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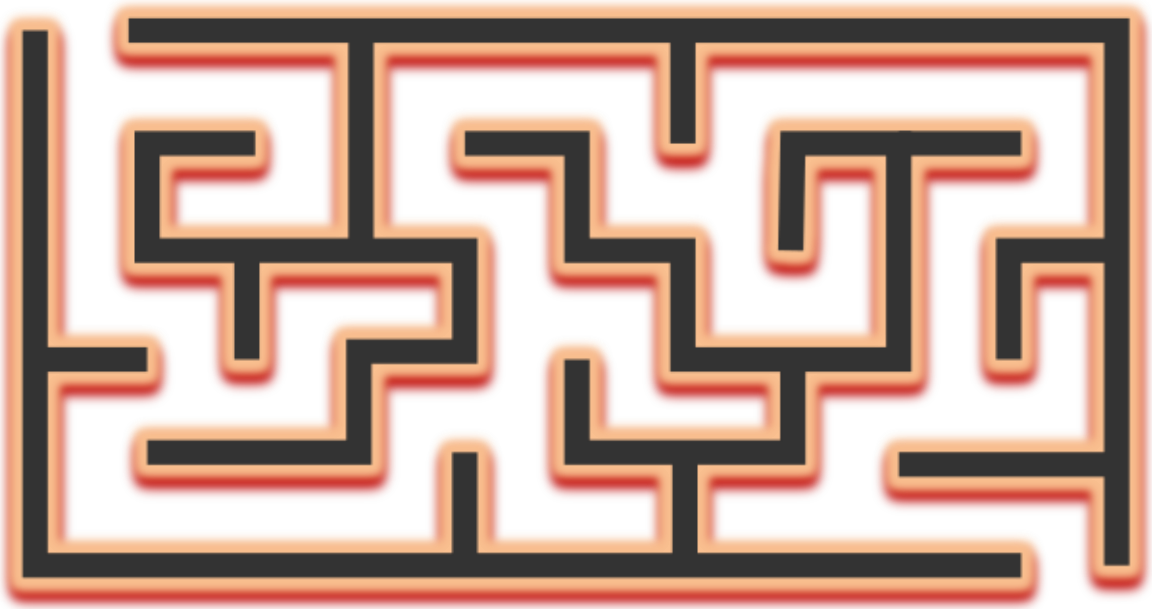

South Australian Law Reform Institute

Losing it

State schemes for storing and locating wills

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

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Terms of reference

The Attorney-General of South Australia, the Hon. John Rau MP, invited the Institute to identify the areas of succession law that were most in need of review in South Australia, to review each area and to recommend reforms. The Institute has identified seven topics for review, and will prepare and release an Issues Paper for each, followed by a Final Report. This Issues Paper, on whether South Australia should have a register of wills, is the third in the Institute's review of succession law in South Australia.

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Abbreviations

Court-authorised will—a will made by a court or an instrument altering or revoking a will by court order (usually where the testator is a minor who needs the assistance of the court in making a will or is someone who lacks the capacity to make their own will). Such wills and instruments are required by statute to be retained and kept securely by the court. By contrast, see *private will.*

Model Bill—the *Wills Bill 1997* proposed by the National Committee in its *Consolidated Report*.

National Committee—The National Committee for Uniform Succession Laws, established by the Standing Committee of Attorneys-General.

National Committee Consolidated Report—National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys-General on the Law of Wills*, Queensland Law Reform Commission, Miscellaneous Paper No 29 (1997) <http://www.qlrc.qld.gov.au/Publications.htm#3>.

Private will—a will made by a person with full testamentary capacity without the assistance of a court. In Australia, it is not compulsory to deposit such wills in public *will banks* or to record their whereabouts in public *will registers*. By contrast, see *court-authorised will.*

Public Trustee—the Public Trustee or State Trustee or equivalent.

Registrar—the Supreme Court Registrar of Probates or equivalent.

Will bank—a facility for the physical or electronic deposit and safekeeping of a will, which may also maintain a searchable index or record of deposited wills.

Will register—a facility for recording the details of a will so that it can be found when the testator dies, but which does not accept the deposit of a will for safe custody.

Overview

1. There are two kinds of schemes that make it easier to locate a person's will after they die and so avoid delays in the granting of probate. One is a scheme that records the existence and location of a will (called a *will register* in this paper). The other is a scheme for the physical custody and safekeeping of wills (variously called a will bank, a will repository, a will depository, a will register or a court register (U.S.) but described as a *will bank* in this paper).[1] Will bank schemes have the additional objective of seeking to prevent wills being damaged, destroyed or lost by offering secure archiving and storage.

2. There are will banks and will registers operated by private enterprise all around the world, including Australia (called *private schemes* in this paper). Australia, like some other countries, also has some will banks and will registers[2] that are funded and managed by State or Territory governments (called *public schemes* in this paper), but has no national public scheme.

3. For this review—exploring whether such public schemes are needed in South Australia and if so how they might work—we investigate public schemes in each Australian jurisdiction and in the United Kingdom and Canada.

4. In particular, this paper examines:

   (a) whether the South Australian Registrar of Probates should continue to retain court-authorised wills;

   (b) whether the current limited public 'will bank' scheme for private wills that is maintained by the South Australian Registrar of Probates should be retained or whether it should be replaced by a different public will bank scheme maintained either by the Registrar or by some other body or person;

   (c) whether there should be a public will register scheme for private wills in South Australia and if so, what its features should be.

5. A critical consideration in this discussion is the extent to which, if at all, the State should be involved in such schemes, given that they are also offered by private enterprise. The main objectives of public schemes (to preserve wills and to record that they exist and where they are) might be said to arise from the public interest in the orderly disposition of deceased estates. But against that, it could be argued, is a countervailing public interest in governments *not* funding public schemes unless there is a clear need for them which cannot be met effectively by private enterprise. The tension between these two interests is examined throughout this paper.

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[1] The distinction is not so clear when a will bank records and indexes deposits, makes that index available for limited search and that index is called a register of wills. This is the situation in the Australian Capital Territory.

[2] There has been only one public will register in Australia—a pilot scheme in New South Wales, discussed in more detail later.

6. The Institute seeks the views of the public and of legal and financial professionals on these issues, asking a series of questions. Appendices to the paper reproduce current laws for Australian public schemes (for private wills),[3] model laws proposed by the National Committee for Uniform Succession Laws,[4] the public will bank scheme in the United Kingdom[5] and the public will register scheme in British Columbia, Canada.[6]

Public will bank schemes

7. Generally, two kinds of wills are held in public will banks:

    - A will that is required by law to be retained by the court because it is made, changed or revoked under court authorisation or order (a 'court-authorised will').[7] A will or instrument like this might be made on behalf of a minor who for some reason[8] wishes the court to assist in the making of their will or for a person lacking the capacity to make a will themselves.
    - A will that the testator has chosen to deposit, not being compelled by law to do so (a 'private will').

8. Some court-based public will banks in Australia are for the retention of court-authorised wills only,[9] while others also accept private wills.[10]

9. Where a public will bank is not court-based (and these are usually managed by the Public Trustee)[11] the only kinds of wills that may be deposited are private wills.

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3 Appendix 1 (South Australia); Appendix 2 (Australian Capital Territory); Appendices 3, 4 and 5 (New South Wales); Appendix 6 (Northern Territory); Appendix 7 (Queensland); Appendix 8 (Tasmania); Appendix 9 (Victoria); Appendix 10 (Western Australia).

4 Appendix 11 (Model laws).

5 The legislation establishing the United Kingdom public will bank scheme is reproduced in Appendix 12.

6 The legislation establishing the public will register scheme in British Columbia is reproduced in Appendix 13.

7 See, for example, *Wills Act 1936* (SA) ss 6(4)(b), 7(10).

8 The National Committee for Uniform Succession Laws cites as an example of such reasons 'where the minor was:

- suffering from an illness or injury that may well be fatal; and
- had a sufficient estate to make the application to the court worthwhile; and
- wished the estate to be distributed otherwise than in accordance with the intestacy rules, which might well only benefit both the parents of the minor. A minor may wish his or her estate to go to one parent rather than both, especially where the minor is estranged from one of his or her parents, or the minor may simply wish to benefit another person, for example a *de facto* spouse, a particular sibling, or a carer.'

National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys-General on the Law of Wills*, Queensland Law Reform Commission, Miscellaneous Paper No 29 (1997) 41 <http://www.qlrc.qld.gov.au/Publications.htm#3> (hereafter 'National Committee Consolidated Report').

9 For example, Tasmania and Queensland.

10 South Australia is one of these. Its will bank is maintained by the Registrar of Probates at the Supreme Court.

11 As, for example, in Queensland and Western Australia.

10. In Australia, public will banks accept original paper wills only, although some require deposited paper wills to be scanned onto an electronic database so that there is an electronic copy of the will as well.[12]

11. Model laws for the deposit of wills[13] have been proposed but not universally adopted in Australia. They were developed as a minor part of the comprehensive model for Australian and New Zealand succession law proposed by the National Committee for Uniform Succession Laws (the 'National Committee').[14] The Queensland Law Reform Commission undertook the National Committee's research. It reported on the law of wills in December 1997 in the first of a series of reports arising out of the project.[15] The report included a model for a public will bank for both court-authorised wills and private wills.

12. The National Committee's model public will bank scheme, as it covers court-authorised wills, is based on the South Australian legislation.[16] It would require the retention by the Supreme Court of all court-authorised wills and the deposit of wills so retained with the Supreme Court Registrar. Unlike the South Australian scheme, the National Committee's model would also permit the deposit and storage of *any* private will with the Supreme Court registrar,[17] and not simply those attested in a particular way.[18]

13. Some Australian jurisdictions (for example New South Wales[19] and the Northern Territory[20]) have based their public will bank schemes at least in part on the Model Bill provisions.[21] Tasmania has a different system which does not permit the deposit of private wills and restricts the deposit of court-authorised wills to those for minors.[22] Parliamentary debates on the Bill inserting these provisions[23] do not reveal the reason for this.

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12 See, for example, the requirements of the 'WA Will Bank', managed by the Public Trustee of Western Australia. Information about the WA Will Bank may be found at <http://www.publictrustee.wa.gov.au/W/wa_will_bank.aspx?uid=2725-1746-1325-2220>.

13 *Draft Wills Bill 1997* (the 'Model Bill'): National Committee Consolidated Report, 133. The Model Bill is reproduced in Appendix 11 to this paper.

14 The National Committee was established in 1991 as part of the Uniform Succession Laws Project initiated by the Standing Committee of Attorneys-General of Australia.

15 For a detailed account of the background of the Uniform Succession Laws Project, see the preface to the National Committee Consolidated Report.

16 *Wills Act 1936* (SA) s 7.

17 National Committee Consolidated Report, 106.

18 Further information about this aspect of the South Australian scheme appears at paragraphs 17 and 18 of this paper.

19 *Succession Act 2006* (NSW) ss 16, 18, 51–53 (reproduced in Appendix 3 to this paper).

20 *Wills Act 2000* (NT) ss 18, 19, 25, 49–53 (reproduced in Appendix 6 to this paper).

21 See Appendix 11 for the Model Bill provisions.

22 *Wills Act 2008* (Tas). Section 20(4)(b) provides that a 'will or instrument making or altering, or revoking the whole or any part of, a will' of a minor made under court-authorisation 'must be retained by the Registrar'. Tasmania is unique in allowing its Guardianship and Administration Board, as well as the court, to authorise the making or altering of wills for people lacking testamentary capacity (although the Board may do so only if this is the person's first will). Relevant Tasmanian provisions are set out in Appendix 8 to this paper.

23 *Wills Bill 2008* (Tas).

14. The public will bank schemes in Victoria[24], Western Australia,[25] Queensland,[26] South Australia[27] and the ACT[28] pre-date the Model Bill. Indeed, the draft *Wills Act 1994* (Vic), included in a report of the Victorian Parliamentary Law Reform Committee in 1994,[29] was considered by the National Committee in drafting its Model Bill.[30]

15. South Australia's public will bank scheme, established nearly a century ago,[31] permits the deposit of a limited class of private wills with the Registrar of Probates and requires the Registrar to retain court-authorised wills. Deposits are not recorded on any database. There is no capacity to scan deposited paper wills or to accept electronic wills.[32] Approximately 30 private wills have been deposited so far. The oldest is that of Colonel William Light, deposited in August 1839. Today, the main reason for depositing a private will with the Probate Registry appears to be that the depositor, who was previously responsible for holding the will, no longer has any connection with the testator. From 2009 to 2013 inclusive, four private wills were deposited.

16. An outline of the South Australian public will bank scheme is given below.

Public will bank scheme in South Australia

The Registrar of Probates provides, for a fee, secure custody for court-authorised wills and some private wills.[33] Except to require that the Registrar retain court-authorised wills, there have been no significant changes to the South Australia's laws for the deposit of wills since they were first enacted in 1919.

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24 *Administration and Probate Act 1958* (Vic) pt I div 1A ss 5A–5C; *Wills Act 1997* (Vic) ss 20, 21, 25 (both reproduced in Appendix 9 to this paper).

25 *Wills Act* 1970 (WA) pt XI div 1 ss 40, 44, 45 (inserted into the Act by the *Wills Amendment Act 2007* (WA)); *Public Trustee Act 1941* (WA) s 54 (both reproduced in Appendix 10 to this paper).

26 *Succession Act 1981* (Qld) ss 19, 21, 29–32; *Public Trustee Act 1978* (Qld) s 63 (both reproduced in Appendix 7 to this paper).

27 *Administration and Probate Act 1919* (SA) s 13. Relevant provisions from this Act (pt 2 div 2 ss 13–16) are reproduced in Appendix 1 to this paper.

28 *Wills Act 1968* (ACT) ss 32-34 (reproduced in Appendix 2 to this paper).

29 Law Reform Committee, Parliament of Victoria, *Reforming the Law of Wills* (1994).

30 National Committee Consolidated Report*,* (v).

31 *Administration and Probate Act 1919* (SA) pt 2, div 4.

32 In 2002 the Courts Administration Authority of South Australia recommended the establishment of an electronic will bank in a secure and searchable database in the Probate Registry. This recommendation was not taken up by the Government of the day because it was not ready to establish the electronic and legal framework for e-wills. The project, initiated by the then Registrar of Probates, Mr Alured Faunce-de-Laune, was called *The Wills Electronic Register Project,* 2001-2002). Records of this project are held by the Registrar of Probates and are not publicly available.

33 *Administration and Probate Act 1919* (SA) pt 2 div 4. This legislation is reproduced in Appendix 1 to this paper.

Other options for a testator wishing to store a will in South Australia are to appoint the Public Trustee as executor, whereupon the Public Trustee will hold the will for safe keeping, free of charge,[34] or to make private arrangements for storage.

Court-authorised wills

The Registrar must retain a will or an instrument altering or revoking a will made under court authorisation for a minor[35] and a will or instrument made under court authorisation for a person lacking testamentary capacity.[36]

A court-authorised will may not be withdrawn[37] unless the court has made an order authorising its revocation or when the testator, having lacked testamentary capacity, has acquired or regained it, or, having been a minor, has turned 18 or married.[38]

Private wills

There are restrictions on the types of private wills that may be deposited with the Registrar of Probates in South Australia, namely:

(a) that the will must appoint an executor;[39] and

(b) that the will must be witnessed by the Registrar of Probates, a district registrar, a notary public, a solicitor, or a commissioner for taking affidavits in the Supreme Court, and supported by separate certification from that witness (if other than the Registrar or a district registrar) verifying that they have witnessed the will.[40]

When receiving a will for deposit, the Registrar must enclose it in a sealed packet, mark it with the details of the will (name of testator, name of executor(s), date of will, time of deposit, and deposit number), and provide the depositor with a certificate of deposit.[41]

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34 Public Trustee (South Australia), *Wills: Frequently Asked Questions* (30 June 2011) <http://www.publictrustee.sa.gov.au/products-and-services/wills/wills-faqs.html>.

35 *Wills Act 1936* (SA) s 6(4)(b). The requirement that the Registrar retain the will was introduced in 1994 when s 6 was inserted into the Act by the *Wills (Miscellaneous) Amendment Act 1994* (SA). Under s 6 the will must be deposited with the Registrar, while under s 7 (see note below) the will must be retained by the Registrar. The difference in wording is of no moment. It is to reflect the fact that a will under s 6 is made by the minor, while a will made under s 7 is signed by the Registrar.

36 *Wills Act 1936* (SA) s 7(10). The requirement that the Registrar retain the will was introduced in 1996 when s 7 was first inserted into the Act by the *Wills (Wills for Persons Lacking Testamentary Capacity) Amendment Act 1996* (SA).

37 *Wills Act 1936* (SA) ss 6(5), 7(10).

38 This means that in South Australia a minor whose will has been made under court order can withdraw it if he or she has married but is still under the age of majority.

39 *Administration and Probate Act 1919* (SA) s 13(1).

40 Ibid s 13(3), (4).

41 Ibid s 13(2).

A private will may be withdrawn, for a fee, during testator's lifetime upon production of the certificate of deposit. The Registrar may dispense with the requirement for production of the certificate.[42]

When the testator dies, an executor may apply for probate of the deposited will by declaring (in addition to all the usual matters that must be declared to obtain a grant of probate) that the deposited will is the last will of the testator.[43] If satisfied that it is proper to do so and that all relevant fees and charges have been paid, the Registrar may then release the will to the executor.

As mentioned, the deposit and withdrawal of a will during the testator's lifetime attract prescribed fees. The current fees are $106 for depositing a will or codicil[44] and $52 for withdrawing a deposited will.[45]

The fees apply to both court-authorised and private wills.

17. The main difference between the South Australian scheme, the Model Bill proposal and all other public will bank schemes in Australia and the United Kingdom is that the South Australian provisions[46] restrict the deposit of private wills by reference to—

    (a) *whether the will appoints an executor*, thereby restricting deposit to private wills which, on their face, may be administered by a grant of probate and excluding wills which, for want of such appointment, might be administered under a grant of letters of administration with will annexed; and

    (b) *whether at least one witness to the will is from a particular class of professionals* (the Registrar of Probates, a district registrar, a notary public, a solicitor, or a commissioner for taking affidavits in the Supreme Court) and has certified that they have witnessed the will. This requirement prevents the deposit of wills witnessed by lay people.

18. Scrutiny of Parliamentary debate does not reveal the policy behind these restrictions. They seem incompatible with the objectives of public will bank schemes for private wills. The risk of a will being lost or not known about is surely greater where an executor has *not* been appointed and where the only witnesses are lay people; but these are the very kinds of wills which may *not* be accepted for deposit by the South Australian court registry.

19. In the United Kingdom there is a public will bank scheme under which, as under the scheme proposed in the Model Bill, court-authorised wills *must* be deposited and any kind of private will *may* be deposited with the Principal Registrar of the Supreme Court.[47]

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42 Ibid s 15.
43 Ibid s 16. The declaration is made using Form 46, *The Probate Rules 2004* (SA) 116.
44 *Supreme Court Regulations 2005* (SA) sch 2 item 14.
45 Ibid sch 2 item 15.
46 *Administration and Probate Act 1919* (SA) ss 13(1)–(2).

20. There are no public will bank schemes in Canada or New Zealand.

21. The paragraphs below explore considerations relevant to changing South Australia's public will bank scheme, first in respect of the deposit of court-authorised wills and secondly in respect of the deposit of private wills.

Deposit of court-authorised wills

22. All Australian States and Territories require their Supreme Courts to retain in their registries wills that are made under court authorisation.

23. The National Committee suggests, in relation to court-authorised wills for persons lacking testamentary capacity,[48] including minors,[49] that:

> it is desirable that the will should be retained in the registry. This gives the court continuing control over the will created under its jurisdiction.

24. Court retention of these kinds of wills means that executors, testators, beneficiaries and other parties cannot have immediate access to the will and the testator cannot change the will without the oversight of the court.

25. All Australian jurisdictions except Tasmania[50] require every court-authorised will to be so retained. The Model Bill would require all court-authorised wills to be retained by the Registrar and once retained to be treated as having been deposited.[51] The South Australian scheme for court-authorised wills is along these lines. The rationale for this approach is to ensure that no changes can be made to these wills without the oversight of the court.

26. The Tasmanian provisions, enacted well after the Model Bill was proposed, uniquely require only court-authorised wills for minors to be held by the court[52] and shift responsibility for the custody of court-authorised wills made for adults who lack testamentary capacity away from the court and to the executors named in the will.[53] If the executor is the Public Trustee or a trustee company, that entity must hold the will; any other executor must nominate a law practice to hold the will for them.[54]

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47 *Senior Courts Act 1981* (UK) ss 124–126 (reproduced in Appendix 12 to this paper). The depository is to be administered in accordance with the *Wills (Deposit for Safe Custody) Regulations 1978* (UK) SI 1978/1724.

48 National Committee Consolidated Report, 53 [2(e)(iv)].

49 Ibid 41 [1(b)(ii)].

50 As mentioned, Tasmania restricts the retention of court-authorised wills to those made for minors. In Tasmania, court-authorised wills for adult persons lacking testamentary capacity must instead be retained by the executor. See Appendix 8 to this paper.

51 Model Bill, pt 3.

52 *Wills Act 2008* (Tas) s 20(4)(b).

53 Ibid s 28.

54 Ibid.

Deposit of private wills

27. The three current models of public will bank schemes for private wills in Australia involve deposit either

    - with the Probate Registry, where court-authorised wills are already retained; or
    - with the Public Trustee (either confined to the wills it prepares, or open also for the deposit of other private wills); or
    - with a prescribed body or official.

Probate Registry model

28. The Model Bill proposes a Probate Registry model, and this is the practice in the United Kingdom[55] and South Australia.

29. However, it should be noted that the Queensland Law Reform Commission recommended that providing safe custody for private wills

> has obvious resourcing implications for the court. There are also other issues, for example, the registrar's liability in the event of the loss of such a will, that would need to be investigated before the Commission would be prepared to recommend extending a provision about the retention of certain wills so as to enable all wills to be deposited.[56]

30. For these reasons, Queensland has chosen to restrict deposits to its Probate Registry to court-authorised wills;[57] the registry may not accept the deposit of private wills.

31. In the United Kingdom and all other Australian jurisdictions which permit the deposit of private wills with court registries, except South Australia, *any* kind of private will may be so deposited. The South Australian Probate Registry may accept the deposit of a limited class of private will only.[58]

32. The scheme proposed in the Model Bill[59] would permit any will to be deposited voluntarily with the court registry, without restriction. The majority of the National Committee took the view that

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55 *Senior Courts Act 1981* (UK) ss 124–126. The Probate Service, part of HM Courts and Tribunals Service, maintains a will bank for wills and codicils. Information about this may be found at <http://www.justice.gov.uk/courts/probate/depositing-documents-for-safe-keeping>.

56 Queensland Law Reform Commission, *The Law of Wills,* Report No 52 (December 1997) ch 8, 121 (Recommendation 1(c)).

57 *Succession Act 1981* (Qld) ss 50–51.

58 See discussion in paragraphs 16–18.

59 Model Bill, pt 6.

> generally it is desirable to have a central registry of wills. For this reason, the National Committee is of the view that it should be possible to deposit any will with the Registrar.[60]

33. Court-based will banks for private wills generally charge fees either for deposit only or for both deposit and withdrawal. In South Australia, fees are payable for both (see paragraph 16 above). In the United Kingdom, there is a fee of £20 for deposit and no fee to withdraw the will after the testator dies.

34. Generally, public will bank schemes for private wills, including but not limited to those based in courts, have rules about who may deposit a will and who may withdraw a deposited will. In the United Kingdom, for example, the testator or someone acting on his or her behalf can deposit the will or codicil, but only the testator can withdraw it during their lifetime, on production of the certificate of deposit. When the testator dies, the only person who can withdraw the will is the executor, on production of the certificate of deposit and the death certificate. Similar requirements exist in South Australia. In the Australian Capital Territory, the Registrar maintains an index of wills deposited or withdrawn, which any person may search.[61]

Public Trustee model

35. The Public Trustee model is usually established under Public Trustee legislation.[62]

36. As mentioned earlier, South Australia's Public Trustee may not accept the deposit of wills other than those which appoint the Public Trustee as executor or trustee or which are prepared by the Public Trustee.[63]

37. By contrast, Queensland's Public Trustee may, as a 'special function of a public nature', store *any* kind of private will, not only those prepared by the Public Trustee or naming the Public Trustee as executor or trustee.[64] The Queensland Public Trustee does not appear to promote this function in any of its publications, and the statistics it provides about the number of wills it stores do not differentiate between the wills it prepares and others. In May 2011, the Queensland Public Trustee held over 900 000 wills.[65] It drafts wills free of charge for any Queenslander over the age of 18.[66] In the 2012-2013 financial year the Queensland Public Trustee made over 25 000 wills.[67]

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60 National Committee Consolidated Report, 106.
61 See *Wills Act 1986* (ACT) ss 33, 34 (reproduced in Appendix 2 to this paper).
62 See, for example, *Public Trustee Act 1978* (Qld) s 63, and *Public Trustee Act 1941* (WA) s 54(2).
63 *Public Trustee Act 1995* (SA) s 52.
64 *Public Trustee Act 1978* (Qld) s 63.
65 The Public Trustee of Queensland, *Queensland Wills Week Media Kit* (May 2011) <http://www.pt.qld.gov.au/files/news/wills-week-media-kit.pdf>.
66 The Public Trustee of Queensland, *Wills* (26 February 2013) <http://www.pt.qld.gov.au/wills/>.
67 The Public Trustee of Queensland, *2012-2013 Annual Report*, 9.

38. Similarly, the Public Trustee for Western Australia, in meeting its community service obligations,[68] has since 1 July 2009 maintained the 'WA Will Bank' in which people may deposit paper wills at no cost in the Public Trustee's secure vault. The service is designed for wills other than those that are prepared by the Public Trustee (which are also kept in the vault). The rate of deposit of private wills (other than those prepared by the Public Trustee) began at approximately 65 per month, reducing by the end of the 2013 financial year to approximately 54 per month. These kinds of wills constitute a tiny fraction of the total number of wills held in secure storage by the Western Australian Public Trustee.[69] A condition of deposit in the Will Bank is that the Public Trustee's office will scan the original will when it is accepted for deposit and keep the electronic copy as well as the paper original 'in the unlikely event of disaster'.[70]

Prescribed body model

39. In the Northern Territory, the court registry does not accept the deposit of private wills. Instead, private wills, regardless of who prepares them, may be deposited with a person or body prescribed by regulation, or, in default of prescription, the Public Trustee.[71] In the absence of any current prescription, the Northern Territory's Public Trustee is the Territory's public will bank for private wills.

40. There is no fee for deposit and storage of such wills. In the financial year 2011-2012, 379 wills (described as 'registered, as distinct from prepared') were deposited.[72]

Public will registers

41. In most common law jurisdictions, there are will registers that are privately-owned and operated[73] which, for a fee, register information about wills, powers of attorney and many

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68 Required under the *Public Trustee Act 1941* (WA).

69 The WA Public Trustee reported that in the 2012-2013 financial year its will vault held a total of 107,950 wills: *Public Trustee Annual Report 2012-2013* (Government of Western Australia, Department of Attorney-General) 16. However, of these wills, less than 2% were deposited through the Will Bank scheme (approximately 2027 in total: 650 in 2009-10, 725 in 2010-11 and 652 in 2012-13).

70 WA Will Bank Deposit Form <http://www.publictrustee.wa.gov.au/_files/will_deposit_form.pdf>. More information about the WA Will Bank may be found on the website of the Public Trustee of Western Australia http://www.publictrustee.wa.gov.au/W/wa_will_bank.aspx?uid=2725-1746-1325-2220.

71 *Wills Act 2000* (NT) ss 49, 50.

72 Public Trustee for the Northern Territory, *Annual Report 2011-2012,* 8.

73 Examples in Australia are The Will Registry <http://www.thewillregistry.com.au> and The Australian Registry of Wills, Deeds and Documents <https://theaustralianregistry.com.au/>. In the United Kingdom certainty.co.uk claims the support of the legal profession for its similarly-functioning 'UK National Wills Register'. Its website http://www.certainty.co.uk/national-will-register/ claims that 'Extensive research has ensured that the Certainty National Will Register complies with legal requirements and is exclusively for the use of solicitors, lawyers, STEP members, ILEX Fellows, the public, charities and financial institutions.'

other kinds of legal documents. People use these registers to ensure that their will can be found after they die.

42. There is no public will register scheme in place in South Australia. The only Australian jurisdiction to attempt such a scheme is New South Wales. Its pilot scheme was discontinued in late 2013 for lack of use.

43. The National Committee made no recommendations for a public will register. The United States,[74] the United Kingdom and New Zealand do not have public will registers. The only Canadian province to have one is British Columbia.[75]

44. To illustrate the features of a public will register scheme, we compare the features of the scheme in British Columbia with the now defunct pilot scheme in New South Wales.

Wills notice scheme, British Columbia

45. The 'wills notice' scheme in British Columbia[76] was established in 1996[77] and is maintained by the Office of Vital Statistics (the equivalent of the South Australian Registry of Births Deaths and Marriages).

46. The following details of the scheme[78] may help illustrate how it works:

- Registration is by the electronic or hard copy filing of a 'wills notice' which gives details of the will and its location.[79]
- If the location of a will that has been filed under a wills notice is changed, the testator can file a notice of change giving the current location.[80]
- A person may file a notice that they have revoked a will, whether or not they have registered its existence.[81] The aim is to give the executor and beneficiaries information about whether a will they find is a valid will. However, it is not mandatory to file a notice of revocation of a will, even if the will has been registered.
- The scheme is voluntary. The failure to file or the filing of a wills notice has no effect on the validity of a will or of the revocation of a will.[82]

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74 Note that the 'Will Registers' in each State in the US are the equivalent of Australian probate registries. They are not will registers in the sense being discussed here.

75 *Wills, Estates and Succession Act* [SBC 2009] c. 13 pt 4 and the *Wills, Estates and Succession Regulations,* pt 2. Relevant extracts from the Act and Regulations are set out in Appendix 13 to this paper.

76 Ibid.

77 *Wills Act* [RSBC 1996] c 489, now repealed.

78 Information about the will registry in British Columbia may be found on this website: <http://www.vs.gov.bc.ca/wills/>.

79 *Wills, Estates and Succession Act* [SBC 2009] c.13, s 73.

80 Ibid s 75.

81 Ibid s 74.

82 Ibid s 78.

- The registry must establish and maintain a system to record every notice filed (that is, of the location of a will or of its revocation).[83]
- An application to search the register results in the issue of a certificate for the last notice filed for the person named in the application, along with the search results showing a list of all notices filed for the person named in the application.[84]
- Lawyers may search the register as of right but non-lawyers must first produce a death certificate to satisfy staff that the enquiry relates to a person who has died and to prevent the register being used by potential heirs to locate a will of a living person and find out how much they have been left.[85]
- Proof of a search of the wills register is a pre-requisite for a grant of representation.[86]

47. There are no publicly-available statistics on the number of wills recorded on the register.

48. When the provisions establishing the public wills notice scheme were reviewed by the Parliament of British Columbia and transferred to a new Act,[87] it was decided to keep the registration of wills voluntary, rather than making it compulsory. The official explanation[88] is:

> The present registration scheme is voluntary and it has been determined that it continues to serve a useful purpose.
>
> The British Columbia Law Institute considered and rejected a suggestion that the registration of a wills notice be made compulsory. There were four reasons for this decision:
>
> 1. It will increase cost, and may deter people from making a will. Wills are a relatively low-cost service offered by lawyers and making registration of wills mandatory will add a cost.
> 2. People making a will without a lawyer (e.g., using a will kit) may not know that they need to register a will.
> 3. It would result in a number of otherwise valid wills having to be given effect by the court through its curative power. The general direction of the Act is to reduce formalities where

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83 Ibid s 76.
84 Ibid s 77.
85 Ibid.
86 *Supreme Court Civil Rules,* r 25-3 rr (2)(d) and (6)(e). These rules are reproduced in Appendix 13 to this paper.
87 *Wills, Estates and Succession Act* [SBC 2009] c.13, pt 4.
88 The explanation for the Act is published by the British Columbia Attorney-General's Department <http://www.ag.gov.bc.ca/legislation/shareddocs/wesa/Part4.pdf> and is based on the work of the British Columbia Law Institute in *Wills, Estates and Succession: a Modern Legal Framework,* Report 45, June 2006. This particular quotation comes from the part of the explanation that describes s78 of the Act.

practical; if a will was required to be registered then unregistered wills would have to be invalid.

4. The transition to mandatory registration would be a problem. How would all the currently unregistered wills be treated? There would have to be a very long transition period, where old unregistered wills would likely continue to be considered valid, whereas more recently drafted wills, meeting the same formalities, would be considered invalid if they were not registered.

49. Incentives to use the public will register in British Columbia are low cost registration,[89] low search fees[90] and a legal requirement that applications for grants of representation include evidence of a search of the register.[91] Another incentive is a streamlining of documentation. By locating the register within the Office of Vital Statistics, the scheme ensures that all information about a person's death and the person's intentions for the distribution of his or her property on death is recorded in the same place and is easily searchable and verifiable. For the State, the advantage in such a location is that it can apply existing systems for registration and search with minimal additional cost.

New South Wales public will register pilot

50. Detail of the New South Wales pilot will register is scarce, because as a pilot scheme it had no statutory framework. Some information about it remains on the New South Wales Births Deaths and Marriages Registry website,[92] and this is reproduced in Appendix 4 to this paper. Also reproduced (in Appendix 5) is the text and application form printed in the Registry's brochure for the register. This scheme aims to record details about a will but not to store the will itself.

Comparison of public will register schemes in British Columbia and New South Wales

51. The public will register schemes in New South Wales and British Columbia have these features in common:

    (a) It is not compulsory to register the location of a will;

    (b) The testator or someone authorised by the testator may register;

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89 CAN$17 per registration: *Wills, Estates and Succession Regulation,* pt 2.

90 CAN$20 per request ($55 for same day service): *Wills, Estates and Succession Regulation,* pt 2.

91 Above n 86.

92 See the website of Registry of Births, Deaths & Marriages, New South Wales Government, *Wills*, <http://www.bdm.nsw.gov.au/bdm_dth/bdm_wil.html>.

(c) Registration records information identifying the testator, identifying who registered the will (the testator or a person authorised to do so by the testator), and identifying where the will is located;

(d) Registration does not include deposit of a will—there is no facility for the physical retention and custody of wills or copies of wills;

(e) The register operates through the Registry of Births, Deaths and Marriages or equivalent.[93]

52. Ascertainable differences between these schemes are—

(a) As to the information recorded on the register:

- In British Columbia, the register simply records information about who registered the will, the testator, the registrant (if other than the testator) and the location of the will.
- In New South Wales, the register also recorded the name and address of the testator's parents and additional details about the will—namely when it was executed, the names and addresses of the executors and their relationship to the testator.

(b) As to entitlement to search the register:

- In British Columbia, lawyers may search the register without restriction,[94] but for non-lawyers searches are permissible only upon proof of the death of the person nominated in the search application. It appears that testators wishing to search in their lifetime must use a lawyer to do so.
- In New South Wales, by contrast, lawyers had no special rights of access to the register. The scheme permitted a testator or their authorised representative (likely a lawyer) to search the register personally during their lifetime. Anyone else could search only upon proof of the testator's death.

(c) As to fees:

- In British Columbia, there is a small registration fee and a small fee for requesting a search of the register.[95]

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93 In New South Wales, the source of the authority for the Registry of Births Deaths & Marriages to maintain the pilot wills register appears to be s55A of the *Births Deaths and Marriages Act 1995* (NSW), under which the Registrar may collect and maintain information other than registrable information (i.e. information about births, deaths and marriages) and must apply to that information the same provisions about access and privacy as apply to registrable information.
For British Columbia, the registry is the Vital Statistics Agency ('VSA'): *Wills, Estates and Succession Act* [SBC 2009] c.13 pt 4 div 7.

94 *Wills, Estates and Succession Act* [SBC 2009] c.13 s 77.

95 See above nn 89–90.

- Under the New South Wales pilot register registration was free and a fee of $48 was incurred upon successful search.

(d) As to requirements for recording changes to registered details:

- In British Columbia the testator may file a notice of change, without having to re-register.
- In the New South Wales pilot, a change could be achieved only by re-registration.

(e) As to a search of the register being a prerequisite for a grant of representation:

- In British Columbia an applicant for a grant of representation must file a certificate from the director of the will register showing the results of a search for the will of the deceased.[96]
- There was no such requirement for an applicant for a grant of representation in New South Wales.

Reform considerations

53. This part of the paper examines the policy rationales and practical considerations for South Australia maintaining or changing its public will bank scheme and for establishing a public will register scheme.

Public will bank schemes for court authorised wills

54. There appears to be consensus in Australia, the United Kingdom and Canada that courts need to retain court-authorised wills in their registries, to give

> the court continuing control over the will created under its jurisdiction
> … [and to allow] the court to oversee the authorised will[97]

and this was the recommendation of the National Committee.[98]

55. Court-authorised wills are not commonplace, making up only a small fraction of the wills that are made in Australia. South Australia's model for the retention of court-authorised wills is consistent with the National Committee's recommendation.

56. There seems to be no call in Australia for the reform of laws requiring the retention of such wills in court registries.

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96 Above n 86.
97 National Committee Consolidated Report, 41, 53.
98 Ibid.

57. However, the different treatment given by Tasmanian law to court-authorised wills for minors and court-authorised wills for adults lacking testamentary capacity (see paragraphs 25 and 26 above) should be examined as a possible reform consideration. Under the Tasmanian scheme, only court-authorised wills for minors need be retained by the court. Court-authorised wills for adults lacking testamentary capacity do not need to be so retained. Instead, the Registrar must send a copy of the will to the testator and to the executor(s) named in the will.[99] If the executor is not the Public Trustee or a trustee company, their copy of the will must be sent to a law practice nominated by the executor. Presumably the professional and legal obligations of lawyers and trustee companies are considered sufficient to prevent any changes being made to such wills by testators without court authorisation should they continue to lack testamentary capacity. If a will is retained by a court registry, a formal application must be made to release it before any change can be made to it. If it is held by a law practice or the Public Trustee, the cost and formality of such application is removed (although the will must still be proved to the court if any change is to be made to it while the testator lacks testamentary capacity), and, perhaps more significantly, the court is not responsible for the physical custody of the will but knows where it is held.

Public will bank and will register schemes for private wills

58. In the next part of the paper we look at

- the impact of the digital era on how wills are made and stored;
- the arguments for and against State involvement in schemes for the deposit of private wills or for the registration of the location of private wills;
- the merits of compulsory deposit or registration;
- the benefits or otherwise in uniformity of public schemes;
- general provisions governing the inspection of wills.

E-wills

59. All current will bank and will register schemes contemplate that, as a general rule, the only valid will is a paper one. Even schemes which store scanned versions of deposited wills on their databases assume that the scanned version is backed by the original in paper form.

60. But the generation and storage of business and legal documentation is rapidly becoming digitalised, and it would be short-sighted not to contemplate that wills too will eventually be accepted as originals in authenticated digital form without needing to be evidenced or

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[99] *Wills Act 2008* (Tas) s 28.

backed up by hard copy. Indeed, for people reaching adulthood in the 21st century, it might seem bizarre *not* to create and store one's will electronically.

61. Courts in Australia are beginning to grant probate for electronic versions of wills which are not supported by original paper wills executed in the traditional way, albeit in exceptional circumstances. Because probate legislation does not explicitly recognise the authenticity of electronic wills or set methods for authenticating them, people must always go to court to determine their validity, and if it is to grant the application, the court must be prepared to interpret words in the statute that contemplate wills being in a physical or paper form (for example, the word 'document') generously.[100] Examples of such cases were discussed in a *Law Report* programme on ABC Radio National in November 2013.[101] They included a grant of probate in Queensland in 2013 for a will made on the notes application of a smart phone shortly before the testator committed suicide; in New South Wales for a will saved on a laptop computer; and in Victoria for a will recorded on webcam, again shortly before the testator committed suicide. In each case the court was satisfied, by various unorthodox means, that this was indeed a valid will and the deceased's last one.

62. If and when hard copy wills become the exception rather than the rule, there will be no need for will banks that provide physical storage facilities. State investment in a public *electronic* will bank might then be the only sensible option.

63. If, in the meantime, there are to be public will banks or will registers for paper wills, their schemes should anticipate the likelihood that eventually e-wills will replace paper wills. A proposal of this kind was made by the Courts Administration Authority in 2002 (the South Australian Wills Electronic Register (WER) proposal),[102] but was not taken up. The proposal was for the electronic publication and registration of wills and their secure archiving in an electronic database maintained by the Registrar of Probates. It was not a scheme for the registration of the details of a will and hence not a public will register in the sense being used in this paper, but rather a public will bank for electronic wills.

64. The WER scheme contemplated e-storage by the Probate Registry. If the concept were to be revisited now, the arguments made in this paper about whether courts should be storing private wills at all and the option of a system where e-wills are stored on a secure database maintained elsewhere than the court should be explored.

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100 As to this, see the recommendations of the South Australian Law Reform Institute to amend the *Evidence Act 1929* (SA) so that it includes provisions for the proof and admission of information that is generated, stored, reproduced or communicated by a technological process or device that reflects modern technologies and can accommodate future, as yet unknown, technologies: South Australian Law Reform Institute, *Modernisation of South Australian evidence law to deal with new technologies*, Final Report No 1, October 2012.

101 ABC Radio National, *The Law Report*, 26 November 2013 (Damian Carrick interviewing Charlie Young, Senior Associate, Bennett & Philp (Brisbane law firm)). <http://www.abc.net.au/radionational/programs/lawreport/digital-wills/5115064>

102 Below n 32.

65. Although the rapid march of technology would suggest the importance of reforming laws governing the execution of wills, this review is confined to schemes for storing and locating wills. The Institute is of the view that the topic of what constitutes a will in the digital era should be explored separately, but any reform to schemes for storing and locating wills ought to anticipate the possibility of reform with respect to e-wills.

State involvement

66. As heralded in the introduction to this paper, a key question is why the State should involve itself with the safekeeping or registration of information of private wills when these facilities are or can be offered by private enterprise.[103]

67. A strong argument against public will bank or will register schemes for private wills is that unless there is a serious problem for the State with the consequences of lost wills, and an unmet demand for facilities to remedy this, the benefits of State involvement may be outweighed by the cost and legal liability risks associated with meeting that demand.

68. Those costs and legal liability risks may be summarised as follows:

- Reasonable fees for registration, deposit, subsequent dealings, inspection or release may not be enough to offset the cost of such schemes. On the other hand, fees set at or near a full cost recovery level may impose an onerous financial burden on testators or persons dealing with the will, and, in a voluntary scheme of registration or deposit, may be a disincentive to using it at all.
- There is perhaps an inherent problem in any public will bank or will register scheme, in that it must either allow the deposit or registration of *any* document that is submitted as a will or accept only documents that appear to be validly-made wills.
    - If the scheme accepts any document submitted as a will, it will contain (or refer to) not only valid wills but also some documents that are simply expressions of testamentary intention, lists or letters to family. That may not seem too grave a problem as long as it is understood, and indeed made clear to users, that the documents held or registered are not necessarily wills or wills that are valid. However, it could lead to a defective document being deposited in substitution for a previously deposited valid will and the consequent loss or mislaying of the earlier valid will.

[103] For an interesting description of these issues, see the second reading speech by Murray Thompson MP to the *Administration and Probate (Amendment) Bill 1994* (Vic), a bill which introduced the current will bank scheme in Victoria: Victoria, *Parliamentary Debates*, House of Assembly, 23 March 1994, 469–70 (Murray Thompson).

- If the scheme accepts only documents that appear to be validly-made wills, considerable time and expertise would be required to determine whether a document was indeed a properly executed will before accepting it for deposit or registration.

- Any attempt to limit liability for loss of or damage to a deposited will in an effort to reduce costs may detract from the perceived advantage of a public will bank over other sources as a place of secure custody, including private will banks. In a report by the Queensland Law Reform Commission considering the suitability of National Committee's model laws for Queensland, the Commission had reservations about the issue of liability for a court-based public will bank for private wills in the event of loss or damage to a will in the Registrar's custody. The Commission said:

> However, while the Commission recognises that there would be advantages in having a central registry for the deposit of all wills, the Commission has reservations about recommending at this stage that the court should assume that function. Such a suggestion has obvious resourcing implications for the court. There are also other issues, for example, the registrar's liability in the event of the loss of such a will, that would need to be investigated before the Commission would be prepared to recommend extending a provision about the retention of certain wills so as to enable all wills to be deposited.[104]

As a result, Queensland has no court-based public will bank for private wills.

- In jurisdictions where the Public Trustee may hold private wills other than those it prepares itself, the general statutory protection from official or personal liability for injury, loss or damage sustained as a result of the Public Trustee carrying out its duties under the Act[105] will apply to the duties of holding private wills. If those duties are neglected or not performed properly, there would be no such protection and the Public Trustee would be liable for the consequences. Similar liability considerations would apply to a public will register for private wills in terms of accuracy of recording and confidentiality.

69. To test the arguments for State involvement in will banks or will register schemes, one might ask:

    - Is there evidence of a serious problem in South Australia in terms of loss of wills? Isn't it the case that the vast majority of wills are not lost? (Note that there are no statistics in South Australia on the prevalence of lost wills or on how many 'lost' wills are eventually found through current search methods.)

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[104] Queensland Law Reform Commission, *The Law of Wills,* Report No 52 (1997) 121–2.
[105] See, for example, *Public Trustee Act* (NT) s 97.

- Isn't it comparatively rare for a will's status as the last will of a testator to be disputed? (Again, statistics are not available on this point.)
- In any event how can it be said that evidence of the deposit of a will in a will bank or of the registration of its existence and location is conclusive as to its status as the last one made by the testator? A search of a will bank or will register (whether deposit or registration is compulsory or not, and whether this is a public scheme or a private scheme) cannot reveal whether a will in that bank or referred to in that register is the testator's last one; nor will a search of the facility confirm whether the testator has indeed made a will or not.
- Isn't it the case that there is no evidence of an unmet demand for public will banks and will registers by people who are at risk of losing their wills? The New South Wales pilot public will register was discontinued for lack of use, suggesting little unmet demand in that State at least. Very few people use the current South Australian court-based public will bank for their private wills[106] (although this may be because it accepts only a limited class of private wills and because its existence is virtually unknown). The reason for Queensland's decision not to establish a court-based will bank for private wills was that in Australia there is little take-up of such facilities.[107] And in 2006 the Queensland Attorney-General postponed the introduction of a will register pending evaluation of the effectiveness of pilot will register in New South Wales, expressing reservations about the take-up, privacy and effectiveness of the register in ruling out the possibility that there exists a later will than the one that has been registered.[108] Given the failure of the New South Wales pilot, it seems unlikely that the issue is being actively considered by the Queensland Government.
- It could also be argued, in terms of the source of demand, that the very people most likely to want to register the location of their will or to deposit it in secure custody (whether these facilities are offered privately or by the State) are those who arrange their affairs in an orderly way. Such people are unlikely to lose their wills during their lifetime and highly likely to leave clear instructions about where to find their wills when they die.
- Is there any evidence of a failure of private will banks or will registers to meet relevant appropriate standards (for example, privacy and security)?

70. In response, it may be argued that State involvement in providing these facilities can nonetheless be justified

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106 The Registry holds approximately 30 private wills dating back to 1839.

107 See the second reading speech to the *Succession Amendment Bill 2006* (Qld), Queensland, *Parliamentary Debates*, House of Assembly, 14 February 2006, 78 (Linda Lavarch, Minister for Justice and Attorney-General).

108 Ibid.

- in terms of demand, given the high rate of use of public will banks operated by Public Trustees, especially those that also accept the deposit of wills that the Public Trustee has not prepared itself;[109]
- in terms of avoiding unnecessary expense for individuals and the State by helping to reduce the occurrence of lost wills, such as it is, through a streamlined and inexpensive service (for example, through low cost registration, deposit and search and through automatic integration with other relevant State records under arrangement with Births Deaths and Marriages Registries);
- in terms of helping reduce litigation about whether a particular will is the testator's last one by providing certainty that a will was or was not deposited or its details registered at a particular time. Laws that make the search of public will banks and will registers a mandatory step in applying for grant of probate or letters of administration (as in British Columbia, discussed earlier) can reinforce this;
- in terms of increasing incentives for people to make *complete* arrangements for what is to happen to their property when they die, including storing their wills securely and notifying others of where the will is kept (although this could also be achieved by greater Government promotion of the use of private schemes and of other private methods of storage and notification);
- in terms of offering a guarantee of higher standards than a private scheme might be expected to maintain. The facilities of a public scheme would have to meet publicly-determined standards for confidentiality, accurate recording, appropriate access, and (in the case of a will bank) secure storage. Private schemes are not regulated. Statutorily-based facilities are perhaps less likely to close down than private ones. The operator of a private scheme may not be as accountable for its processes as the operator of a public scheme, and there is the risk, should the private business fail, that there will be a breakdown in security and confidentiality and that the priority given to the preservation of registration information or the return of deposited wills will be compromised.

Voluntary or mandated public deposit/registration?

71. Another question for consideration is whether deposit or registration under a public scheme should be voluntary or mandated.

72. A mandatory scheme cannot guarantee that the last deposited or registered will was the testator's last will, because there are always people who are ignorant or careless of their legal

[109] For example, the Will Bank in Western Australia (discussed in paragraph 38), the will repository maintained by the Northern Territory Public Trustee (discussed in paragraphs 39 and 40) and the Public Trustee's facility in Queensland (discussed in paragraph 37).

obligations. This may be the reason that in no Australian jurisdiction is it obligatory for the maker of a private will to deposit it with the court or, where this option is available, with the Public Trustee. This is the approach taken in the Model Bill and is the law in the United Kingdom. The will registration scheme in British Columbia remains voluntary following a review of the Act after 15 years of operation.[110]

73. Another reason may be that there is no realistic sanction for a failure to deposit or register a will. Further, a scheme of mandatory deposit might exclude informal wills which, although not satisfying the formal requirements for deposit, may well be validly created.

74. On the other hand, a voluntary public scheme is likely to be used only if there are clear incentives for a testator to use it—for example, a level of security and confidentiality that is greater than could be achieved in private schemes or through using other private means to store or record the location of one's will; an automated process of deposit or registration that requires very little additional effort or cost after drawing up a will; and perhaps a guarantee of fast-tracking the probate process.

Uniformity

75. If a decision is made to establish a public will bank scheme for private wills in South Australia that is more accessible than the current court-based one, there is also the question of whether to attempt to achieve uniformity with New South Wales, Victoria and the Northern Territory by adopting the provisions of the Model Bill.

76. Generally speaking, uniformity of laws or schemes with other Australian jurisdictions is a desirable result. However, some might say it is questionable whether the uniformity of public will bank or will register schemes across Australia would of itself yield measurable benefits.

77. The Uniform Succession Laws Project did not propose a national public will register or will bank, there being constitutional barriers to this, but rather that each jurisdiction should be free to establish and manage its own public will bank scheme independently, preferably along the lines suggested in the Model Bill.

Inspection of wills

78. The options offered below, in so far as they refer to deposited wills, do not restrict the class of person who may inspect them other than by reference to instructions given by the testator and to general provisions that govern the obligations of those who hold a will or purported will to permit inspection.

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[110] See discussion in paragraph 48 above.

79. Such general provisions exist in the succession legislation in some other States (but not in South Australia) and the National Committee recommended a model provision.[111] Hence it did not recommend separate inspection provisions for its proposed public will bank, assuming that the general inspection provisions would apply.

80. The Model Bill inspection provision would oblige a person who holds a will or purported will to permit inspection, after the testator dies, by any person named in the will as beneficiary or executor; a surviving spouse, a parent or guardian, issue of the testator; a person who might be entitled to a share under intestacy; a creditor or person having a claim against the estate; a beneficiary under a prior will; a parent or guardian of a minor referred to in the will or who would be entitled to a share in the estate under intestacy; or any other person who the Registrar of Probates considers has shown a legitimate interest in the estate.

81. There is no such provision in South Australian succession legislation. The question of whether there should be legislation for access to or inspection of wills of deceased persons in South Australia is being considered separately by the South Australian Law Reform Institute and will not be canvassed further in this paper. However, for the purposes of examining reform options for public will bank and will register schemes, the models below refer to a hypothetical 'general inspection provision' to signify the same kinds of entitlements as are covered by the provision in the Model Bill.

Options for reform

82. Three options for the reform of South Australia's laws are canvassed below.

Option 1: No public will bank or will register for private wills

83. Under this option, there would be no public will bank for private wills, whether with the Probate Registry or anywhere else, nor would there be any public will register for private wills. The Probate Registry would continue to be the repository for court-authorised wills.

84. The rationales for this option include these:

    (a) There is a continuing need for courts to retain court-authorised wills and the Probate Registry is the appropriate repository for them;

    (b) The current restrictions on the kinds of private wills that may be deposited with the Probate Registry have resulted in a negligible take-up of this facility which does not justify the Registry retaining this function;

[111] National Committee Consolidated Report, 111; Model Bill provision cl 52.

(c) Even should those restrictions be removed, there is no evidence to suggest that the result would be an increase in the number of deposits of private wills substantial enough to justify the Registry continuing to have this function;

(d) Any significant increase in deposit rates would require a more sophisticated system to guarantee appropriate lodgement and withdrawal processes, secure storage, accurate and searchable electronic record keeping, appropriate levels of privacy, and supervised access and inspection facilities than exists now. This suggests that the function of maintaining a public will bank scheme for private wills would be better exercised, if at all, by a body other than the Probate Registry. However, without evidence that a public will bank would significantly reduce the overall number of wills that are lost in South Australia or reduce the number of disputes about a will's status as the last will of the testator in South Australia, there is no justification for the expenditure of public money to establish one;

(e) For similar reasons of lack of demand and little demonstrable efficacy, there is no justification for the expenditure of public money to establish a public will register for private wills in South Australia;

(f) There are more effective ways to encourage and assist people to take responsibility for the secure storage of their wills and to ensure that their wills can be found easily after they die than by investing public funds in public will banks or will registers. It may be more effective for the State to tackle the problem of lost wills in one or more of these ways:

- investing in public awareness campaigns about the value in making *complete* arrangements for what is to happen to one's property at death by (a) making a will; (b) storing it securely (for example with the bank, a solicitor's or accountant's office, in a home safe, or with a private will banks) and (c) notifying others about where the will is stored;
- urging legal professional bodies to encourage their members to routinely ask clients for whom they make wills to tell them where their wills are stored and let them know if the location changes;
- subsidising private will bank or will register schemes that meet minimum standards of security and privacy.

Option 2: A public will register for private wills; no public will bank

85. Under this option, the Probate Registry would no longer have the function of holding private wills but would continue to hold court-authorised wills. There would be no public will bank for private wills. Instead there would be a public electronic will register to record the existence or revocation of a private will and where it is stored. The model contemplates

testators making private arrangements for the secure custody of their wills (for example, at home, with a bank, with a solicitor or accountant, or with a private will bank) and then being able to record, on this public register, the will's existence (or revocation) and location.

86. Registration would not be compulsory.

87. The electronic register would have the capacity to store a scanned copy of any will that is registered (the scan being attached to the online registration application) and, further, to store electronic wills (e-wills) should the law be changed to allow wills to be made this way.

88. The public will register would be maintained by a State body to be prescribed by regulation. This would give the Government the ability to nominate a body with existing capacity (such as the Registry of Births Deaths and Marriages or the Public Trustee) if it wished to take advantage of an already established, secure and sophisticated electronic system of recording and registering information, or to set up a new body dedicated to this function.

Option 2: Public electronic will register

1 The register is to be maintained by a body (other than the court registry) prescribed by regulation.

2 Its function is to record the existence of a will or codicil,[112] its location, and the fact that a will has been revoked.

3 Only the testator or a person authorised in writing by the testator may register this information.

4 Registration of information, or of a change to registered information, is by electronic notice.

5 The register's database would be capable also of electronically storing

- a scanned version of a will about which information is recorded on the register, if attached to the electronic notice;
- an electronic will (e-will), should the law be changed to permit people to make wills this way.

5 Testators are not obliged to register information about their wills. Also, a person may register the revocation of a will even if the will has not been registered.

6 Registration or lack of registration of information about a will does not affect the validity of a will or the revocation of a will.

7 The information received on registration is to be held on a secure electronic database, with a restricted online search capacity.

8 The information that is recorded on the register is

a the identity, date of birth and address of the testator, and, if different, the identity and address of the person registering the information;

[112] Further reference to a will in this model is to be taken to include a codicil.

b the date and nature of the notice (including notices of change);

c where the will is being kept;

d the dates and details of applications for access to the record and their outcome.

9 During the testator's lifetime, the only persons who may have access to this information are:

a the testator or a person authorised by the testator, through automatic online read-only PIN access (so that the record cannot be changed other than by registering that change formally). A testator may authorise another person(s) to have access, and may place conditions on that access, in the notice of registration itself.

b a person authorised by order of the Supreme Court or the Registrar of Probates where a person has lost capacity to manage his or her own affairs or where a person is absent from the jurisdiction and cannot be found, for the purposes of establishing whether they have made or revoked a will or establishing where their will is located.

10 After a testator dies, general provisions about inspection of wills[113] govern who is entitled to inspect database entries relating to registration by the testator.

11 Proof of a relevant search of the record is to be required as part of an application for a grant of probate or letters of administration.

12 The fee structure is low to encourage registration and facilitate search after the testator's death. It might, for example, permit free registration but impose a fee for search.

Option 3: Public will bank for private wills; no public will register

89. This option would establish a public will bank for private wills with a searchable electronic record of deposits, without also establishing a separate public will register. The function of holding private wills would be removed from the Probate Registry. It would continue to hold court-authorised wills.

90. The choice of where the public will bank is sited would be guided largely by funding and capacity considerations: the site would need the capacity to maintain, indefinitely, a secure facility for the physical custody of an accumulating number of wills and an accurate electronic records of their deposit, inspection and withdrawal. It would need the capacity to manage access, inspection and withdrawal of deposited wills and to manage the release of deposited wills when the testator dies.

91. Also, given the rapid rate of digitalisation of legal documentation, the will bank's database would have the capacity to store and register electronic wills (e-wills) should a suitable method of authentication be approved.

[113] See above, paragraphs 78–81.

Option 3: Public will bank for private wills

1 The will bank, the holder of which is to be prescribed under the Act, has the capacity to store any validly executed paper will or codicil,[114] a scanned will or an electronic will.

2 A condition of the deposit of a paper will is that it is scanned by the will bank and the scanned copy stored electronically.

2 Deposit may be made by the testator or someone authorised by the testator in writing; from the practitioner who prepared the will; or, should the testator have lost testamentary capacity since making the will, by the testator's personal representative or guardian or a person who the court has authorised to deposit that will.

3 The testator must specify on deposit:

- who, during their lifetime, should they lose testamentary capacity or on the happening of any other specified event, may (a) have access to the record of the deposited will or (b) inspect the testator's current deposited will or (c) both.
- to whom the will is to be released when they die.

4 The testator, and (if other) the depositor, is to be issued with a certificate of deposit noting all authorisations.

5 A testator, or a legal practitioner acting on behalf of the testator, may withdraw a deposited will during the testator's lifetime on production of the certificate of deposit. The requirement to produce a certificate of deposit may be dispensed with at the discretion of the will bank.

6 Liability of the will bank for loss, damage, destruction, theft, inaccurate recording, inappropriate access to or tampering with a deposited will would be limited.

7 A deposited will is not invalidated by a defect in the deposit, the record of deposit or its custody, nor is it validated by deposit alone.

8 An electronic indexed record is kept of all deposits, withdrawals and releases of deposited wills and of access to the record and inspections of deposited wills.

9 Only the testator, a person authorised on the certificate of deposit to do so or a person ordered by a court to do so may search the index of deposits or inspect a deposited will during the testator's lifetime. General provisions about inspection of wills[115] govern who is entitled to inspect a deposited will after the testator dies.

[114] Further reference to a will in this option is to be taken to include a codicil.
[115] See above, paragraphs 78–81.

10 Proof of a relevant search of the record is required as part of an application for a grant of probate or letters of administration.

11 The will bank is to have a fee structure designed to encourage deposit and facilitate search after the testator's death. For example, it might permit deposit without fee but require a fee for inspection, copying or release of a deposited will.

Questions

The questions below seek your opinion about changing the South Australian provisions for the deposit of private wills and about whether the State should establish a public register for private wills.[116] They can be downloaded from the Institute's webpage: http://law.adelaide.edu.au/research/law-reform-institute/ under *Current Projects*.

A public will bank for private wills

1 Should the State offer and maintain a public facility for the secure custody of private wills (a public will bank)? Why/why not?

2 If the State is to offer a public will bank for private wills,

2.1 Should there be any restriction on the kinds of private wills that may be deposited? For example—

- Should only paper wills be accepted for deposit? Why/why not?
- Should electronic wills be accepted for deposit? Why, and in what circumstances/why not?

2.2 Should the will bank refuse to accept a document for deposit if it does not meet the formal requirements for the execution of a will? Why/why not?

2.3 Where should the will bank be located (for example, with the Probate Registry, with the Public Trustee, with the Registry of Births Deaths and Marriages or with some other source)?

2.4 Should the will bank charge fees for:

- the deposit of a private will?
- the withdrawal of a private will?
- the inspection of a deposited will?
- the release of the deposited will after the testator dies?

[116] Note that in these questions, reference to a will includes a codicil.

- a search of the will bank's records for a deposited will?

2.5 If there are to be fees, should there be a power to waive them? If so, in what circumstances?

2.6 Should it be compulsory to deposit a will with the will bank? Why/why not?

2.7 If deposit is to be compulsory, what would be the sanction for failing to deposit a will?

2.8 If deposit is to be by choice, what incentives might be built into or associated with the will bank scheme to encourage its use?

2.9 Should anyone, other than the testator or a person nominated by the testator, be able to inspect or withdraw a deposited will while the testator is living, and, if so, in what circumstances?

2.10 When a testator whose will is deposited in the will bank dies, who should be entitled to:

- inspect it?
- have access to information recorded in the scheme record of deposits?
- withdraw it?

2.11 Should there be any limit on the liability of the will bank for loss, damage, theft or destruction of a deposited will or for permitting unauthorised access to or dealings with a deposited will? If so, what limits should there be?

2.12 If an indexed record of deposits is maintained, what information should it record?

2.13 Should proof of a search of the will bank's records be required as part of an application for a grant of probate or letters of administration? Why/why not?

2.14 What methods of deposit (for example, by post or electronically) should be available?

2.15 Should the repository be required to scan all deposited wills and store the scanned copies electronically? Why/why not?

2.16 Should any new will bank scheme have the facility to store electronic wills (e-wills), in anticipation that the law may change so that e-wills are accepted as valid wills?

2.17 What are your views on the public will bank model suggested in Option 3? Are there features you would change in it?

2.18 Are there other models for a public will bank, or alternatives to a public will bank, that might work better? If so, what are they?

A public will register for private wills

3 Should the State offer and maintain a public electronic will register for private wills? Why/why not?

4 If the State is to offer a public will register

4.1 Who should maintain it (for example, the Registrar of Probates, the Public Trustee, the Registrar of Births Deaths and Marriages, or some other body or person?)

4.2 What information should be recorded on the will register? Why?

4.3 Other than the testator, who (if anyone) should be able to:

- register information about a will?
- update the information recorded on the register?
- search or inspect or take copies of the information on the register—
    - during the testator's lifetime? If so, what if any restrictions should there be on the information that may be accessed by such a person?
    - after the testator dies? If so, what if any restrictions should there be on the information that may be accessed by such a person?

4.4 Should there be a fee—

- for registering a will or information about a will?
- for access to the register by a person other than the testator or his or her personal representative, should such access be permitted?
- for changing the information recorded about a registered will?

4.5 If there are to be fees, should the holder of the will register be able to waive them? If so, in what circumstances?

4.6 Should it be compulsory to register a will in South Australia or should people have a choice? Why/why not?

- If it is to be compulsory, what should be the sanction for failing to register?
- If it is to be by choice, what incentives, if any, might be built into or associated with the scheme to encourage registration?

4.7 What methods of registration (for example, by post or electronic registration) should be available?

4.8 Should the will register, although designed to record only the existence and location of wills, also have the capacity to store

- scanned copies of wills that a recorded on the register? Why/why not?
- electronic wills? Why/why not?

4.9 Should a person be able to register that they have *not* made a will? Why/why not?

4.10 Should proof of a search of the register be required for an application for a grant of probate or letters of administration? Why/why not?

4.11 Should there be any limit on the liability of will register for the consequences of breach

of duty (for example, inaccurate recording or failure to record, or permitting access to unauthorised persons)? If so, what limits should there be?

4.12 What are your views on the model for a public will register set out in Option 2? Are there features you would change in it?

4.13 Are there other models for a public will register, or alternatives to a public will register, that might work better? If so, what are they?

Appendices

1 South Australian will deposit legislation

Administration and Probate Act 1919 **(SA)**

Part 2—Granting, revoking etc of probate and administration

Division 4—Deposit of wills

13—Wills may be deposited

(1) Any will, duly executed as provided by subsection (3) of this section, and whereof an executor or executors is or are appointed, may at any time previous to the death of the testator be deposited for safe custody with the Registrar by the testator, or on his behalf by any district registrar, solicitor, notary public, or commissioner for taking affidavits in the Supreme Court.

(2) The Registrar shall—

(a) enclose such will in a packet and seal the same; and

(b) endorse on such packet the names of the testator and executor or executors, the date of the will, the time of its being deposited, and the number of the deposit; and

(c) deliver to the depositor a certificate of such deposit.

(3) Every will deposited under this section shall be executed by the testator as required by law, and one of the attesting witnesses shall be the Registrar, a district registrar, notary public, solicitor, or a commissioner for taking affidavits in the Supreme Court.

(4) Such attesting witness, unless he is the Registrar or a district registrar, shall verify the testator's execution of the will by a certificate in the prescribed form, which shall accompany the will.

14—Deposit of codicil

On depositing any codicil to a will already deposited, and not withdrawn, a reference to the numbers of the will and codicil and any previously deposited codicil shall be made on the packets containing the will and codicil or codicils and in the index to be kept by the Registrar.

15—Withdrawal

(1) A deposited will may be withdrawn by the testator, or someone authorised by him.

(2) On such withdrawal the Registrar shall take a receipt for the will and enter a memorandum of the withdrawal and the time thereof in his index, and also on the will, before delivery.

(3) Any other will deposited by the testator shall not receive the number of the former will so withdrawn.

(4) On the withdrawal of a will, the certificate of deposit given by the Registrar shall be delivered up and cancelled, unless the Registrar sees fit to dispense with such delivery.

16—Proceedings for probate on death of testator where will has been deposited

(1) On the death of a testator, whose will is at the time of his death deposited with the Registrar, any executor of the will may in person apply for probate of such will.

(2) The Registrar shall thereupon supply the executor so applying with a printed form of declaration in the prescribed form, and upon the executor making such declaration the Registrar, if he thinks the case a proper one for the exercise of the power by this section given to him, may, on payment of all duties due, grant probate to the executor.

(3) Such probate shall be made out by the Registrar, or a clerk in his office, and the Registrar shall make the prescribed charges for the form of declaration and for making out the probate.

Supreme Court Probate Rules (SA)

Restrictions on searches and removal of documents

72.01 No person shall, without the permission of the Registrar or of the Court be allowed to inspect, or to order a copy, or any extract of, any will or document deposited under section 29 of the Act, or filed in the Registry other than the registered copy of the will of a deceased person or the administration act, or order.

72.02 No affidavit or record of the Court in its Testamentary Causes Jurisdiction shall be taken out of the Court without an order of the Court or the Registrar and no subpoena for the production of any such document shall be issued.

72.03 Where an order has been obtained under Rule 72.02 the Registrar may require that before the document is taken out of the Court, an office copy of the document be filed in the Registry by the person requiring the document to be produced.

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2 Australian Capital Territory will deposit legislation

***Wills Act 1968* (ACT)**

Part 4 Miscellaneous

32 Wills may be deposited with registrar

(1) Subject to subsection (2), a person may deposit his or her will in the office of the registrar.

(2) The registrar may refuse to allow a will to be deposited under subsection (1) unless—

(a) the will is enclosed in a sealed envelope or cover; and

(b) the envelope or cover has written on it—

(i) the full name, occupation (if any) and address of the testator, or some other means of readily identifying the testator; and

(ii) the full name, occupation and address of the executor, or of each executor, named in the will.

(3) The registrar shall cause a will deposited under subsection (1) to be kept safely at that office until it is dealt with in accordance with subsections (4) and (5).

(4) If a person whose will is deposited in the office of the registrar under subsection (1) requests the registrar to do so, the registrar shall cause the will to be delivered to that person.

(5) If the registrar is satisfied that a person whose will is deposited in the office of the registrar under subsection (1) is dead, the registrar shall—

(a) cause the will to be delivered to the executor or 1 of the executors named on the envelope or cover in which the will is sealed or, if such an executor cannot be found or refuses to accept the will, to the person (if any) that a judge of the Supreme Court directs; or

(b) with the permission of a judge of the Supreme Court, cause the will to be destroyed.

33 Register of wills deposited with the registrar

(1) The registrar shall keep an index of wills deposited in his or her office under section 32.

(2) If such a will is delivered to a person or destroyed under section 32 (4) or (5), the registrar shall enter in the index particulars of the date when, and the person to whom, the will was delivered or the date when the will was destroyed.

34 Searches

A person may search in the index kept by the registrar under section 33.

3 New South Wales will deposit legislation

***Succession Act 2006* (NSW)**

Chapter 2 Wills

Part 2.5 Deposit of and access to wills

51 Will may be deposited with Registrar

(1) Any person may deposit a will in the office of the Registrar.

(2) A will is not to be deposited unless it is in a sealed envelope that has written on it the following information:

(a) the testator's name and address (as they appear in the will),

(b) the name and address (as they appear in the will) of any executor,

(c) the date of the will,

(d) the name of the person depositing the will.

(3) A will that is deposited must be accompanied by the fee prescribed by the regulations.

(4) Despite subsection (3), a fee is not payable for the deposit of a will if:

(a) the will is deposited:

i. in accordance with section 16 or 18, or

ii. because a local legal practitioner has died, or has ceased, or is about to cease practising law in New South Wales, or

(b) the fee is waived by the Registrar in accordance with regulations made under the *Civil Procedure Act 2005*.

52 Delivery of wills by Registrar

(1) If a will has been deposited with the Registrar under this Act, the testator may at any time apply in writing to the Registrar to be given the will or to have the will given to another person authorised by the testator in writing to receive it.

(2) On receiving the application, the Registrar must give the will to the testator or the person authorised by the testator unless the testator is a minor or a person who lacks testamentary capacity.

(3) If a will has been deposited with the Registrar under this Act and the testator has died, any executor named in the will or any person entitled to apply for letters of administration with the will annexed may apply in writing to the Registrar to be given the will.

(4) On receiving the application referred to in subsection (3), the Registrar must give the will to the executor or other person or to any Australian legal practitioner or trustee company nominated by the executor or person.

(5) The Registrar may examine any will to enable the Registrar to comply with this Part.

(6) The Registrar must ensure that an accurate copy of every will given to a person under this section is made and retained by the Registrar.

(7) If there is any doubt as to whom a will should be given, the Registrar, or any other person, may apply to the Court for directions as to whom the Registrar should give the will.

53 Failure to retain does not affect validity of will

Any failure of the Registrar to retain a will as required by this Act does not affect the validity of the will.

4 New South Wales pilot will register scheme

Reproduced below is an extract from the information about the New South Wales will register provided on the website of the NSW Births Deaths and Marriages Registry <http://www.bdm.nsw.gov.au/bdm_dth/bdm_wil.html>.

WILLS

Lodgement of new registrations into the Registry's Wills Register has been discontinued, effective January 2013. The Wills Register will be closed in late 2013.

Searches relating to wills previously listed on the register may still be conducted. Further advice will be made available later in 2013.

Access to the Wills Register

While you are alive, only you or your authorised representative can access details of your will from the Wills Register.

An authorised representative may be your solicitor or the Executor to your estate.

The Registry cannot divulge any personal information regarding the contents of the will as it only records the location at which it is held.

Searching the Wills Register

Before Death

While the Testator (person whose will it is) is alive, only they or their authorised representative can search the Wills Register.

You will need to supply at least three forms of identification from the categories below with your application.

After Death

Any person can search the Wills Register as long as the death can be established.

If the Testator dies in NSW, the applicant must provide the Registry with the date of death.

It the Testator dies outside of NSW, the applicant must provide the Registry with a copy of the Death Certificate, a Cause of Death Medical Certificate or a Coroner's order.

If a search identifies that a solicitor or other professional body holds the Will, the details will be released to the person requesting the search.

If the search identifies that the will is being stored other than with a solicitor, the person requesting the search will need to provide the Registry with at least three forms of identification before the information is released. See Identification List below.

Identification List *[omitted]*

If the death has been registered in NSW, then the search can be conducted.

If the Registry finds that the death has not been registered in NSW, the searcher must provide proof of death, to show entitlement to search. eg,

- Death Certificate
- Cause of Death Medical Certificate
- Coroner's Order

Searchers will be provided with all registrations under the specified name.

To conduct a search on the Wills Register, you must put your request in writing to:

NSW Registry of Births Deaths & Marriages

GPO Box 894

WOLLONGONG NSW 2520

Ensure you include all details of the will you wish to search.

Cost and Delivery

A fee only applies if there is a result.

- If there is no result, a fee does not apply
- If there is a result, see our current fees for the "standard certificates" fee

The Registry will notify you if there is a result and request the fee (includes postage and handling) before the search result can be released

For further details, phone **13 77 88**.

5 New South Wales pilot will register brochure

THE WILLS REGISTER[117]

What is the Wills Register?

The Wills Register records the location of a will. The register enables you to record where the will is kept, who made the will (the Testator) and the Executor named in the will (the person responsible for carrying out your wishes). The Registry of Births, Deaths & Marriages does not need to see a copy of the will, nor does it physically store the will.

Why do we need a Wills Register?

More people are realising the importance of making a will. However, a will can only be used if it can be located. The Wills Register provides peace of mind for thousands of people that their will can be found when needed and the assets and possessions they have worked hard for distributed as they wish.

How much does it cost to register my will?

Registering your will is **free.**

Do I have to register my will?

Registration is voluntary. However it will make it easier for your family to locate your will and any related instructions when needed. If your will is stored with a solicitor or professional trustee, they may register your will for you.

REGISTERING YOUR WILL

How do I register my will?

You can register your will over the Registry's secure Internet site www.bdm.nsw.gov.au by following the prompts to the Wills Register page. Alternatively you can complete an application form on the back of the Wills Register brochure and mail or fax this to the Wollongong Registry. If your details change e.g. location of your will, simply register your information with us again.

Will I receive confirmation that my will has been registered?

When you register your will, you will receive electronic or written confirmation with a registration number, depending whether you submitted your form via the Internet or by post. This registration number can be quoted at the time of the will search, but it is not necessary to have this number to activate a search.

What do I do is I change the details of my will?

When you make a change to your will that alters the information we have registered, or you make a new will, please register your will with us again.

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[117] Reproduced here is the text from a brochure issued by the NSW Registry of Births Deaths & Marriages and the NSW Attorney-General's Department.

You are not able to make changes to an existing registration. When the time comes to conduct a search, all registrations will be provided.

Who can find out about my will?

Privacy is very important to the Registry. **While you are living**, only you and your authorised representative can access your details from the Wills Register. **After your death**, any applicant can search for your will as long as the death can be established.

If I register the existence of my will, does this mean it is valid?

The NSW Registry does not see your will, so cannot comment on its validity and cannot provide you with legal advice. We recommend that you seek appropriate advice from a solicitor, the Public Trustee or another professional. Registration does not confer any validity upon the will itself.

SEARCHING FOR YOUR WILL

How will my family be able to search for my will details upon my death?

Your family will need to forward an application form to the Registry. At the time of the search the death must be established by providing the date of death (if died in NSW) or a copy of the death certificate (if they died elsewhere). In most cases, a solicitor or funeral director will arrange the search for your family.

What does it cost?

The usual fee for obtaining a standard Registry certificate will apply.

How do I know the information will be there when it is needed?

The NSW Registry of Births, Deaths & Marriages is obliged by legislation to maintain its registers forever with appropriate privacy safeguards.

Where should I keep my will?

The choice is up to you. If you have made your will with a solicitor of the Public Trustee or other trustee company, they will usually offer to store your will for you.

The Registry does not provide storage for wills, but you have many other options, including:

- Solicitors
- Safety deposit boxes at banks
- Specialist will storage companies
- As a deposited will a the NSW Supreme Court
- In the custody of a trusted friend or relative or any other place you feel would be safe and permanent, but still be accessible when the will is needed.

Extract from

Application to lodge will details with the NSW Registry of Births, Deaths & Marriages Wills Register

Details of testator (the person whose will it is)

Family name (Surname) of testator

Given names of testator

Full name at birth

Any other family names used

Date of birth

Sex

Place of birth (Town/State or City/Country)

Testator's address & postcode

Testator's postal address & postcode (*if different to above)*

Testator's telephone (business hours)

Name of person lodging will details *(if different to testator)*

Address & postcode

Relationship to testator

Parents of testator (*if known) it will help locate the will more easily*

Mother's maiden name

Mother's given name

Father's family name

Father's given names

Details of will

Date of will

Current location of will & postcode

Name of person(s) appointed executor of will *(the executor is the person(s) you appoint to carry out your wishes under the will)*

Relationship to testator

Executor's address & postcode

Executor 2 (*if more than one (1) executor is appointed)*

Relationship to testator

Executor's address & postcode

Signature of person lodging

6 Northern Territory will deposit legislation

***Wills Act 2000* (NT)**

Part 6 Deposit of wills with prescribed person

49 Prescribed person

(1) The Regulations may prescribe a person to be or more than one person each to be a person with whom a will may be deposited under this Part.

(2) In prescribing a person under subsection (1), the Regulations may:
   (a) prescribe a person by name;
   (b) prescribe a person by reference to the office, designation or position held or occupied by the person; or
   (c) prescribe a person as the person from time to time holding, acting in or performing the duties of a named office, designation or position.

(3) If, for whatever reason, there is no person prescribed under subsection (1), the Public Trustee is the person with whom a will may be deposited under this Part.

50 Will may be deposited with prescribed person

(1) A person may deposit a will with a prescribed person.

(2) A will is not to be deposited with a prescribed person unless it is in a sealed envelope that has written on it:
   (a) the testator's name and address (as they appear in the will);
   (b) the name and address (as they appear in the will) of each executor of the will;
   (c) the date of the will; and
   (d) the name of the person depositing the will.

(3) Subject to subsection (4), a will deposited with a prescribed person must be accompanied by the prescribed fee.

(4) A person depositing a will with a prescribed person must pay the prescribed fee unless:
   (a) the will is deposited with the prescribed person:
      i. under Part 3; or
      ii. because a lawyer has died or has ceased or is about to cease practising law in the Territory; or
   (b) the fee is waived by the prescribed person in accordance with the Regulations.

51 Delivery of will by prescribed person

(1) If a will has been deposited with a prescribed person under this Act, the testator may at any time apply in writing to the prescribed person to be given the will or to have the will given to another person authorised in writing by the testator to receive it.

(2) On receiving the application under subsection (1), the prescribed person must give the will to the testator or the person authorised by the testator unless the testator is a minor or a person who lacks testamentary capacity.
(3) If a will has been deposited with a prescribed person and the testator has died, an executor named in the will or a person who is entitled to apply for letters of administration with the will annexed may apply in writing to the prescribed person to be given the will.
(4) On receiving the application under subsection (3), the prescribed person must give the will to the executor or other person or to a legal practitioner or a trustee company within the meaning of the *Companies (Trustees and Personal Representatives) Act* authorised in writing by the executor or other person.
(5) A prescribed person must make and retain or cause to be made and retained an accurate copy of every will he or she gives to a person under this section.
(6) If there is any doubt as to whom a prescribed person should give a will, the prescribed person or any other person may apply to the Court for directions as to whom the will should be given.

52 Examination of will by prescribed person

A prescribed person may examine a will to enable him or her to comply with this Part.

53 Failure to retain will does not affect validity of will

If a prescribed person fails to retain a will as required by this Act, his or her failure to retain the will does not affect the validity of the will.

7 Queensland will deposit legislation

Public Trustee Act 1978 **(Qld)**

Part 5—Special functions of a public nature

63 Wills, deeds and documents may be deposited

(1) Any person may deposit any trust instrument in the Public Trust Office for safe custody.

(2) Any testator may deposit the testator's will in the Public Trust Office for safe custody, and, after the death of the testator, the public trustee shall deliver the will to such person as the testator may have directed in writing, or, in the absence of such direction, to such person as the public trustee thinks proper.

...

(4) The public trustee's liability in respect of any document or security deposited pursuant to this section shall, where a charge is made, be that of a bailee for reward, and, where no charge is made, be that of a gratuitous bailee.

8 Tasmanian will deposit legislation

***Succession Act 2008* (Tas)**

PART 3 - Wills made, altered, revoked or rectified under authorisation of Court or made under authorisation of Board

Division 1 - Wills by minors

20. Court may authorise wills by minors

(1) The Court may, on application by or on behalf of a minor, make an order authorising the minor to make or alter a will in specific terms approved by the Court, or to revoke the whole or any part of a will of the minor.

(2) An authorisation under this section may be granted on such conditions as the Court thinks fit.

(3) Before making an order under this section, the Court must be satisfied that –

(a) the minor understands the nature and effect of the proposed will, alteration or revocation and the extent of the property disposed of by it; and
(b) the proposed will, alteration or revocation accurately reflects the intentions of the minor; and
(c) it is reasonable in all the circumstances that the order should be made.

(4) A will or instrument making or altering, or revoking the whole or any part of, a will made pursuant to an order under this section –

(a) must be executed as required by law and one of the attesting witnesses must be the Registrar; and
(b) must be retained by the Registrar; and
(c) is not valid if it is made in breach of any condition subject to which an authorisation under this section is granted.

(5) A will made by a deceased minor according to the law relating to wills of minors of the place where the deceased was resident at the time of execution is a valid will of the deceased.

(6) The Court may make an order under this section even if the will was made before the commencement of this Act.

Division 2 - Power of Court to authorise making of statutory will, or alteration or revocation of a will for persons lacking testamentary capacity

28. Will or instrument to be forwarded to certain persons

On the execution of a statutory will, or an instrument altering or revoking a will, made pursuant to an order under this Division the Registrar must forward –

(a) the will to the executor named in the will or, if the executor is not the Public Trustee or a trustee company within the meaning of the *Trustee Companies Act 1953*, to a law practice nominated by the executor; and

(b) the instrument to the executor named in the will which the instrument is altering or revoking and any executor named in the instrument or, if the executor is not the Public Trustee or a trustee company within the meaning of the *Trustee Companies Act 1953*, to a law practice nominated by the executor; and

(c) a copy of the will or instrument to the proposed testator.

9 Victorian will deposit legislation

***Administration and Probate Act 1958* (Vic)**

Part I—General

Division 1A—Deposit of wills with registrar

5A Will may be deposited with registrar

(1) Any person may deposit a will in the office of the registrar.

(2) Any will deposited in the office of the registrar must be in a sealed envelope which has written on it—

(a) the testator's name and address (as they appear in the will); and

(b) the name and address (as they appear in the will) of any executor; and

(c) the date of the will; and

(d) the name of the person depositing the will-

and must be accompanied by the prescribed fee.

(3) No fee is payable in respect of any will deposited with the registrar if the deposit is made because a legal practitioner has died, or has ceased, or is about to cease, practising in Victoria.

5B Power to prescribe fees

(1) The Governor in Council may make regulations for or with respect to prescribing fees for the purposes of this Division.

(2) Regulations made under subsection (1)—

(a) may prescribe fees in respect of a particular class or classes of wills or will makers; and

(b) may prescribe different fees in respect of different classes of wills or will makers; and

(c) may authorise the registrar to waive fees in particular cases or classes of cases.

5C Delivery of wills by registrar

(1) Upon receiving an application in writing and the prescribed fees, the registrar may give any will deposited with the registrar—

(a) to the testator; or

(b) to a legal practitioner or trustee company nominated by the testator; or

(c) upon the death of the testator—

i. to any executor named in the will or any legal practitioner or trustee company nominated by an executor; or

ii. to any person entitled to apply for letters of administration with the will annexed or a legal practitioner nominated by that person.

(2) The registrar may examine any will to enable the registrar to comply with this Division.

(3) The registrar must ensure that an accurate copy of every will given to a person under subsection (1) is made and retained.

(4) If there is any doubt as to whom a will should be given, the registrar, or any other person, may apply to the Court for directions as to whom the registrar should give the will.

(5) The registrar may transfer any will that has been held by the registrar for more than 70 years to the Keeper of Public Records for preservation in accordance with section 7 of the *Public Records Act 1973* and the provisions of this section continue to apply to the will.

(6) For the purposes of subsection (5), wills held by the Registrar-General are deemed to have been held by the registrar.

10 Western Australian will deposit legislation

Wills Act 1970 (WA)

Part XI — Wills of persons who lack testamentary capacity

44. Deposit of wills made under this Part with Principal Registrar

(1) After a will or instrument has been signed by the Principal Registrar under section 40(4) —
  (a) it must be deposited in the office of the Principal Registrar; and
  (b) the fee prescribed under section 171(1)(c) of the Supreme Court Act 1935 must be paid by the person who made the relevant application under section 40.

(2) A will or instrument deposited in the office of the Principal Registrar under subsection (1) must be in a sealed envelope that has written on it —
  (a) the name and address of the person concerned, as they appear in the will or instrument;
  (b) the name and address of any executor as they appear in the will or instrument; and
  (c) the date of the will or instrument.

(3) If the Court has made an order authorising the revocation of a will deposited under subsection (1), the Principal Registrar must release the will to the person who made the relevant application under section 40.

(4) If the person concerned has acquired or regained testamentary capacity to the satisfaction of the Court, the Principal Registrar must release to that person a will deposited under subsection (1).

45. Court may allow access to will

(1) A person may, with the leave of the Court and in accordance with the terms of the leave, request the Principal Registrar to provide the person with a copy of a will deposited in the office of the Principal Registrar under section 44, and the Principal Registrar must comply with a request so made.

(2) The Court may, on the application of any person, grant leave to the person for the purposes of subsection (1) on such terms as it thinks fit, but only if —
  (a) the Court is satisfied that adequate steps have been taken to allow all persons with a legitimate interest in the application to be represented in the proceedings; and
  (b) it appears to the Court to be necessary or desirable for the proper carrying out of the provisions of the will that leave be granted.

***Public Trustee Act 1941* (WA)**

Part IV General

54 Deposit of wills and other documents

(1) Any testator may deposit his will in the Office of the Public Trustee for safe custody or for acceptance or rejection after death.

(2) Any person who has in his custody or control any testamentary paper of any insane patient, insane person, or represented person, may deposit the same in the Office of the Public Trustee upon oath, as he may direct, there to remain for safe custody.

(3) If the will is deposited for safe custody then, after the death of the testator, the Public Trustee shall deliver the same to such person as the testator may have directed in writing or, in the absence of such direction, to such person as the Public Trustee thinks entitled thereto.

11 Model will deposit laws

Extracts from

Uniform Succession Laws Project *Draft Wills Bill 1997*

Part 6 Deposit of wills with Registrar

49 Will may be deposited with Registrar

(1) Any person may deposit a will in the office of the Registrar.

(2) Any will deposited in the office of the Registrar under this Act must be in a sealed envelope that has written on it:

(a) the testator's name and address (as they appear in the will), and

(b) the name and address (as they appear in the will) of any executor, and

(c) the date of the will, and

(d) the name of the person depositing the will,

and must be accompanied by the fee prescribed by the regulations.

(3) A fee is not payable in respect of any will deposited with the Registrar if the deposit is made:

(a) in accordance with Part 3, or

(b) because a legal practitioner has died, or has ceased, or is about to cease, practising in [*insert name of jurisdiction*].

(4) The regulations may prescribe fees for the purposes of this section.

(5) Any regulations made under this section:

(a) may prescribe fees in respect of a particular class or classes of wills or will makers, and

(b) may prescribe different fees in respect of different classes of wills or will makers, and

(c) may authorise the Registrar to waive fees in particular cases or classes of cases.

50 Delivery of wills by Registrar

(1) If a will has been deposited with the Registrar under this Act, the testator may at any time apply in writing to the Registrar to be given the will or to have the will given to a person as directed by the testator.

(2) On receiving the application, the Registrar must give the will to the testator or to any person nominated by the testator, but only if the testator is, at the time of making the application, not a minor and not a person who lacks testamentary capacity.

(3) If a will has been deposited with the Registrar under this Act and the testator has died, any executor named in the will or any person entitled to apply for letters of administration with the will annexed may apply in writing to the Registrar to be given the will.

(4) On receiving the application, the Registrar must give the will to the executor or other person or to any legal practitioner or trustee company nominated by that executor or person.

(5) The Registrar may examine any will to enable the Registrar to comply with this Part.
(6) The Registrar must ensure that an accurate copy of every will given to a person under this section is made and retained by the Registrar.
(7) If there is any doubt as to whom a will should be given, the Registrar, or any other person, may apply to the Court for directions as to whom the Registrar should give the will.

51 Retention of wills

Any failure by the Registrar to retain a will as required by this Act does not affect the validity of the will.

12 United Kingdom will deposit legislation

Senior Courts Act 1981 **(UK)**

Part V

PROBATE CAUSES AND MATTERS

Provisions as to documents

124. All original wills and other documents which are under the control of the High Court in the Principal Registry or in any district probate registry shall be deposited and preserved in such places as the Lord Chancellor may direct; and any wills or other documents so deposited shall, subject to the control of the High Court and to probate rules, be open to inspection.

125. An office copy, or a sealed and certified copy, of any will or part of a will open to inspection under section 124 or of any grant may, on payment of the prescribed fee, be obtained-

(a) from the registry in which in accordance with section 124 the will or documents relating to the grant are preserved ; or

(b) where in accordance with that section the will or such documents are preserved in some place other than a registry, from the Principal Registry ; or

(c) subject to the approval of the Senior Registrar of the Family Division, from the Principal Registry in any case where the will was proved in or the grant was issued from a district probate registry.

126.-(1) There shall be provided, under the control and direction of the High Court, safe and convenient depositories for the custody of the wills of living persons; and any person may deposit his will in such a depository on payment of the prescribed fee and subject to such conditions as may be prescribed by regulations made by the President of the Family Division with the concurrence of the Lord Chancellor.

(2) Any regulations made under this section shall be made by statutory instrument which shall be laid before Parliament after being made; and the Statutory Instruments Act 1946 shall apply to a statutory instrument containing regulations under this section in like manner as if they had been made by a Minister of the Crown.

13 British Columbia will register legislation

Extracts from

- *Wills, Estates and Succession Act* [SBC 2009] c. 13
- *Wills, Estates and Succession Regulation*
- *Courts Rules Act* [RSBC 1996] c 80

WILLS, ESTATES AND SUCCESSION ACT [SBC 2009] c. 13

PART 1—DEFINITIONS AND INTERPRETATION

Definitions and interpretation

1 (1) In this Act:

…[*text omitted]*

"**chief executive officer**" means the chief executive officer under the Vital Statistics Act;

…[*text omitted*]

"will" means

(a) a will,

(b) a testament,

(c) a codicil,

(d) an appointment by will or by writing in the nature of a will in exercise of a power,

(e) anything ordered to be effective as a will under section 58 [court order curing deficiencies], or

(f) any other testamentary disposition except the following:

(i) a designation under Part 5 [Benefit Plans];

(ii) a designation of a beneficiary under Part 3 [Life Insurance] or Part 4 [Accident and Sickness Insurance] of the Insurance Act;

(iii) a testamentary disposition governed specifically by another enactment or law of British Columbia or of another jurisdiction in or outside Canada;

…*[text omitted*]

Part 4—WILLS

Division 7 — Registration of Notice of Will

Filing of notice of will

73 If a person makes a will, a notice of will may be filed with the chief executive officer in a form satisfactory to the chief executive officer.

Filing of notice of revocation

74 If a will is revoked, whether or not a notice was filed under section 73, a notice of revocation in a form satisfactory to the chief executive officer may be filed with the chief executive officer.

Filing notice of change of place of will

75 If a notice has been filed under section 73 and the will is no longer located at the place mentioned in the notice, notice of the change in a form satisfactory to the chief executive officer may be filed with the chief executive officer.

Chief executive officer's records

76 The chief executive officer must maintain, in a system that the chief executive officer believes facilitates access to information by those who require it, a record of every notice filed under this Division.

Search of records

77 (1) A lawyer or a member of the Society of Notaries Public of British Columbia may, on application in a form satisfactory to the chief executive officer, ascertain from the chief executive officer whether or not a notice has been filed under this Division.

(2) A person other than a lawyer or a member of the Society of Notaries Public of British Columbia may, on written application accompanied either by a certificate of the death of the person named in the application or by a statutory declaration proving to the satisfaction of the chief executive officer that the person named in the application has died, ascertain from the chief executive officer if the person named in the application has filed a notice under this Division.

(3) The chief executive officer must

(a) issue to an applicant under subsection (1) or (2)

(i) the search results for the person named in the application, and

(ii) a certificate showing the contents of the last notice that is relevant to the application, and

(b) permit the applicant, or the agent of the applicant, to inspect the notices.

(4) The chief executive officer may provide a lawyer or member of the Society of Notaries Public of British Columbia who is an applicant under subsection (1) with

(a) a copy of a notice filed under this Division, or

(b) access by computer or otherwise to information contained in a notice filed under this Division.

(5) Except as provided in this section, the chief executive officer must not provide to any person information regarding notices filed under this Division or information about whether or not a notice has been filed.

Validity of will or revocation not affected

78 The validity of a will and the validity of a revocation of a will are not affected by filing or not filing a notice under this Division.

Wills, Estates and Succession Act

WILLS, ESTATES AND SUCCESSION REGULATION

Part 2 — Wills Notices

Filing wills search certificate in court registry

6 Where a certificate referred to in section 77(3) *[search of records]* of the Act is required or used in support of an application for a representation grant, the certificate must be filed in the court registry in which the application for the representation grant is made.

Court registrar's duties in respect of wills search and certificates

7(1) The district registrar at the court registry in which the application referred to in section 6 is made must keep the certificate of search on file in the court registry.

(2) If the certificate of search refers to a wills notice in respect of a will or codicil bearing the same date as the will or codicil in respect of which a representation grant is issued, the district registrar must

(a) mark on a photocopy of the certificate of search the place and date of issuance of the letters of administration with the will annexed or letters probate, the wills notice number referred to on the certificate of search, the court registry filing number and the date of the will or codicil that is the subject of the representation grant, and

(b) mail the photocopy to the chief executive officer.

Index of wills notices

8(1) The chief executor officer must maintain an 'active' index of wills notices, listing all notices filed under sections 73 *[filing of notice of will],* 74 *[filing of notice of revocation]* and 75 *[filing notice of change of place of will]* of the Act, relating to wills of will-makers in respect of whom the chief executive officer has not been notified of the issuance of a grant of letters of administration with the will annexed or letters probate.

(2) The chief executive officer must maintain an 'inactive' index of wills notices, listing all notices filed under sections 73 to 75 of the Act, relating to wills of will-makers in respect of whom the chief executor officer has been notified of the issuance of a grant of letters probate or letters of administration with the will annexed.

Transfers to 'inactive' index

9 On receipt of a photocopy of a certificate of search marked as required by section 7, the chief executor officer must transfer to the 'inactive' index information relating to all wills notices which are clearly identifiable as pertaining to the will-maker on whose behalf the representation grant has been issued, after which the chief executive officer may destroy the photocopy.

Wills searches

10 A search under section 77 (1) or (2) of the Act must be limited to a search of the 'active' index referred to in section 8 (1) unless the application for search specifically requests that the search be made in the 'inactive' index.

Certificates

11 A certificate under section 77 (3) of the Act may be accompanied by an abstract of information from each wills notice or by copies of the wills notices, or by a combination of abstracts and copies.

Fees

12(1) The fees under Division 7 *[Registration of Notice of Will]* of Part 4 *[Wills]* of the Act are the following:

(a) under section 73 or 74 of the Act, $17 for each notice filed;

(b) under section 75 of the Act,

(i) $17 for each notice filed, or

(ii) $1 700 for 100 or more notices that are filed by a person at one time, whichever is less;

(c) under section 77 of the Act,

(i) $20 for each search request submitted,

(ii) an additional $33 for each search request submitted when same day service is requested and provided, and

(iii) an additional $5 for each alias name recorded on the search request form.

(3) For fees in subsection (1), except in paragraphs (b) (ii) and (c) (ii) and (iii), a further operator fee of $1.50, plus any tax imposed under Part IX of the *Excise Tax Act* (Canada) on the operator fee, may be charged for any transaction done by electronic means from a location outside a government office or at a government office by a person who is not a government employee.

COURT RULES ACT [RSBC 1996] c 80

SUPREME COURT CIVIL RULES

Rule 25-3 — Application for Estate Grant

How to Apply

Documents to be filed in an application

(2) A person wishing to apply for an estate grant must, after delivering in accordance with Rule 25-2 the documents that were required to be delivered under that rule, file the following documents:

… *(text omitted)*

(d) two copies of a certificate from the chief executive officer under the Vital Statistics Act indicating the results of a search for a wills notice filed by or on behalf of the deceased;

… *(text omitted)*

Form of affidavit for application for grant of probate or grant of administration with will annexed

(6) The affidavit required of an applicant under subrule (2) (b) in relation to an application for a grant of probate or a grant of administration with will annexed may be in Form P3 if

…(*text omitted*)

(e) a certificate has been obtained from the chief executive officer under the Vital Statistics Act indicating the results of a search for a wills notice filed by or on behalf of the deceased, and the certificate indicates that no wills notice has been filed by or on behalf of the deceased

(i) in relation to a testamentary document that is dated later than the date of the will, or

(ii) at all.