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LEGAL SERVICES

A Court made Will, Pt 2: Sophie's Story

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(Her real name isn't Sophie, but I'll call her that to protect her identity.)

Sophie was born in 1916 and made her Last Will in 1955 when she was 39 years of age. She's now 96 years of age and her situation and that of the beneficiaries under the 1955 Will are very different to that which existed 57 years ago.

Unfortunately, Sophie suffers from severe dementia. Her affairs are handled by a financial manager and she doesn't have the capacity to make a new Will. It is on that basis that her financial manager asked the Supreme Court to make a new Will for Sophie.

After carefully considering her background including her continuing relationships and testamentary wished and her assets, as well as the changes in Sophie's circumstances since 1955, the Court made a Will appointing different beneficiaries.

All this occurred on 8 October 2012, and is an example of one of the useful changes that occurred with the new Wills legislation that commenced in 2008.

Obligations of fiduciaries to act gratuitously

The law places exact obligations on a person who performs tasks for another. The person appointed to perform the task, is called a fiduciary. Common examples of fiduciaries are trustees, executors, attorneys and financial managers. Persons who hold these positions must generally act gratuitously, that is, without payment. They must perform that obligation personally and not be reimbursed for expenses.

Now these obligations can be onerous, so there are some exceptions. For instance, a fiduciary can be paid for his or her efforts if the court allows it or the person appointing the fiduciary allowed it or all persons affected by the payment have capacity, no conflict of interest, are fully informed and agree. Also a fiduciary can be reimbursed expenses if they are reasonably incurred. All of this means that care is needed when choosing a fiduciary or agreeing to act in that capacity.

What's in a Will Pt II

In February 2013, the Supreme Court spent about a day deciding what was meant by a

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clause in a Will which said "I give and bequeath to my daughter my property at .... Newport". If you ever needed convincing that only someone who knows about the law of succession should draw a will, then this is it. You see, to a succession lawyer the word "bequeath" is used to describe the giving of a personal item. The word used to describe the giving of real estate is "devise".

As a result one of the beneficiaries of the Will argued that the clause which purported to bequeath the real estate in Newport meant something other than the giving of real estate.

Now the argument didn't succeed. The Supreme Court judge decided that in the context of the Will, "bequeath" meant simply "transfer" and did not have its technical meaning. But the fact that the Court took a pragmatic approach to the interpretation of the Will clause had not stopped the beneficiaries who had the competing arguments about the Will engaging senior counsel, junior counsel, a solicitor each, and spending tens and tens of thousands of dollars disputing the meaning of the clause.

The importance of CARE, Care and more care.

If you've ever questioned the reason why solicitors are usually very careful taking instructions for a Will, then a recent Supreme Court decision gives the answer.
The first Will was prepared at the initiative of neighbours and other contacts of the intended Will maker. The instructions were obtained from the Will maker in five minutes.

Naturally, instructions were not obtained about the Will maker's assets, family and likely claimants on her estate. The Will was not signed in the presence of the solicitor. Four days later the solicitor realised that the signed Will contained a mistake. He prepared another Will which he gave to the neighbours to arrange to sign.

Supreme Court of New South Wales

More than seven years after her death and after four days of hearings in the Supreme Court, the Court found that those Wills were ineffective because of lack of testamentary capacity, undue influence and lack of knowledge and approval. It is to avoid these outcomes that great care is taken in preparing Wills.

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