mention key takeaways from the topic.
- **Objectives**
The objectives section discusses why it is important Elders are aware of the information contained in the topic. It can include evidence of need, context, and the overall goal behind providing this information.
- **Terminology**
This section includes definitions particularly relevant to the current topic. It is important these terms are explained to the target audience. The terms listed in this section can also be found in the *Terms and definitions*. Accompanying definition cards to share with participants can also be found in the *Resources and extra materials* section.
- **Key legal messages**
These sections are the core of each topic and the facilitator's guide overall. They provide the legal information that must be passed on to the target audience. Separated in dot point form, the key points are organised in order of how facilitators should logically deliver the information to the target audience.

The final section, *Resources and extra materials*, contains the resources that may be incorporated into the presentation. It also includes other documents that may be used when setting up a will creation clinic.

Format and delivery of this chapter to Elders

Although this chapter contains numerous legal messages, it is not designed to be simply used as a script. The information is best delivered in the form of a yarning circle. Yarning circles have been used by Indigenous Australians to preserve and pass on cultural knowledge for centuries.⁵ They provide a safe space for participants to be heard, and foster trusting and respectful relationships.⁶ Although they may take a several different formats, participants are usually seated in a circle and subsequently invited to introduce and share something about themselves.⁷ The facilitator then proceeds with the presentation, and encourages members of the circle to participate when they feel comfortable.

If the information cannot be delivered in a yarning circle, it should still be presented as interactively as possible. Facilitators should aim to stimulate as much discussion between not just the audience and themselves, but between members of the audience. Where they would suit the learning needs of the audience, handouts and online materials (like a PowerPoint) should also be incorporated into the presentation. However please note that in some instances, it may not be culturally appropriate to discuss these issues in an interactive environment. If possible, consult with local Elders about the format of the presentation prior to hosting.

As noted, the key legal messages contained in this chapter are not designed to be read as if they were a script. Rather, they should be used as talking points to encourage discussion. Given the importance of the information provided, the topics and their enclosed key legal messages should also be delivered in the order they appear in this document. It is similarly important that all legal messages are covered to ensure the presentation is both effective and comprehensive – particularly given that wills and enduring powers of attorney are highly topical areas of concern for Elders. Being broadly aware of the legal messages contained in this document prior to beginning the presentation may also assist facilitators in shaping the discussion.

The most successful community legal education programs are those that not only recognise the learning needs of the audience but are structured in such a way to accommodate those needs.

When planning to deliver the program, facilitators should first consult the *Preparing to give community legal education* section. It provides a broad introduction to the intricacies associated with presenting to Indigenous audiences. If possible, facilitators should then consult with the community, carers, or aged care service providers as to how they believe the information should be presented.

Given the presentation discusses the creation of wills, facilitators should also consider accompanying the presentation with a will creation clinic or service to help participants with their will. For further information, see the *Hosting a will creation clinic* section below.

⁵ Queensland Curriculum and Assessment Authority, 'Yarning Circles' (Web Page, 25 October 2020) <https://www.qcaa.qld.edu.au/about/k-12-policies/aboriginal-torres-strait-islander-perspectives/resources/yarning-circles>.

⁶ Janine Dunleavy, *About Yarning Circles* (Southern Cross University, 2013) <https://www.scu.edu.au/media/scueduau/academic-schools/-gnibi-college-of-indigenous-australian-peoples/About-Yarning-Circles-A-Guide-for-Participants.pdf>.

⁷ Queensland Curriculum and Assessment Authority (n 22).

1.4 Hosting a will creation clinic

As part of the *Analysis Project*, YFS Legal surveyed Indigenous people in Logan on whether they currently had a valid will. Of those surveyed, 87.5% did not have a will.⁸ During the development stage of this chapter, YFS then conducted several wills and enduring powers of attorney education sessions with Logan Elders. Surveying members of the audience as to whether they would like to have a will created or whether an existing will needed updating, over 70% indicated that they would like to have a will completed or updated.

In Queensland, there are very few avenues available for a person to have their will (or enduring power of attorney) completed outside of paying a lawyer, and in many instances Elders may be unable to afford or unable to effectively access those services.

Taking the above points together, although it is still useful to deliver wills information to Elders, the overall value and benefit of these information sessions is severely diminished if Elders cannot afford or effectively access services to have their will-related issues addressed. YFS Legal found that the wills information sessions are therefore best accompanied with a free clinic so that Elders may have their wills updated or completed.

Why you should offer free enduring powers of attorney

YFS Legal also sought advice from practising wills and estates lawyers while developing this chapter. It became apparent from their feedback that Elders should also be offered an enduring power of attorney as part of the will creation clinic. Both documents are equally as important, and it eases the burden on Elders to have both documents completed in advance. As noted previously, there are also very few affordable options available to Elders to have their enduring power of attorney completed. Ergo, enduring powers of attorney should also be completed during the free will clinic.

How you could gather volunteer lawyers

To ensure that there would be no costs involved for the Elders, YFS Legal used volunteer wills and estates lawyers to interview and draft the wills at our clinic.

In seeking volunteers for the clinic, we initially contacted several law firms (using our existing contacts) and found that there was significant interest in providing such support to First Nations people.

We also reached out to lawyers individually by posting in Facebook groups and many members were also willing to help pro bono. As an example, YFS posted in a group with approximately 5,000 members called Lawyer Mums Australia seeking feedback on the toolkit:

'Hey!

I am the Principal Solicitor at a community legal centre in Queensland.

We are currently doing a First Nations Wills Project. We previously conducted a needs analysis of the local Indigenous community and found that an overwhelming number of Elders wanted to learn more about wills and enduring powers of attorney.

⁸ *Analysis Project* (n **Error! Bookmark not defined.**).

We have put together a kit and presentation on how to provide this information to Elders in a culturally appropriate way.

We are seeking some pro bono help from wills and estates lawyers to look at the kit and verify that the law is correct and that there are no gaps.

Depending on the amount we may be able to pay a small cost – we really want to deliver a high-quality project.

If the above interests you, please pm me.

Thanks!

We received numerous offers for help in response to this post. Posting in similar groups can be a useful way for facilitators to secure volunteers for their own will clinics.

What the will clinic looks like

Other presentations and clinics such as this have been undertaken by organisations in New South Wales and other states. As part of the feedback and revision process, YFS sought feedback from these organisations on how to facilitate and run the wills creation clinics.

In general, YFS found that the clinic should take place over two days – one to host an information session and to receive instructions from the Elders, and the other to review the drafted wills and enduring powers of attorney and to sign them. A detailed breakdown of each day can be found below in the table below.

During YFS' clinic, Elders were given the option to have their will and/or enduring power of attorney document completed – they did not need to complete both. Nevertheless, if Elders required both documents it took the volunteer lawyers on average 60 minutes to take instructions from each Elder. When signing subsequently signing and witnessing these documents, it took YFS Legal approximately 45 to 60 minutes.

The overall process of drafting, writing, and signing the wills and enduring powers of attorney documents were completed within one week. When coming back to sign their relevant documents, 90% of the participants signed the documents drafted for them by the volunteer lawyer.

Depending on the number of Elders attending, the days may need to be separated to allow the volunteer lawyers sufficient time to draft the wills and enduring powers of attorney. It was noted by organisations who ran similar program that a quick turnaround between the information session, drafting and signing of the wills improved the rate of wills being completed.

Each day should take the following form:

<p>Session 1:</p>	<p>1. Information session Firstly deliver the community legal education session on wills and enduring powers of attorney. This should be done early in the morning to ensure that the Elders are aware of terminology and consider what questions they may like to ask the volunteer lawyers. This can take from 30 minutes to an hour.</p> <p>2. Lunch and/or break Facilitators to provide food and beverages to Elders after the information session. If possible, volunteer lawyers should also try to get to know the Elders during this time. This can assist in helping the Elders feel comfortable talking to the volunteer lawyers.</p> <p>3. Meet with volunteer lawyers Volunteer lawyers to meet with the Elders individually to discuss their potential will and enduring power of attorney. It is during this time that the Elders will sign a client agreement. After the Elders have signed this agreement, the volunteer lawyers will take instructions from the Elders. The client agreement and handout used by the lawyers on taking instructions can both be found in the <i>Resources and extra materials</i> section.</p>
<p>Session 2: (Week after)</p>	<p>1. Meet with volunteer lawyers Elders to meet with the volunteer lawyers (virtually or in-person) to go over and discuss the drafted documents. Volunteer lawyers to make any changes to the wills as requested by the Elders.</p> <p>2. Elders to sign wills and enduring powers of attorney Elders to sign the drafted documents. Facilitators may have to print these documents out at the venue and witness the document signing. Note, only certain people can witness these documents, and the enduring power of attorney guidelines must be met.</p> <p>3. Conclusion Facilitator or firm to take a copy of the wills and enduring powers of attorney, but the Elder is to keep the original copies. For risk management purposes, the original copy of the client agreement and a fact sheet on wills and enduring powers of attorney must also be given to the Elders at the conclusion of the clinic. Both documents can be found in the <i>Resources and extra materials</i> section of this chapter.</p>

Note the above is a general guide only, and the clinic can be held over longer periods if required. For example, the YFS clinic took place over two weeks as we had large groups of Elders seeking wills and enduring powers of attorney. Each day of the first week was spent delivering information sessions and receiving instructions from Elders. YFS then spent the next week meeting with Elders to review their newly drafted wills.

YFS Legal did not take the originals of any documents, only copies were made of the documents. The agreement with the client stipulates that YFS would not keep any of the original documents. All copies of client documents were uploaded into CLASS Legal Database.

The following documents were used at YFS clinic and can be found in *Resources and extra materials* section below:

- Client agreement
- Intake sheet for wills and enduring power of attorney
- File note for enduring power of attorney signing
- File note for wills signing
- Client checklist – to be completed at the end of signing

1.5 Opening topic: Opening the presentation and introduction

A core part of a community legal education session is its introduction. It should include an Acknowledgement of Country, or preferably, Welcome to Country, introduce the facilitators and or presenters, and assure the audience that they are in a culturally safe space.

The introduction should take the following structure:

1. **Acknowledgement of Country/Welcome to Country:** if possible, organisers or facilitators should invite local Elders to perform a Welcome to Country. Otherwise, facilitators (and other speakers) should perform an Acknowledgement of Country prior to formal event proceedings. Further information on Acknowledgements and Welcomes can be found in the *Preparing to give community legal education* section.
2. **Introductions:** facilitators or presenters should now properly introduce themselves. Mention who you are, where you grew up, where your family come from, and briefly your story to where you are today. Some speakers may also like to mention that they have children, or briefly also mention their partners. This is an important part of engaging with Elders as it helps to build connection and rapport.
3. **Presentation overview:** briefly outline the presentation and mention what will be discussed. Emphasise that today is about encouraging them to get a will and enduring power of attorney completed, and that any discussions about particular family matters should not be shared among the wider community.
4. **Legal advice disclaimer:** facilitators **must** underscore that this presentation is **not** legal advice. Stress that this presentation is only to help them better understand the importance of getting a will and enduring power of attorney document completed. It is presented for their general information only and is not a statement of law. While the audience will likely ask questions that directly relate to their own personal circumstances – recommend that they seek legal advice. Note also that this information is current as of August 2022 and may have changed since release.
5. **Invite the audience to participate:** invite the audience to introduce themselves if they are comfortable (particularly if presenting to small groups) but do not force them to do so. Let them know that the presentation is meant to be relaxed, and that they are free to ask questions at any time. You may like to ask questions such as, ‘How are you feeling today?’ as this can assist in helping the audience feel comfortable.

1.6 Terms and definitions

Adequately provide for: The amount of money or other property required from an estate to ensure a deceased's spouse, children and dependents are supported.

Administrator: Can be (1) a person appointed by the Court to administer an estate where there is no executor, or no will, or (2) a person appointed by QCAT to administer someone's financial affairs when they are alive but do not have capacity to manage their own finances.

Attorney for financial matters: An attorney for these matters can make decisions about your money, property and houses, bank accounts, investments, or other legal assets. This could be selling your house, paying bills for your care, or purchasing an investment.

Attorney for personal (including health) matters: An attorney for these matters can make decisions about your care, welfare, where and who you live with, as well as support services you may need. They can also make decisions about health matters. This includes medical treatment decisions, and end of life decisions (for example, the attorney could refuse life-sustaining treatment on the other person's behalf).

Beneficiary: A person named in a will to receive a gift/s.

Bequest: A gift in a will.

Binding Death Benefit Nomination: A written direction by someone for how they would like their superannuation death benefits to be distributed. Note that not all nominations are binding and whether they are can depend on your superannuation provider.

Children, grandchildren, and their children: Includes children who have been conceived but not yet born (e.g. pregnant partner) and adopted children. Natural children and adoptive children are entitled to claim in their parents' (or adoptive parents') estate. Adopted children are not entitled to their natural parents' estate.

Codicil: A document that makes a change to an existing will.

Conditional bequest: A gift that is given to a beneficiary only if the beneficiary satisfies a certain condition. For example, they are over 18.

Contest: To challenge the validity of a will in Court.

Customary law obligations: Obligations and responsibilities to community passed down by your mob.

Dependent: A parent of a deceased person, the parent of a surviving child under the age of 18 who is also the child of the deceased person, or a person under 18 who was **wholly** or **substantially** maintained or supported by the deceased person (i.e. financially supported).

Distribute: To complete the formal process of giving something to a beneficiary through your will or other rules.

Enduring power of attorney: A legal document where you appoint someone (called an 'attorney') to make decisions about financial and legal matters on your behalf, while you are still alive.

Estate: Property owned by the person making the will. This includes a house, money, art, jewellery, ritual objects, secret knowledge, or information. Does not usually include joint property (e.g. a house you jointly own with a partner) and often may not include superannuation.

Executor: The person you have chosen to carry out your wishes in your will. This person must be 18 years or older.

Guardian: A person you want to look after your child. This is not binding.

Insolvent: A person is insolvent if they cannot pay their debts on time. If an insolvent person dies, their estate or money does not automatically go towards paying the debt. The person's funeral costs and other expenses involved with the administration of their estate take priority.

Intestate: When a person passes away without a will.

Joint tenants: A person is a joint tenant when they jointly own a property (usually a house or land) with one or more parties. When the person dies the property passes to the other party/parties and does not form part of their estate.

Kinship: The Aboriginal and Torres Strait Islander idea of family. Kinship is at the heart of Aboriginal and Torres Strait Islander Culture and community.

Mental capacity: Having mental capacity means you can think, understand and communicate decisions for yourself.

Minor: A person under the age of 18.

Partially intestate: When a person does not include all of their estate in the will.

Probate: The court's legal recognition of the will and of the executor's authority to deal with the assets in the estate.

Probate notice: A notice that is published online after a person has passed away. It provides details of the will (or lack thereof) so others may file a claim in court or notify the executor in relation to a claim against the estate.

Property (land and houses): Land, houses or other buildings.

Public Trustee: An organisation that provides will-making services and sometimes acts as administrator or executor.

QCAT: The Queensland Civil and Administrative Tribunal, is a bit like a court, and appoints people to manage your affairs if you do not have capacity to do so yourself.

Residuary clause: A residuary clause is included in a will to give away everything else remaining in your estate after any individual gifts have been given.

Revoke: To legally cancel.

Royalties: Royalties are small payments made to the artist each time their artwork is used or displayed.

Spouse: A married husband or wife, or de facto partner of a person (i.e. someone who isn't married to a person but lives with them as a couple). Includes same-sex couples.

Sound mind: To understand yourself, situation, and surroundings. A person has a sound mind when they are capable of making rational decisions and judgements. They should also be able to understand what they are physically doing, the situation they are in, and their surroundings.

Tenants in common: People are tenants in common when they each own individual shares of a property. On the death of one person, their share in a property is distributed according to their will (compared with **Joint Tenants**).

Testamentary capacity: A person who has a sound mind, memory and understanding to make a will.

Testamentary guardian: A guardian appointed by the testator in their will.

Testate: When a person dies and has left a valid will, they are said to have died testate.

Testator: The person who makes the will.

Trust: A trust is a relationship where one person (the trustee) holds assets for the benefit of another (beneficiary).

Will: A will is a legal document that appoints an executor and sets out how a person would like to distribute their estate when they pass away.

1.7 Topic 1: What is a will?

Introduction

Many First Nations people die without a valid will. Dying without a will can lead to difficulties or conflict within the family of the deceased – especially if there is a disagreement as to who gets a particular possession. When a person dies without a will, their estate is distributed in accordance with succession laws. The current Queensland succession laws do not fully account for things such as guardianship (who looks after children under 18), burial wishes and customary law obligations. These things need to be set out in a will to ensure that the wishes of the person making the will are carried out in a culturally appropriate way.

Objectives

The objective of this topic is to ensure that people are aware of what a will is. It is hoped that teaching about their importance will prompt Elders to create a will and not only alleviate any potential conflict within their family, but make sure that their wishes are carried out in a culturally respectful way. Therefore, this topic also aims to highlight the consequences of what may occur if someone passes away without one.

Terminology

Distribute: To complete the formal process of giving something to a beneficiary through your will or other rules.

Enduring power of attorney: A legal document where you appoint someone (called an 'attorney') to make decisions about financial and legal matters on your behalf, while you are still alive.

Estate: Property owned by the person making the will. This includes a house, money, art, jewellery, ritual objects, secret knowledge, or information. Does not usually include joint property (e.g. a house you jointly own with a partner) and often may not include superannuation.

Guardian: A person you want to look after your child. This is not binding.

Insolvent: A person is insolvent if they cannot pay their debts on time. If an insolvent person dies, their estate or money does not automatically go towards paying the debt. The person's funeral costs and other expenses involved with the administration of their estate take priority.

Intestate: When a person passes away without a will.

Kinship: The Aboriginal and Torres Strait Islander idea of family. Kinship is at the heart of Aboriginal and Torres Strait Islander Culture and community.

Tenants in common: People are tenants in common when they each own individual shares of a property. On the death of one person, their share in a property is distributed according to their will (compared with **Joint Tenants**).

Testamentary capacity: A person who has a sound mind, memory and understanding to make a will.

Testamentary guardian: A guardian appointed by the testator in their will.

Testate: When a person dies and has left a valid will, they are said to have died testate.

Testator: The person who makes the will.

Trust: A trust is a relationship where one person (the trustee) holds assets for the benefit of another (beneficiary).

Will: A will is a legal document that appoints an executor and sets out how a person would like to distribute their estate when they pass away.

Key legal messages

1. A will is a legal document that you create to set out how you would like to distribute your estate – i.e. your belongings – when you pass away.
2. It is important to create a will:
 - (a) to ensure your belongings are distributed how you would like them to be;
 - (b) so you can nominate the person you would like to be in charge of all of this (your executor) after you pass away, otherwise other people will decide who does this; and
 - (c) so you can express your burial wishes.
3. The current Queensland laws do not fully account for how First Nations people think about kinship, so it is also vital to include any guardianship issues in your will.
4. Creating a will can help ensure your wishes are dealt with in a culturally respectful manner.
5. A will can help decrease the risk of conflicts over guardianship, burial disputes, or your estate.

1.8 Topic 2: The importance of making a will

Introduction

If a will is not created, intestacy laws set out in the *Succession Act 1981 (Qld)* determine how a deceased's estate is dealt with. This may lead to an outcome that the deceased and their family may not have wanted. The laws of intestacy can differ significantly to traditional or customary ways of dealing with someone's belongings after death, guardianship or care of children, customary obligations, and burial wishes. A will can set out these wishes to ensure they are carried out in a culturally appropriate way.

There are many common misconceptions about whether someone needs a will – for example, that people who don't have a lot of money or belongings don't need to create a will. This is false. There is no required amount of money or property needed for someone to make a will.

Objectives

It is important that First Nations people are aware of will creation to avoid passing away intestate (or without a will). Creating a will ensures property and guardianship of children are appropriately dealt with in a way the person would like them to. This can reduce conflict within families and the community and ensure property and guardianship of children are dealt with in a culturally safe manner. This topic also aims to educate Elders on common misconceptions about creating a will, and how creating a will can prevent potential elder abuse in the future.

Terminology

Administrator: Can be (1) a person appointed by the Court to administer an estate where there is no executor, or no will, or (2) a person appointed by QCAT to administer someone's financial affairs when they are alive but do not have capacity to manage their own finances.

Customary law obligations: Obligations and responsibilities to community passed down by your mob.

Enduring power of attorney: A legal document where you appoint someone (called an 'attorney') to make decisions about financial and legal matters on your behalf, while you are still alive.

Estate: Property owned by the person making the will. This includes a house, money, art, jewellery, ritual objects, secret knowledge, or information. Does not usually include joint property (e.g. a house you jointly own with a partner) and often may not include superannuation.

Executor: The person you have chosen to carry out your wishes in your will. This person must be 18 years or older.

Guardian: A person you want to look after your child. This is not binding.

Insolvent: A person is insolvent if they cannot pay their debts on time. If an insolvent person dies, their estate or money does not automatically go towards paying the debt. The person's funeral costs and other expenses involved with the administration of their estate take priority.

Intestate: When a person passes away without a will.

Mental capacity: Having mental capacity means you can think, understand and communicate decisions for yourself.

Joint tenants: A person is a joint tenant when they jointly own a property (usually a house or land) with one or more parties. When the person dies the property passes to the other party/parties and does not form part of their estate.

Kinship: The Aboriginal and Torres Strait Islander idea of family. Kinship is at the heart of Aboriginal and Torres Strait Islander Culture and community.

Mental capacity: Having mental capacity means you can think, understand and communicate decisions for yourself.

Minor: A person under the age of 18.

Partially intestate: When a person does not include all of their estate in the will.

Trust: A trust is a relationship where one person (the trustee) holds assets for the benefit of another (beneficiary).

Will: A will is a legal document that appoints an executor and sets out how a person would like to distribute their estate when they pass away.

Key legal messages

1. When creating a will, there are criteria that must be satisfied to ensure the will is legally valid. These criteria are discussed in the next topic – *Topic 3: How do I make a will?*
2. A will can be made regardless of how much money or how many belongings you have. You should be sure to include all parts of your estate in your will. If you don't, you may be 'partially intestate'.
3. Creating a will can help to ensure the testator's wishes are carried out and limit family and/or community conflict. For example, if you would like a particular item to go to a particular relative, a will can help ensure that it goes to that person – rather than family members arguing about who gets the item. Please note that a court can ultimately decide what happens but having a will can minimise the chances of a testator's wishes being ignored.
4. If you do not create a will the laws of succession will determine what happens to your estate. The Queensland laws generally do not align with traditional or customary ways of dealing with someone's property after their death.
5. A will can help ensure any customary obligations are upheld.
6. You should make a will as soon as possible. By creating your will while you have sufficient mental capacity, you can help prevent elder abuse in the future. Although you think your kids or other family members will take care of you and act in your best interest when you're older, this isn't necessarily guaranteed. If your mental or physical state declines significantly, your family could pressure you or take advantage of you. Creating a will as soon as possible can help prevent elder abuse in the future.

Elder abuse

1. Elder abuse can be any type of abuse – emotional, physical, mental, sexual or financial. One of the most common forms of elder abuse is financial abuse. This can occur when you are writing your will. If people around you pressure or influence you to give them money or property in your will, this could be considered ‘undue influence’ or financial abuse. You should not feel pressured or forced to put things in your will that you do not want to. If someone has unduly influenced you, the will can be invalidated.
2. If you are experiencing elder abuse, or suspect an older person is being abused, you can contact the Elder Abuse Helpline. Funded by the Queensland Government, this organisation provides free and confidential advice. They can be contacted via 1300 651 192.
3. It is important to make decisions about who gets what on your own or with a lawyer while you still have the capacity to do so. If you write your will with people who could get things from it, you may feel pressured to include them or give them things you do not want to. By writing your will with just your lawyer, you can prevent financial abuse and being potentially bullied or taken advantage of in the future.
4. If you do feel pressured or are forced by others to make changes to your will, there is a free Elder Abuse Hotline you can call for support on 1300 651 192. You can remain anonymous through this hotline and all calls are kept confidential. For more information, visit their [website](#).⁹
5. It is better to write your will earlier rather than later to ensure that you fully understand everything. If you are completely mentally stable when creating your will, it will be more difficult for people to challenge the validity of your will and argue that you did not know what you were doing.
6. While you are alive, generally no one is entitled to a copy of or to see your will if you do not want them to. You may wish to share it with others, but you do not have to. Please note that if your mental state declines, your administrator may be entitled to see your will.
7. You should tell the executor of your will where it is so they can access it after you pass away. You should be cautious with sharing the will with others as they may pressure you to make changes.

⁹ Elder Abuse Prevention Unit (Web Page, 2014) <https://www.eapu.com.au/>.

Common misconceptions about creating a will

1. You only need a will if you are rich or have lots of stuff – **False.**

Not having much money or many things does not mean you do not need a will. You may have an object that means a lot to you, or to someone close to you. You can make sure this goes to someone in particular by making a will.

2. You do not need a will if you don't have a house or land – again **False.**

It does not matter if you do not own a house, land, property or whether you rent a place to live. As mentioned previously, you may still have belongings you want someone in particular to get.

3. A will passes on debts to your family – **False.**

If you die with a mortgage, credit card, or personal loan, the debts are usually paid out of your estate – i.e. the money you have left in your bank after you die, or the sale of the house covered by the mortgage. If there is not enough money left to cover the debts, there are certain rules that apply. However, family members usually don't have to worry about inheriting those debts as they are paid out before they get any things from your will.

1.9 Topic 3: How do I make a will?

Introduction

A will can be created several ways, but it must be done correctly to ensure it is legally valid. There are certain criteria that must be satisfied to ensure a valid will is made. If a will is not valid, then the person may be wholly or partially intestate. This can create difficulty for your family in the future and could lead to your wishes not being carried out.

A will can be created by yourself, with a lawyer or with the Public Trustee. Will kits can also be purchased from a news agent or post office. However, it is **not recommended** that people create their own wills with these kits as it is extremely easy to make a mistake on them, and to consequently invalidate the will. If the will is invalid, the person will become intestate, and the person's wishes will not be carried out.

Objectives

This topic aims to introduce the key steps and requirements that are needed to make a valid will. The formal requirements and details of who a beneficiary and executor are and what their responsibilities are also discussed. It is important to ensure that the testator understands the responsibilities of the executor so they pick the right person as this position has significant responsibilities.

Terminology

Adequately provide for: The amount of money or other property required from an estate to ensure a deceased's spouse, children and dependents are supported.

Administrator: Can be (1) a person appointed by the Court to administer an estate where there is no executor, or no will, or (2) a person appointed by QCAT to administer someone's financial affairs when they are alive but do not have capacity to manage their own finances.

Attorney for financial matters: An attorney for these matters can make decisions about your money, property and houses, bank accounts, investments, or other legal assets. This could be selling your house, paying bills for your care, or purchasing an investment.

Attorney for personal (including health) matters: An attorney for these matters can make decisions about your care, welfare, where and who you live with, as well as support services you may need. They can also make decisions about health matters. This includes medical treatment decisions, and end of life decisions (for example, the attorney could refuse life-sustaining treatment on the other person's behalf).

Beneficiary: A person named in a will to receive a gift/s.

Dependent: A parent of a deceased person, the parent of a surviving child under the age of 18 who is also the child of the deceased person, or a person under 18 who was *wholly* or *substantially* maintained or supported by the deceased person (i.e. financially supported).

Enduring power of attorney: A legal document where you appoint someone (called an 'attorney') to make decisions about financial and legal matters on your behalf, while you are still alive.

Estate: Property owned by the person making the will. This includes a house, money, art, jewellery, ritual objects, secret knowledge, or information. Does not usually include joint property (e.g. a house you jointly own with a partner) and often may not include superannuation.

Executor: The person you have chosen to carry out your wishes in your will. This person must be 18 years or older.

Guardian: A person you want to look after your child. This is not binding.

Kinship: The Aboriginal and Torres Strait Islander idea of family. Kinship is at the heart of Aboriginal and Torres Strait Islander Culture and community.

Mental capacity: Having mental capacity means you can think, understand and communicate decisions for yourself.

Property (land and houses): Land, houses or other buildings.

Testator: The person who makes the will.

Will: A will is a legal document that appoints an executor and sets out how a person would like to distribute their estate when they pass away.

Key legal messages

1. To create a will, you must be over 18.
2. It is **not recommended** that you write your own wills or use kits purchased from a news agent or post office. When making a will, you should go to your local community legal centre or consult a lawyer.
3. To be legally valid, a will must:
 - (a) be in writing;
 - (b) have a date written on it to ensure the executor can determine the most recent version of the will; and
 - (c) be signed by the testator in the presence of two witnesses (over 18) who are all together at the time it is signed and are not the beneficiaries (and not related to the beneficiaries).
4. When making a will, you should go to your local community legal centre or consult a lawyer. Any language (for example, your mob's language) can be used as long as it can be translated effectively for the executor.

Executor

When making a will, an executor will need to be appointed. This is the person who will be responsible for carrying out the wishes in the will. Things an executor may have to do include:

- finding the will
- collecting in all the assets such as property and cash
- identifying, and paying any debts or taxes
- managing copyright and resale royalty entitlements for artworks
- distributing the assets of the estate as directed by the will.

When deciding who to make executor, you should consider if there may be any conflict between the executor and your beneficiaries. You should also consider whether the executor will be able to carry out duties imposed on them. The best executors are impartial and not overly emotional. You can appoint more than one person, or even a number of people in a row to be your executor. This can help ensure that if one executor dies you do not need to make a new will.

Note that if an executor makes errors or does not act in the best interests of the estate that they could be personally liable and could be sued.

Executors must be over the age of 18 years old and have the mental capacity to act in their role. Their duties as an executor could continue for a long time and they may have to manage assets or property until a testator's children (or young beneficiaries) are a particular age. For example, a person may die and want to give their children money when they turn 25. The executor would be in that role for however long it takes the children to turn 25.

Beneficiaries

Beneficiaries are the people who you want to give money, objects or other property to. Beneficiaries can be anyone, for example, relatives, your partner, children, friends, charities, or other organisations. When deciding who to give stuff to (i.e. make a beneficiary), it may help to consider:

1. Who depends on me financially?
2. Do I need to appoint a guardian for any children under 18?
3. Do I want any assets (artwork, furniture, family heirlooms) to remain in the family?
4. Do I want to support any organisations, charities, non-profit groups?

You should also note that if you **do not** give anything to your partner (or spouse), children or other dependents in your will, they might be able to challenge it in court after you pass away. If you don't want to give those people anything valuable, you should get legal advice about this. This could lead to problems after you pass away.

Although you may have separated from your wife or husband, it is important to divorce them if you do not want them to receive anything from your estate after you have died. Not divorcing an ex-partner could lead to them contesting your will after you have passed away. This will be discussed in later topics, but if you hold any property with your former spouse or de facto partner, you should get legal advice about this as soon as possible.

When naming beneficiaries, their full names should be written in the will or be as specific as possible. Vaguely named beneficiaries such as 'child' or 'aunt' can create conflict as to who the beneficiary is, or who the gift is for. Writing a beneficiary's full name will ensure the right person is receiving the gift.

1.10 Topic 4: What can/should I include in a will?

Introduction

Any object you own can be included in a will. A will may include land, artwork, who will look after children or pets, jewellery, furniture, vehicles, and customary law obligations. Any personal belongings, no matter how small, can be put into a will. There can be problems when it comes to property if you own it with other people. Therefore, it is integral Elders are aware of or consider how they own their property and only include items in their estate that they own.

Objectives

The objective of this section is to ensure people are aware of what should go into a will and that wills can be made with any number of belongings. People should also be aware that they need to include everything they own so they do not become partially intestate.

Terminology

Adequately provide for: The amount of money or other property required from an estate to ensure a deceased's spouse, children and dependents are supported.

Administrator: Can be (1) a person appointed by the Court to administer an estate where there is no executor, or no will, or (2) a person appointed by QCAT to administer someone's financial affairs when they are alive but do not have capacity to manage their own finances.

Attorney for financial matters: An attorney for these matters can make decisions about your money, property and houses, bank accounts, investments, or other legal assets. This could be selling your house, paying bills for your care, or purchasing an investment.

Attorney for personal (including health) matters: An attorney for these matters can make decisions about your care, welfare, where and who you live with, as well as support services you may need. They can also make decisions about health matters. This includes medical treatment decisions, and end of life decisions (for example, the attorney could refuse life-sustaining treatment on the other person's behalf).

Beneficiary: A person named in a will to receive a gift/s.

Bequest: A gift in a will.

Binding Death Benefit Nomination: A written direction by someone for how they would like their superannuation death benefits to be distributed.

Conditional bequest: A gift that is given to a beneficiary only if the beneficiary satisfies a certain condition. For example, they are over 18.

Customary law obligations: Obligations and responsibilities to community passed down by your mob.

Distribute: To complete the formal process of giving something to a beneficiary through your will or other rules.

Estate: Property owned by the person making the will. This includes a house, money, art, jewellery, ritual objects, secret knowledge, or information. Does not usually include joint property (e.g. a house you jointly own with a partner) and often may not include superannuation.

Executor: The person you have chosen to carry out your wishes in your will. This person must be 18 years or older.

Guardian: A person you want to look after your child. This is not binding.

Joint tenants: A person is a joint tenant when they jointly own a property (usually a house or land) with one or more parties. When the person dies the property passes to the other party/parties and does not form part of their estate.

Minor: A person under the age of 18.

Partially intestate: When a person does not include all of their estate in the will.

Royalties: Royalties are small payments made to the artist each time their artwork is used or displayed.

Spouse: A married husband or wife, or de facto partner of a person (i.e. someone who isn't married to a person but lives with them as a couple). Includes same-sex couples.

Sound mind: To understand yourself, situation, and surroundings. A person has a sound mind when they are capable of making rational decisions and judgements.

Tenants in common: People are tenants in common when they each own individual shares of a property. On the death of one person, their share in a property is distributed according to their will (compared with **Joint Tenants**).

Will: A will is a legal document that appoints an executor and sets out how a person would like to distribute their estate when they pass away.

Key legal messages

1. Things to consider

You should ensure you are specific when naming who the beneficiaries are. For example, you might like to write your children's full names or use a more general term such as "my biological children" in order to accurately specify who you wish to leave a gift to.

You should also specifically describe what the gift is – particularly if it is not money. Photos of gifts can also be included or attached to a will to remove any doubt.

Further, you need to ensure that you will still own the gift when you die. For example, if you would like to give your child your car, it may be better to describe the car in general terms (e.g. "any motor vehicle I own at the date of my death") rather than the specific make and model of the car in case you get a new car between writing your will and passing away. If you sold the car with its make and model named in the will, the car (or your new car) would not automatically go to the beneficiary.

2. Guardianship of children

A guardian may need to be appointed for children under 18 that you care for. Guardians must be appointed for minors as the courts may place greater focus on biological descent rather than relationships between the child and the person you want to care for the child. Note that stepchildren are not legally the children of a deceased person unless they were legally adopted by them.

Courts in Queensland recognise that a parent (or guardian) of an Indigenous child may not be someone biologically connected to them, but an Auntie or Uncle. Although you may want 'Auntie Jane' or 'Uncle John' to become guardian of a child you care

for, it is again still vital that their full name is written in the will as this will remove any uncertainty as to who you want to take care of the child. Note that naming someone as a guardian in your will is an expression of wish and may not be binding. The court will ultimately determine who determines who will be named as guardian, and if someone disagrees with your choice they may challenge it in court.

3. **Land**

House or land can be given to one beneficiary or divided between several beneficiaries.

There are different rules that apply depending on where the property is located, and where the beneficiary lives. These rules tend to apply if the property is not in Queensland, or if a person living in another state is the beneficiary of a Queensland property.

If the land is owned by not just the deceased, but with someone else – or ‘jointly owned’ – the other owner will automatically receive the deceased’s part of the property and it will not be included in the will. This does not apply to land owned by two people as ‘tenants in common.’¹⁰ Tenants in common keep their bit of property and can pass this land onto others in their wills. If there is no will, the land will be distributed according to intestacy laws. If you’re unsure about what will happen to your land or house, seek legal advice.

A question that may arise is how exactly do you divide a big asset such as property between people?

It is useful to divide in percentages. For example, if you would like to split property you own between four children, you may write that you would like to give 25% of the property to each of your four children. This is something you should discuss with the lawyer writing your will.

4. **Artwork**

Artwork created or bought by you can be passed down to your beneficiaries through your will.

5. **Gifts (jewellery, furniture any other belongings)**

Gifts can be passed down to beneficiaries. It is important to specify who they are going to and what the gift is. For example, if a car is being passed down to a person’s child, the full name of the child and make and model of the car should be included. Alternatively, if it is possible that the family car may change, a wider description such as “the family car” or “any car that I own” may be better to ensure that your wishes can be carried out and the car goes to who you want it to.

A gift can be arranged so that a beneficiary receives the gift at a certain stage in their life, such as a certain age or milestone. This is called a conditional bequest.

A gift may be passed down to someone for a specific use only. For example, you might like to pass down your car to someone on the condition that it must be used to pick up and drop off their children from school. This is another form of a ‘conditional bequest’. It is vital you talk to a lawyer about setting one of these up as it can be complex.

¹⁰ *Duties Act 2001* (Qld) s 144.

6. **Pets**

If you have any pets, you should appoint someone to look after them.

Although not binding, you can also add in a separate document, details such as what your pet eats, how many times they should go for a walk, any medical conditions or other things worth noting. Note that this is not binding so you should choose someone who you know will follow your wishes.

7. **Funeral arrangements (including burial instructions)**

The will can specify whether the testator would like to be buried or cremated. The instructions for where the testator would like to be buried can be written in a will. If this information is not included in the will, the decision as to where the body is buried (or whether it is cremated) can be made by the executor. You can also specify where you would like the funeral to be held and other specific information. If disputes occur, the executor has the right to decide.

You should let the executor know the location of your will so it can be readily located after you have passed away. You should also let those around you know your burial wishes as sometimes the will may be found after you have already been buried or cremated. If you were to include a clause stating your preference to be cremated, an executor must follow this wish.

8. **Residuary clause**

A residuary clause, also known as a “catch clause”, helps to ensure the remainder of your estate, after debts have been paid and specific gifts given, is distributed how you would like it to be. A residuary clause will stop you from becoming partially intestate.

The remainder of the estate can be given to one or more people. To avoid any confusion, it is important to specify how it will be divided, for example, in percentages. Percentages are usually better than dollar amounts as sometimes that exact dollar amount may not be left over in your estate.

9. **Superannuation**

Superannuation is not automatically included in your will. You should make a ‘binding death benefit nomination’ to specify who you would like to receive your superannuation after you pass away. A binding death benefit nomination is a written direction that outlines who you would like to receive your superannuation, and these usually need to be renewed every three years.

To make a nomination or a change to an existing nomination, you will need to fill out your superannuation fund’s form, and it is important this is filled out correctly otherwise it will be invalid. For more information you should talk to your superannuation fund.

Only certain people can receive your superannuation, these are your:

- (a) Spouse/partner
- (b) Children
- (c) Financial dependent
- (d) Someone in an interdependent relationship with you (e.g. you live together, one of you provides the other with financial support and one of you provides the other with domestic support and personal care).
- (e) Legal personal representative (executor)

There are several different types of death benefit nominations. Not all super funds allow all of them, but they include:

- (a) *Binding death benefit nomination (3 years)*: Written directions of how the person wants their superannuation to be distributed.
- (b) *Non-lapsing nomination*: Nomination remains in place until a new one is made.
- (c) *Non-binding death benefit nomination*: An expression of your wishes which the superannuation company will take into account when distributing your super.
- (d) *Reversionary nomination*: A person can be nominated to continue to receive a stream of income e.g. pension.

10. Life insurance

Life insurance is another non-estate asset. This means it is separate from your will and not automatically included in your estate. You will need to separately determine who gets your life insurance in your life insurance policy by talking to your provider. By speaking to your provider you could nominate the money from your life insurance to pass to your estate. This will allow it to be managed or distributed according to what your will says.

Note that even if you say what you would like to happen with your life insurance in your will, this could be overridden by what is outlined in your life insurance. For more information on where your life insurance goes, you should talk to your insurance provider.

11. Indigenous artists

If a person has artwork they have made that has been copyrighted, royalties can be collected by the family after the passing of the artist. Royalties are small payments made to the artist each time their artwork is used or displayed. For example, a singer would receive payments each time someone plays their song.

In Australia, families may collect royalties from the resale and reproduction of artwork for 70 years after the artist's passing. This may be in the form of:

- (a) Money held by art galleries from the sale of or display of the artwork.
- (b) Resale royalties.
- (c) Copyright entitlements or licensing that the artist may have.

12. Other things to consider

There are other assets that form part of your estate that you may like to include in a will:

- Shares
- Investments
- Term deposits

1.11 Topic 5: Customary law obligations

Introduction

First Nations people might have obligations to their mob and community. These could be, for example, the responsibility of passing down or protecting certain objects, stories or other information. This topic is designed to explain what customary law obligations are and how they interact with a will. Note that not everyone may have customary law obligations, and that these obligations will likely vary for different communities. Different physical items or information may need to be protected such as songs, paintings, traditional objects, and locations.

Due to their secrecy and cultural importance, it is essential that these objects or information are carefully accounted for in a will. The importance of including customary law obligations is particularly emphasised in instances where it may not be culturally appropriate for knowledge of that information or those objects to go to anyone other than the intended beneficiary.

Objectives

By creating awareness of the different ways customary objects and information may be included in a will, particularly given that these items are not covered by succession laws, it is hoped that more First Nations people will create wills and ensure their cultural wishes are respected and carried out. It also aims to encourage Elders to speak to a lawyer about other ways (such as through legal trusts) they may be able to pass on these objects or information to someone.

Terminology

Customary law obligations: Obligations and responsibilities to community passed down by your mob.

Testator: The person who makes the will.

Trust: A trust is a relationship where one person (the trustee) holds assets for the benefit of another (beneficiary).

Will: A will is a legal document that appoints an executor and sets out how a person would like to distribute their estate when they pass away.

Key legal messages

1. If a person passes away without passing knowledge, objects, or secret information on to another person, a will can be useful in guaranteeing that this occurs after their passing. Wills can contain a starting point for beneficiaries on where to locate objects or information. For example, a deceased person could leave a beneficiary direction to a place or to a sealed envelope containing cultural information. You should not include confidential information in your will, as after your death, it may be a publicly accessible document.
2. The passing of cultural information or objects onto another person can also be done through trusts. Trusts are specialised legal tools and you should speak to a lawyer as this can be a complex process.

1.12 Topic 6: Life changes and updating your will

Introduction

It is common for your life circumstances to change after you have created your will. This can impact your will, and it is important to update your will to reflect your change in circumstances. For example, if you marry or divorce you may want to cancel some or all gifts to your former partner in your will. These changes need to be correctly done to ensure your will is still valid.

Objectives

When life changes occur, it is important to reflect these changes in your will. Failing to update your will after could lead to issues after you have passed away. For example, your ex-spouse could receive a gift in your will even though you were no longer together, or even though you did not really want them to receive that gift. Changing your will can only be done in two ways and needs to be done correctly for the change to be valid.

Terminology

Adequately provide for: The amount of money or other property required from an estate to ensure a deceased's spouse, children and dependents are supported.

Administrator: Can be (1) a person appointed by the Court to administer an estate where there is no executor, or no will, or (2) a person appointed by QCAT to administer someone's financial affairs when they are alive but do not have capacity to manage their own finances.

Attorney for financial matters: An attorney for these matters can make decisions about your money, property and houses, bank accounts, investments, or other legal assets. This could be selling your house, paying bills for your care, or purchasing an investment.

Attorney for personal (including health) matters: An attorney for these matters can make decisions about your care, welfare, where and who you live with, as well as support services you may need. They can also make decisions about health matters. This includes medical treatment decisions, and end of life decisions (for example, the attorney could refuse life-sustaining treatment on the other person's behalf).

Beneficiary: A person named in a will to receive a gift/s.

Children, grandchildren, and their children: Includes children who have been conceived but not yet born (e.g. pregnant partner) and adopted children. Natural children and adoptive children are entitled to claim in their parents' (or adoptive parents') estate. Adopted children are not entitled to their natural parents' estate.

Children, grandchildren, and their children: Includes children who have been conceived but not yet born (e.g. pregnant partner) and adopted children. Natural children and adoptive children are entitled to claim in their parents' (or adoptive parents') estate. Adopted children are not entitled to their natural parents' estate.

Codicil: A document that makes a change to an existing will.

Executor: The person you have chosen to carry out your wishes in your will. This person must be 18 years or older.

Joint tenants: A person is a joint tenant when they jointly own a property (usually a house or land) with one or more parties. When the person dies the property passes to the other party/parties and does not form part of their estate.

Revoke: To legally cancel.

Spouse: A married husband or wife, or de facto partner of a person (i.e. someone who isn't married to a person but lives with them as a couple). Includes same-sex couples.

Tenants in common: People are tenants in common when they each own individual shares of a property. On the death of one person, their share in a property is distributed according to their will (compared **with Joint Tenants**).

Will: A will is a legal document that appoints an executor and sets out how a person would like to distribute their estate when they pass away.

Key legal messages

1. Significant events in your life need to be reflected in your will. These could be:
 - (a) *Marriage or start of a de facto relationship*
A will may be automatically revoked if a marriage occurs. If the will was made in contemplation of marriage (i.e. the will was made knowing you were going to get married) the will would not be revoked.
 - (b) *Divorce or end of a de facto relationship*
Parts of the will that are for your spouse will be revoked. De facto relationships will have the same effect as marriage and be revoked.
 - (c) *Children or grandchildren are born*
You may want to give or change gifts in your will to include new children/grandchildren that are born.
 - (d) *Executor or beneficiary dies*
If an executor dies you need to replace them in your will. If a beneficiary dies you may want to give their gift to a different beneficiary. To avoid updating your will, you could appoint more than one person (or even people in a row) to be your executor.
 - (e) *Buy or sell property*
Different rules may apply to buying and selling property individually as opposed to with other people, e.g. as tenants in common or as joint tenants.
 - (f) *Financial circumstances change significantly*
Gaining employment, becoming unemployed or other disruptions to income.
2. Alterations can't validly be made to a will by simply:
 - Rubbing out, deleting, or crossing out a certain part of your will
 - Writing or adding new parts to your will
 - Writing between the lines of your will
 - Writing anything that will affect the will
3. The only way of altering a will is by using a codicil or creating a new will. Creating a new will is an easier and more reliable way of updating a will. A will can be updated by:
 - Revoking the will and making a new one.
 - Making a codicil. A codicil may add or delete some information in the will. It must still comply with the formal requirements of a will.
4. It is recommended that you revoke the old will and re-write a new one. This is an easier process than making a codicil and can help ensure the will is valid and that any new changes are clear.

1.13 Topic 7: Where can a will be kept?

Introduction

It is important to ensure people are aware of the different places a will can be stored safely since there may not be a suitable location in their homes. People need to ensure they have told a person/people where the will is stored so it can be easily and quickly accessed if needed. A will can be kept in a safe place at home (such as a drawer or filing cabinet), or the solicitor who drafts the will may store it.

Objectives

Keeping a will at home may not always be the best option. There are multiple places a will can be safely kept to ensure it does not get damaged and so that the executor can access it when needed. The objective of this topic is to explain the different places a will can be kept and to ensure the executor knows where the will is kept.

Terminology

Executor: The person you have chosen to carry out your wishes in your will. This person must be 18 years or older.

Will: A will is a legal document that appoints an executor and sets out how a person would like to distribute their estate when they pass away.

Key legal messages

1. Places a will can be stored include at home in a safe place such as a filing cabinet or drawer. Note that this means family members or other people in your household may be able to access your will.
2. Some law firms or the solicitor drafting your will may help you with will storage. Note that firms may charge you for storing your will.
3. You must let the executor or someone close to you know where your will is stored to ensure it can be easily accessed after your passing. Failing to tell someone where your will is stored could lead to your wishes not being carried out. For example, you might specify in your will that you want to be buried in a particular spot. If your will cannot be found, your family could decide for you to be buried somewhere else.

1.14 Topic 8: Can people argue about what I do?

Introduction

It is common for conflict to arise in relation to a will. The most common reasons for conflict to occur is if people disagree with the distribution of the will, the burial location or how the body is dealt with. If people are not satisfied with how the will is set out, then they can contest the will in court. Wills can only be contested by certain people within a certain time limit and for a limited number of reasons.

Objectives

The topic aims to inform you about the possibility of your will being contested in court and ways to lessen the chance of conflict. Conflict may be avoided by drafting your will so your wishes are clearly outlined and all dependents are accounted for. If conflict does arise and someone would like to contest your will this will be dealt with, depending on the circumstances, by succession laws or the executor.

Terminology

Dependent: A parent of a deceased person, the parent of a surviving child under the age of 18 who is also the child of the deceased person, or a person under 18 who was *wholly* or *substantially* maintained or supported by the deceased person (i.e. financially supported).

Executor: The person you have chosen to carry out your wishes in your will. This person must be 18 years or older.

Will: A will is a legal document that appoints an executor and sets out how a person would like to distribute their estate when they pass away.

Distribute: To complete the formal process of giving something to a beneficiary through your will or other rules.

Probate notice: A notice that is published online after a person has passed away. It provides details of the will (or lack thereof) so others may file a claim in court or notify the executor in relation to a claim against the estate.

Adequately provide for: The amount of money or other property required from an estate to ensure a deceased's spouse, children and dependents are supported.

Key legal messages

1. After you pass away, a notice will be advertised by the court so people can contest the will if they would like to.
2. People who can challenge a will may be a spouse or partner, children, or any financial dependents.
3. A will could be contested because:
 - (a) it did not adequately provide for someone
 - (b) the will was influenced by other people or
 - (c) the deceased did not have the capacity to make the will.
4. The timeframe for challenging a will because it did not adequately provide for someone is 6 months from the date of death in Queensland. Sometimes this can be 9 months, or longer with permission of the court.

1.15 Topic 9: Enduring powers of attorney

Introduction

At some point in your life you may need someone else to make a decision on your behalf – usually because you can no longer make this decision on your own. This could be a decision about a financial matter, a health issue, or even your day to day living arrangements. An enduring power of attorney is a document that allows you to appoint a certain person to legally make these decisions.

Objectives

People may lose their capacity to make decisions for themselves as they age, suffer a brain injury, or otherwise suffer an intellectual or psychiatric disability. It is important First Nations people secure their future by assigning someone to make decisions for them in the event they lose capacity. Awareness or creation of an enduring power of attorney can eliminate any questions about who has the authority to make decisions about someone's future.

Terminology

Adequately provide for: The amount of money or other property required from an estate to ensure a deceased's spouse, children and dependents are supported.

Administrator: Can be (1) a person appointed by the Court to administer an estate where there is no executor, or no will, or (2) a person appointed by QCAT to administer someone's financial affairs when they are alive but do not have capacity to manage their own finances.

Attorney for financial matters: An attorney for these matters can make decisions about your money, property and houses, bank accounts, investments, or other legal assets. This could be selling your house, paying bills for your care, or purchasing an investment.

Attorney for personal (including health) matters: An attorney for these matters can make decisions about your care, welfare, where and who you live with, as well as support services you may need. They can also make decisions about health matters. This includes medical treatment decisions, and end of life decisions (for example, the attorney could refuse life-sustaining treatment on the other person's behalf).

Key legal messages

1. An enduring power of attorney is a document that allows you to appoint someone you trust to make decisions for you during your lifetime.
2. Attorneys can make decisions about personal matters (including health) matters, and financial matters.
3. You do not have to appoint an attorney to make both personal and financial decisions. You can appoint an attorney who only deals with financial matters, or only deals with personal/health matters. However, attorneys are typically appointed to deal with both issues.
4. Appointing an attorney doesn't automatically give them the power to make decisions about your future. You can choose when they are allowed to start making decisions. This could be immediately upon signing the document, after a particular date or in certain circumstances (for example, you've been admitted to hospital, or otherwise lost capacity).

5. People often choose for their attorney to make decisions for them when they no longer have the *capacity* to make decisions for themselves. This could be because they are no longer capable of:
 - (a) understanding the nature and effect of decisions; or
 - (b) freely and voluntarily making decisions; or
 - (c) communicating their decisions in some way.
6. For someone to be your attorney they must have *capacity*. They must also:
 - be 18 years or older
 - not be your paid carer or have been your paid carer (does not include Centrelink's Carer Pension) within the last three years
 - not be your health provider
 - not be a service provider for a residential service where you live (for example, a worker at a retirement village you live in)
 - not be bankrupt or taking advantage of bankruptcy laws.
7. The best person to appoint as attorney is someone impartial, not overly emotional, and someone you can trust to put your best interests first.
8. An enduring power of attorney dealing with health matters should be someone:
 - you trust to make decisions that you would agree with about your personal care, healthcare and welfare
 - you have discussed your views, wishes and preferences with
 - you know will put your needs, rights, and interests ahead of theirs and others in all decisions
 - you know will understand their legal duties and obligations as your attorney
 - you know will be available to make healthcare decisions about your care on your behalf
 - you know will be confident in discussing your healthcare with your health providers.
9. When appointing someone to make financial decisions, you should consider whether they:
 - are someone you trust to make sound decisions about your financial and property affairs (remembering that they can sell all your assets)
 - will put your needs, rights, and interests ahead of theirs and others
 - are able to manage property and money well
 - will understand their legal duties and obligations as your attorney
 - will be able to communicate effectively and protect and promote your interests
 - are confident with liaising with financial institutions, lawyers, and property agents.

1.16 Resources and extra materials

[Client agreement](#)

[Client checklist regarding the documents signed](#)

[File note – when will is signed](#)

[File note – when enduring power of attorney is signed](#)

[Questionnaire for clients - Wills and enduring power of attorney](#)

[Information sheet after signing of the will and enduring power of attorney](#)

[Wills information cards](#)

[Wills definitions cards](#)

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