

SAMPLE AGREEMENT
AND EXPLANATORY NOTES

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SAMPLE WILL FOR INDIGENOUS ARTISTS

WILL FOR INDIGENOUS ARTISTS

When to use this Will

This sample **Will for Indigenous Artists** has been written to encourage Indigenous artists to think about what happens to their Artworks, property and Copyright when they pass away, and to provide guidance for those who decide to do something about it.

This **sample Will** includes instructions and a sample Will for you to complete. Before you complete the Will you should read the instructions below which explain each part of the Will.

If you do not want certain clauses included in your Will, please delete them. If you do not have access to a computer you can rule out the clause with a ruler and pen. If you delete or rule out a clause, you and both witnesses must write your initials in the margin. **You should not make any amendments after the Will has been executed (signed by you and your witnesses), because this may make your Will invalid.**

How to use this Will

Remember, this Will is a sample only. You will need to change or add to the document according to your specific circumstances.

At times you will need to choose from an alternative that is appropriate for the agreement you want to make. Alternatives are written in the sample agreement like this:

TRUSTEE / EXECUTOR

At other times you will need to insert information such as names, dates or descriptions that are specific to the arrangement you are making. Where this is necessary you will be prompted by an expression in square brackets like this:

[NAME]

Step 1

Read the accompanying explanatory notes.

Step 2

Make sure that the Will is appropriate for your purposes. If you are unsure, you can contact Arts Law.

Step 3

Draft your Will. You will need to create a new document. Remember to remove the ***** symbols, choose between alternatives if needed, delete the alternatives that you do not wish to use, and insert information when required.

Step 4

Get the draft Will reviewed. If you subscribe to Arts Law we may be able to arrange to have your agreement reviewed. This is a good idea if you are unsure if your draft agreement meets your requirements.

Need more help?

If you have questions about a sample Will or want your Will reviewed contact Arts Law.

Telephone: (02) 9356 2566 or tollfree outside Sydney 1800 221 457

Also visit the Arts Law website for articles and information sheets

www.artslaw.com.au

Help us to help you

Arts Law exists to assist low-income creators and organisations like you with legal matters. We provide sample agreements like this so that you can protect and promote your creativity.

Except as permitted by the *Copyright Act 1968* (Cth), you need permission from Arts Law if you want to copy, reproduce, distribute or communicate this sample agreement to any other person.

If you do this without permission you may be infringing our copyright. You Will also be making it harder for Arts Law to help you and other creators to protect your interests.



**Arts Law acknowledges the support of the Commonwealth Government through the
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EXPLANATORY NOTES

Using the Explanatory Notes

The Explanatory Notes are intended to provide more detailed explanations of certain clauses in this **sample Will for Indigenous Artists**, or to give more detail about the law involved.

The Explanatory Notes **DO NOT** form part of the Will and should not be included in your final redrafted Will.

It may be useful to separate the Explanatory Notes from the actual Will when you are redrafting it to suit your particular situations.

The Explanatory Notes are not intended as legal advice and should be considered information only. You can contact Arts Law for legal advice.

EXPLANATION OF THE CLAUSES IN THE WILL

Cancelling earlier Wills (clause 1)

The revocation clause cancels all previous Wills.

Definitions (clause 2)

Definitions assist people (such as lawyers) to understand what the clauses of your Will mean. We have included very broad definitions of your "Intellectual Property", and "Art work" .This means all of your paintings, sculptures, drawings, engravings, photographs, buildings, models of any buildings, and craftwork (e.g. weavings and carvings) must be given to the people you choose in your Will after you pass away.

We have also included a clause which enables you to include gifts to your husband/wife of a 'Tribal Marriage' or customary law. If this is not relevant to you, please delete this clause.

Appointment of Trustee(s) / Executor(s) (clause 3)

The Executors are the person(s) who have the responsibility and the authority to manage, gather and give away your assets. You decide in your Will how this is to happen and who the executors will be.

You should make sure that your executors are willing to be executors, and that they are told where to find your original Will.

It is important that your executors are trusted family members.

Trustees Powers (clause 4)

This Will also sets up a "testamentary" trust. This means that no separate trust deed is required.

The trust shall come into existence upon your death. The advantages of establishing the trust are that it provides an alternative to making an outright gift.

This means the Trustee can respond to the changing needs and circumstances of your beneficiaries.

The penalty rates of tax which normally apply to income received by people under the age of 18 do not apply to "expected trust income." Therefore this clause reduces the amount of tax paid on your gifts.

Clause 4 provides a broad range of specific administrative powers for the executors and trustees. This is required because certain revenue authorities, beneficiaries, lenders and other people dealing with the trust may request to see specific authorisation of particular aspects of estate or trust administration.

This clause also gives power to your executor to use your capital as they see fit for the benefit of your beneficiaries under the age of 18, or their dependants. There is also a provision which allows your executor to make payments to a guardian or a person who your children under the age of 18 live with.

Specific Gifts (clause 5)

These clauses allow you to give specific gifts to people of your choice. If you do not want to leave any specific gifts the clauses "5 - 5.3" can be deleted or ruled out.

The people you leave things to in your Will are legally known as your beneficiaries because they benefit from your Will.

Assignment of copyright (clause 6)

This clause enables you to give your copyright in your Artwork to anyone you choose. If you want them to have the copyright permanently you need to select the word "absolutely" in this clause.

If you would like to donate the Copyright in you Art work to a Charity, Museum or Art Centre, insert their name instead of a person's name.

Balance of Copyright (clause 7)

This clause allows you to give the rest of any "Copyright" and/or "Intellectual property" which you own, in any other paintings, sculptures, drawings, engravings, photographs, buildings, models of my buildings, and works of craftsmanship to anyone you choose.

This means that all left over Copyright which you have created is given to people you have chosen (for example, if someone you have chosen has died or in case you do not fill out a clause properly).

Distribution of Balance of my Estate (clause 8)

This clause only needs to be used if you have no surviving descendants (children or grandchildren), or no descendents who live more than 30 days after your death. This clause divides your estate into equal parts and it gives you the option of testamentary trusts for your children and grandchildren.

The reason why your beneficiary needs to live more than 30 days after your death is that if your beneficiary and you are both involved in a common accident it reduces the costs and taxes of administering the estate twice, and also ensures that your property is distributed the way you want it to be, instead of by the law of succession.

Clause 8.1 is used to prevent a gift from failing. A gift might fail if the family member or friend you wanted to leave the gift to dies before you.

Clause 8.2 provides that if the person in clause 8.1 has also died before you, then the gift must go to another person you choose (for example, a child).

As a further back-up clause 8.3 provides that if the person in clause 8.2 has also died before you and all of the persons in clause 8, then the gift must be divided amongst their children in equal shares. If they have no children then your property must be divided between all the living people named in your Will.

Guardian of your Children (clause 9)

If you have children under the age of 18 you can decide here who you would like their Guardian and alternative Guardian to be when you die.

Please ensure that you have obtained the guardian's permission before you write down their name as a guardian in your Will.

In the event of your death the court may have to approve your proposed guardian, even if named in your Will (unless he/she is the surviving parent in the same household.)

The reason for naming a guardian for your children in your Will is to guide the court. Your wishes as expressed in your Will should carry considerable weight in any decision that the court makes.

Body (clause 10)

You can say whether you would like to be buried or cremated and where you want this to take place. This must be taken into consideration by your Trustee when arranging your funeral.

INSTRUCTIONS FOR SIGNING AND STORING YOUR WILL

To be sure your Will is valid, it is very important that you read these instructions carefully from beginning to end and then follow them exactly. If you do not understand you can call Arts Law for advice.

WITNESSES

- You must have two (2) people who witness you signing your Will
- The witnesses must be older than 18 years of age.
- A witness must not be a beneficiary/person who you have given anything to in your Will.
- A witness must not be the husband or wife of a beneficiary, or engaged to marry a beneficiary.
- The witnesses should have good eyesight. Blind people cannot witness your signature.
- The witnesses must sign themselves and print their names and addresses under their signatures. This is important in case they are required to give evidence about the signing of the Will after your death.

SIGNING THE WILL

- Read your Will through very carefully to ensure that every page is there and that the Will is correct in every detail.
- The pen may be either biro or ink. It should be a black pen. Do not use any type of pen

which can be erased. Please **ensure that you and all your witnesses use the same pen.**

- You and your witnesses must all be present when everyone signs their name and everyone present must watch you sign your name.
- You do not have to tell your witnesses the contents of the Will.
- Be absolutely sure that you sign your own Will and that each page is a page of your own Will and not a Will that belongs to another person.
- Fill in the date in the space provided on the final page.
- Using your normal signature, sign your Will at the foot of each page and at the end of the Will.
- The first witness must then sign at the bottom of each page. The first witness also needs to sign just below the last clause at the end of your Will. The witness needs to add their full name, occupation and address.
- Then the second witness must also sign the bottom of each page and sign next to the signature of the first witness in the space provided and add their full name, occupation and address.

COPYING THE WILL

- Take a photocopy of your Will once it has been signed by everyone, and keep a copy with your personal papers.
- Once your Will has been stapled, **never** remove a staple to copy the Will.

STORING THE WILL

- A lawyer may store your original Will in a safe custody box. Alternatively, it can be kept in a safe deposit box in a bank, or in a very safe place at home.

HOW CAN I INCREASE THE CHANCES OF MY WILL BEING FOUND?

- You should give your executors(s) a letter telling them of the date of your Will, the person who drafted your Will and the place where you have stored your Will. Tell your executor to keep this letter with their personal papers, or in a safe place.
- Wills can also be registered with the Public Trustee in your State or Territory.
- You can also register your Will online to assist executors in locating your Will. The New South Wales Registry of Births Deaths and Marriages has launched a Wills register which operates free of charge. The register is open to the general public to record the date of a Will, its location, the nominated executors and sufficient personal details to enable the Will record to be found after death. The registry won't store Wills or include any details of beneficiaries and bequests. Information is confidential to the Will maker or their authorised representative until their death. Registration can be done online at <http://www.bdm.nsw.gov.au> or by completing a form available from the Sydney Registry.
- For persons residing outside of NSW, there is a national confidential register where you can register your Will online for a small fee. This can be done through the Australian Will Registry at <http://www.aWillr.com.au/Services/Store/intro.php>.

GENERAL FURTHER INFORMATION

What about my Life Insurance, Compensation, Superannuation and Other Proceeds?

- The proceeds of a life insurance policy, superannuation lump sum benefits and compensation are generally deemed **non estate assets** and do not form part of the estate in your Will.
- As superannuation benefits are not deemed to be estate assets please ensure that you have not given any binding nominations to the trustee of that fund which is inconsistent with the clauses of your Will(s).

Can I leave a child out of my Will?

- You must be very careful if considering this. Your dependants, such as a husband/wife/de facto or children can challenge your Will in court if you do not make 'adequate provision' for them in your Will.

Divorce

- If you are divorced, please ensure that this was a legal divorce in which a formal property settlement was made and approved by the Family Court of Australia.
- If the family court has not approved your divorce or you have dependant people who you haven't included in your Will, they may be entitled to a claim against your estate pursuant to a family provision claim.

Can I gift my house in my Will?

- You should check the Certificate of Title to ascertain whose names are on the title of your house and land, and whether the house is registered in more than one name. (If the bank has the Certificate of Title your lawyer may be able to do a search online for you.)
- If your house is owned with another person, such as your husband/wife, there are two ways you can legally own it:
 - As 'joint tenants' which is the most common way of owning property with another person; or
 - As 'tenants in common'. This means that you each own a certain percentage of the property (usually 50%) and you can deal with your percentage however you want to.
- If you own your house as a joint tenant, then when you die, the house automatically passes to the other joint tenant, regardless of what your Will says, or whether you have a Will or not. However, if you own your house as tenants in common, you can leave your percentage of the house to a person elected in your Will.

When should I make a new Will?

It is a good idea to make a new Will every five years. You should also make a new Will when you experience any major changes in your personal circumstances. For example:

- When you get married. Marriage usually cancels a Will, unless it is stated to be in contemplation of marriage.

- When you get divorced. A divorce may cancel some provisions in your Will, but not all of it. If you divorce and no longer wish to leave your property to your previous husband / wife you must change your Will.
- When you have additional children.
- When you acquire, dispose or change the nature of your property.
- When you or a beneficiary (person benefiting from your Will) experiences a change in financial circumstances.
- If a beneficiary of the Will dies.
- If an executor dies, loses mental capacity, or moves interstate.
- If there is a relevant change in the laws.
- If you change your mind about any of the provisions contained in your Will.

When would a Will be invalid?

A Will may be found to be invalid for the following reasons:

- It was not the last Will made.
- The Will has been cancelled.
- The person who made the Will got married after making the Will.
- The person who made the Will did not make the Will freely and voluntarily and had been tricked or pressured into making the Will.
- The exact gift, and / or the identity of intended beneficiaries can not be readily determined.
- The Will was made by an unmarried person under the age of 18 years (a minor).
- The person who made the Will did not have the required mental capacity to make a Will.
- The Will has been altered without following the formal requirements of the relevant legislation (see above).
- The Will was not properly signed and witnessed. The signing and witnessing of a Will must comply with strict formal requirements of the relevant legislation (see above).
- The Will does not validly appoint an executor that is able to act. If this happens the Supreme Court has the power to administer Letters of Administration and the estate Will be distributed by an administrator.

SAMPLE WILL FOR INDIGENOUS ARTISTS

This is the last Will and testament of me ***[name of Will maker]*** of ***[address of Will maker]***, ***[occupation of Will maker]***, (the Testator).

1. Revocation of earlier Wills

1.1. I REVOKE all of my former Wills and testamentary dispositions.

2. Definitions and interpretation

2.1. I DECLARE that in the interpretation of this Will:

2.1.1. **Trustee** means my executor, executors and any trustee and trustees of my estate at any time.

2.1.2. **A gift** to two or more persons is a gift in equal shares.

2.1.3. **Artwork** means any artworks produced by me. These include but are not limited to my: paintings, sculptures, drawings, engravings, photographs, buildings, or models of my buildings, works of artistic craftsmanship.

2.1.4. If a work has more than one author, this does not mean I cannot assign or give away my own copyright in that work.

2.1.5. **Intellectual Property** means all copyright, trade marks and designs (whether registered or not) and all other intellectual property.

2.1.6. **Wife or husband** means spouse in accordance with the relevant Marriage provisions of the State. It also includes a spouse of a 'Tribal Marriage' or customary law if I state this in my Will. If my Will is unclear, my Trustee will determine my wife or husband.

2.1.7. **Will maker** means Testator.

3. Appointment of ***Trustee / Executor***

3.1. I APPOINT my ***[relationship of Trustee to Will maker, ie my wife/husband]***, ***[name of Trustee / executor to be appointed]*** of ***[address of Trustee/ executor]*** as my Trustee of this Will. If ***[name of Trustee]*** should die before me or dies 30 days after me I appoint my ***[relationship of Trustee to Will maker]***, ***[name of Trustee to be appointed]***, of ***[address of Trustee]*** as my Trustee.

4. Trustee powers

4.1. I DECLARE that my Trustee shall have the following powers:

- 4.1.1. Power to exercise in respect of all my property all statutory and other powers that would be exercisable as if my estate were held by my Trustee upon trust for sale.
- 4.1.2. Power for my Trustee in my Trustee's absolute discretion to apply the whole or any part of the income and of the capital to which any beneficiary is entitled or contingently entitled for the maintenance, education, benefit or support of any such beneficiary without being responsible to see to its application.
- 4.1.3. Power to apply for the maintenance, education, advancement or benefit the whole or any part of the capital and income of that part of my estate to which a minor Beneficiary is entitled or may in the future be entitled and for that purpose to:
 - (a) Make a payment or payments to a minor Beneficiary's parent or Guardian or a person with whom the minor Beneficiary resides.
 - (b) Accept the receipt of that payee as an absolute discharge.
- 4.1.4. Power for my Trustee in addition to any investment authorised by law to invest or reinvest the Balance of my Estate in any of the following forms for the purpose of receiving income, interest, profit or capital gain with liberty to vary and transpose the same from time to time, namely:
 - (a) Shares, stock units, debentures, debenture stock, notes including convertible notes or other securities of a company listed on any stock exchange.
 - (b) Land of any tenure including leasehold and land held by company title.
 - (c) Mortgages including contributory mortgages.
 - (d) Units or interests of or in a trust including a fixed or flexible trust.
 - (e) Friendly society investments.
 - (f) Insurance bonds.
 - (g) Bank accepted or endorsed bills of exchange.

(h) Deposits in the authorised short term money market.

(i) Deposits with any public company, banking company, financial institution, public company, credit union or building society at such interest for such period and upon such terms as my Trustee may think fit.

5. Specific gifts [delete / amend or add additional clauses as required]

5.1. I GIVE my ***[relationship]*, *[name]* of *[address]*** ***[all my jewellery/artwork etc/OR specify particular gift, painting(s) etc]***.

5.2. I GIVE my ***[relationship]*, *[name]* of *[address]*** ***[all my jewellery/artwork etc/OR specify particular gift, painting(s) etc]***.

5.3. I GIVE my ***[relationship i.e. child(ren)]* *[name(s)] of [address(es)]*** ***[my personal effects and jewellery]*** equally as to value.

6. Gifts of Intellectual Property

6.1. I GIVE my Intellectual Property rights ***[absolutely/for a particular time/particular place]*** (including any future copyright) in ***[specify particular artwork painting]*** or ***[all of my Artwork]*** to ***[relationship]*, *[name]* *[address]***.

6.2. I GIVE my Intellectual Property rights ***[absolutely/for a particular time/particular place]*** (including any future copyright) in ***[specify particular artwork painting]*** or ***[all of my Artwork]*** to ***[relationship]*, *[name]* *[address]***.

7. Distribution of balance of Intellectual Property

7.1. I GIVE all my other Intellectual Property rights permanently and absolutely to ***[relationship]*, *[name]* *[address]***.

8. Distribution of the Balance of my Estate

8.1. Subject to the earlier clauses of this Will, I give everything else I own **(the Balance of my Estate)** to ***[relationship]*, *[name(s)]* of *[address(es)]*** for their use absolutely as tenants in common in equal shares.

8.2. If that ***[relationship to Will maker, i.e. any of my children]* *[name(s)]*** dies before me or dies less than 30 full days after me then I GIVE the Balance of my Estate UPON TRUST for my surviving ***[relationship, i.e. my grandchildren]*, *[named]*,**

as until they attain the age of [twenty one/eighteen] years as tenants in common in equal shares.

8.3. If any of [my children] do not survive me by thirty full days or fails to attain a vested interest in my estate and reach ***[twenty one/eighteen]*** years, I give their share under this Will to my Trustee upon trust:

8.3.1. If they have any surviving children, then what their respective parents should have taken if living at my death as tenants in common in equal shares.

8.3.2. If they have no children then their share to my surviving children at my death as tenants in common in equal shares.

7. The interest of a beneficiary under the age of ***[twenty one/eighteen]*** years will be held by my Trustee on trust until that beneficiary reaches ***[twenty one/eighteen]*** years and then be given to that beneficiary absolutely.

9. Guardian & custodian [delete if not applicable]

9.1. I APPOINT my ***[relationship]***, ***[name]*** of ***[address]*** to be the Guardian of my children if they are minors at the date of my death, ***[and in the event of the death of their [mother / father] [name]***.

9.2. If ***[name of Guardian]*** should die before me, or is unwilling or unable to act as a Guardian of my children I appoint my ***[relationship]***, ***[name]***, of ***[current address of Guardian]*** as their Guardian.

10. Body [delete if not applicable]

10.1. I DIRECT that my body be ***cremated/buried*** at ***[location]***. [You can insert any other requirements you might want here, including customary / traditional practices].

11. Testimonium

Signed by the Will maker on ***[insert date]***

Signed by the Testator in the presence
of both of us being present at the same
time and attested by us in the presence
of the Testator and each other

.....
[Signature of Will maker]

.....
Witness (sign.)

.....
Witness (sign.)

.....
Print name

.....
Print name

.....
Address

.....
Address

.....
Occupation

.....
Occupation