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INDIGENOUS ESTATE DISTRIBUTION ORDERS

by

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I. INTRODUCTION : THE LEGISLATION

1 Section 134 (in Part 4.4) of the *Succession Act* 2006 NSW empowers the Supreme Court of NSW, upon application by a qualified person and in defined circumstances, to make a "distribution order" affecting the deceased estate of an Indigenous person who has died without a will effectively disposing of all his or her property (that is, wholly or partially intestate).

2 Section 101 of the *Succession Act* defines an Indigenous person" as a person who: (a) is of Aboriginal or Torres Strait Islander *descent*; and (b) *identifies* as an Aboriginal person or Torres Strait Islander; and (c) is *accepted* as an Aboriginal person by an Aboriginal *community* or as a Torres Strait Islander by a Torres Strait Islander *community*.

3 This definition places heavy emphasis on an individual's *self identification* and *community acceptance* as Indigenous. It implicitly involves a sense of mutual *belonging* binding an individual to a community.

4 The definition, with its three elements, is consistent with the observations of Merkel J in *Shaw v Wolf* (1998) 83 FCR 113 at 117-122 about the character of an individual's *self identification*, and *community acceptance*, as Indigenous. Both concepts focus upon interaction between people living in "community" with one another.

5 An application for a distribution order can be made by:

(a) the personal representative of an Indigenous intestate (that is, an administrator or, in the case of a partial intestacy, an executor of the deceased's estate); or

(b) a person "claiming to be entitled" to share in the intestate estate "under the laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged": *Succession Act*, section 133(1).

6 An application for a distribution order must be accompanied by a "scheme for distribution" of the estate in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged: *Succession Act*, section 133(2).

7 In formulating the terms of a distribution order the Court *must* have regard to:

(a) the scheme for distribution submitted by the applicant: *Succession Act*, section 134(3)(a).

(b) the laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged: *Succession Ac*t, section 134(3)(b).

8 However, the Court cannot make a distribution order "unless satisfied that the terms of the order are, in all the circumstances, just and equitable": *Succession Act*, section 134(4).

9 The effect of a distribution order is to vary the operation of the general rules (found in sections 110-132, in Parts 4.2 and 4.3, of the *Succession Act*) governing distribution of an intestate estate: *Succession Act,* section 135.

10 The power to make a distribution order is thus a special power to dispense with the general intestacy rules in the administration of an Indigenous person's estate.

11 The general rules have been amended from time to time to reflect current social relationships in the character of "family".

12 Under the general rules, as presently drafted, there is a standard scheme of distribution that recognises an order of priority that favours, in turn:

(a) a spouse (broadly defined to accommodate multiple relationships): *Succession Act,* Part 4.2 (sections 110-126).

(b) children: *Succession Act*, section 127.

(c) parents: *Succession Act*, section 128

(d) brothers and sisters: *Succession Act*, section 129

(e) grandparents: *Succession Act*, section 130

(f) uncles and aunties: *Succession Act,* section 131.

13 As a default provision, if there is no person who takes an interest in an intestate estate under the general rules, the estate passes to the State (as is traditionally said, *bona vacantia*): *Succession Act*, Part 4.5 (sections 136-137).

14 In such a circumstance, a government Minister has, under section 137(1) of the *Succession Act*, a discretionary power to waive the State's rights to the estate, in whole or part, in favour of:

(a) dependents of the intestate; or

(b) any persons who have, in the Minister's opinion, a just or moral claim on the intestate; or

(c) any organisation or person for whom the intestate might reasonably be expected to have made provision; or

(d) the trustees for any person or organisation mentioned in paragraph (a), (b) or (c).

15 The Minister may grant a waiver under section 137(1) on conditions the Minister considers appropriate: *Succession Act*, section 137(2).

II. THE CASE LAW

16 There have been two judgments of the Supreme Court in which the Court has considered an application for a distribution order and, as it happens, made such an order.

17 In the first judgment (*Re Estate Wilson, deceased* [2017] NSWSC 1; 93 NSWLR 119), I dealt with competing claims to an intestate estate made respectively by the intestate's Aboriginal birth half-sisters and his non-Aboriginal adoptive half-sisters.

18 In the second judgment (*The Estate of Mark Edward Tighe* [2018] NSWSC 163) Kunc J dealt with a claim by a "kinship brother" in circumstances in which, had a distribution order not been made, the intestate's estate would have passed to the State, *bona vacantia.*

19 Our understanding of these types of case will evolve as the Court, parties and practitioners are exposed to different factual settings involving different competing claims of entitlement, different configurations of the concept of an "Indigenous community or group" and, possibly, different formulations of Indigenous "laws, customs, traditions and practices".

20 It is too early to say that the law governing the proper construction, and operation, of Part 4.4 of the *Succession Act* is settled. A conversation has begun. It will continue as new cases are brought to attention.

III. COMMENTARY

21 Without pretending to encapsulate the law (or the practice of the Court in dealing with estate administration cases) in a few lines, I offer the following observations about the law, and legal practice, in light of the two presently available judgments:

(1) The availability of the distribution order procedure should be viewed as a welcome means of varying the general intestacy rules to meet the dictates of equity and justice in a particular case.

(2) For my part, I would welcome as beneficial to the public at large an extension of the distribution order procedure to all intestate estates, Indigenous or otherwise. This would accommodate evolution of the concept of "family" in Australian society, embracing informal family arrangements in which substance is valued over legal form.

(3) Be that as it may, the distribution order procedure should be viewed by everybody as, at best, a *second best* solution to the problem of how property can pass "from one generation to another". The *first best* solution is for each person to make a will formally recording his or her testamentary intentions.

(4) In modern Australian society all manner of people, across the full spectrum of the population, may own property (eg., superannuation, pension entitlements, bank accounts or land) not readily transferable on death without a grant of probate or administration establishing legal title. In a legal system predicated upon the idea that some types of property require title to property to be registered, formally recorded in an administrative record or evidenced by writing of a particular character, the old adage that "possession is nine tenths of the law" may

not apply without a formal grant of title upon an exercise of the Supreme Court's probate jurisdiction. Hence the desirability of a will, to facilitate administration of an estate.

(5) If the distribution order procedure is to work effectively in practice, in a way that is "just and equitable", care needs to be taken not to limit its operation by an unduly narrow interpretation of the jurisdictional grounds necessary to enliven the Court's jurisdiction – in particular:

(a) the concept of an "Indigenous person", defined by the *Succession Act*, section 101.

(b) the concept of an "Indigenous community or group".

(c) the concept of a person "belonging" to an "Indigenous community or group".

(d) the concept of "the laws, customs, traditions and practices" of an Indigenous community or group.

(6) Nor should the procedure – if it is to work effectively in practice – be allowed to become bogged down in "expert evidence" about Indigenous society remote from the family relationships and immediate concerns of the particular person whose estate has to be administered. The focus for attention is essentially a factual inquiry as to the life experience of that particular, individual Indigenous person.

(7) The key to a liberal construction, and operation, of Part 4.4 of the *Succession Act* is an understanding that:

(a) *acceptance* by an individual of *membership* of an Indigenous *community* lies at the heart of the Court's jurisdiction;

(b) a common theme within Indigenous communities is that a close family relationship is not necessarily defined by reference to

"linear" birth lines but by social connections within an Indigenous community; and

(c) an examination of the familial relationships of a particular deceased Indigenous person requires an inquiry into the social relationships which that person, in fact, enjoyed as a member of his or her Indigenous community.

(8) For the reasons explained in *Re Estate Wilson*, in my opinion the expression "laws, customs, traditions and practices" should be viewed *not* as *referring to a set of positivist rules* (such as found in Part 4.2 and Part 4.3 of the *Succession Act*) but as referring to a *general understanding, within a community, of rights and obligations of an individual living, and dying, in the community*. The expression should be read, in context, as "laws, customs, traditions and practices" *relating to distribution of an intestate estate*, not as a reference to a complete *system* of law with a field of operation beyond that subject matter.

(9) The availability of a distribution order should not be necessarily tied to an Indigenous intestate's traditional "clan", unresponsive to the fact that he or she may in fact, have lived in an "Indigenous community or group" far removed from a particular traditional "clan". This may be particularly important in the setting of a collection of Indigenous people (perhaps, typically, living in an urban environment) in which, over time, families have blended across clan boundaries or the Australian community at large.

(10) The word "belong" (reflected in sections 133(1), 133(2) and 134(3) of the *Succession Act*) suggests a sense of mutual ownership operating as between an Indigenous intestate and his or her "community or group" arising from his or her "identification" as an Indigenous person and his or her "acceptance" by an Indigenous community as such.

(11) Although the *Succession Act* does not in Part 4.4 use the word "family", the policy concerns that gave rise to its enactment, and its legislative purpose or object, point towards an Indigenous concept of "family" (in particular, the concept of family understood, in fact, by a particular Indigenous intestate and his or her community or group) as an important, if not the decisive, element of any consideration of "the laws, customs, traditions and practices" of any Indigenous community or group.

(12) Drawing support from section 137(1) of the *Succession Act*, in the search for the meaning of "family" in the context of an Indigenous community or group one should ordinarily ask: Did the deceased person have any *dependents* with a claim on his or her bounty for maintenance, education or advancement in life? Did any person (including but not limited to dependents) have *a just or moral claim* on the deceased person? Is there any organisation or person *for whom the deceased person might reasonably be expected to have made provision?*

(13) An application for a distribution order is focused upon what, if a *particular* deceased person (the intestate) had been required to make a will, he or she *would have done*, in his or her (Indigenous) communal setting, without the emphasis found in family provision proceedings (under Chapter 3 of the Succession Act) on a *general* community assessment of what he or she *ought to have done.*

(14) As in *Re Estate Wilson*, and quite possibly in other cases, the ultimate question for the Court under section 134 of the *Succession Act* may be a question along the following lines: Had the deceased been required to make a will disposing of his or her estate, what are the terms of the will he or she would have made, having regard to the interests of any person dependent upon him or her, the interests of any person who had a just or moral claim on him or her, and the interests of those for whom he or she might reasonably be expected to have made

provision, paying due regard, in all the circumstances, to what would be just and equitable?

(15) If there is no clear answer to such a question, the likelihood is that there is no factual foundation for the making of a distribution order, leaving the general intestacy rules to operate according to their terms.

(16) The critical parameters within which Part 4.4 of the *Succession Act* operates are: (a) an individual's self identification and community acceptance as Indigenous; (b) that individual's life experience of family relationships within the Indigenous community to which he or she belonged; (c) an inquiry as to what he or she would have done had he or she been required to make a will; and (d) the mandatory requirement that the Court cannot make a distribution order unless it is just and equitable in all the circumstances of the case.

(17) As reflected in the requirement of section 134(5) of the *Succession Act* that any distribution order be "in all the circumstances, just and equitable", the jurisdiction exercised by the Court under Part 4.4 of the Act conforms to a traditional equity model of decision-making with its focus on the facts of the particular case.

(18) A constructive approach to the Court's jurisdiction offers an opportunity to all concerned to develop the law, and practice, on a case-by-case approach, taking into account the particular circumstances of individual intestate persons and their respective families.

IV. LAW REFORM PROPOSALS

22 In a postscript to my judgment in *Re Estate Wilson* (at paragraphs [188]-[192] of the case as reported) I invited consideration of whether Part 4.4 of the *Succession Act* might be amended to broaden the power of the Court to dispense with the operation of the general intestacy rules.

23 In July 2017 the South Australian Law Reform Institute published (as Report 7) a *Report on South Australian Rules of Intestacy*.

24 That Report considered *Re Estate Wilson* and the earlier judgment of the Supreme Court of the Northern Territory (*Application by the Public Trustee for the Northern Territory re Estate of Najaluna* [2000] NTSC 52) before making recommendations (in Sub-Parts 7.8 and 7.10) to the effect that in South Australia:

(a) legislation similar to Part 4.4 of the NSW *Succession Act* should not be enacted.

(b) the SA *Family Provision Act* should be amended to include as a class of people eligible to apply for family provision relief "people to whom [an] intestate owed kinship obligations".

(c) the SA *Administration and Probate Act* should be amended to include a provision of general application (that is, not limited to Indigenous estates) enabling the Court to approve agreed alternative schemes of distribution.

25 In December 2017 the South Australian Law Reform Institute published (as Report 9) a follow-up Report entitled "*Distinguishing between the Deserving and the Undeserving": Family Provision Laws in South Australia*.

26 Part 9 of that Report, entitled "Aboriginal Succession Issues", backed away from immediate implementation of any law reform proposal relating to "succession law items with an Aboriginal focus" (to paraphrase paragraph 9.4.1) because, in the absence of any broad consensus, the Institute had formed the view, on reflection, that further research and consultation is required.

27 Whatever, if any, law reform proposals emerge from ongoing research and consultation, NSW practitioners, and all interested persons, must for the time being work with the clay we have: the *Succession Act*, Part 4.4.

V. CONCLUSION

28 Part 4.4 of the *Succession Act* provides *an opportunity* for there to be, *and requires* for its effective operation that there be, a conversation between Indigenous communities and the legal profession about what it is to be an Indigenous person in modern Australian society: "Practical reconciliation" directed to the concerns of an individual Indigenous person living, and dying, in community.

Date: 1 March 2018

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