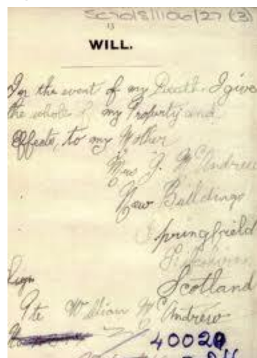
# A Stitch in Time…

Eric von Skala died on 1 August 2009. His last Will, made almost 3 years before on 15 August 2006 stated, in part: “"*If at the date of my death I have my safe deposit box 2769 at the Commonwealth Bank Martin Place I direct my Trustee to distribute my personal belongings and monies as per letters of direction kept within my safe deposit box.*"

Mr von Skala had the safe deposit box at his death. It included an envelope containing 18 notes. The notes were undated, but written and signed by the deceased. One note was not relevant but the other 17 were thought to be important. They were variously addressed "*To the solicitor*", or "*To Alan*", the name of one of his executors, or to "*The solicitor and Alan*", or "*To Allan Dennison*". Thirteen of the notes stated "*Please give*" or "*Give*", and then there was an identified recipient of a gift for a sum of money or of a sum of money and a specific asset.


WILL.

In the event of my Death I give the whole of my Property and Effects to my Mother

The Supreme Court, after a contested hearing, found that all the handwritten notes were in existence at the date the Will was made. The Court concluded that the notes purported to embody the deceased’s testamentary intentions. It ordered that the 17 notes formed part of Mr von Skala’s Will, together with the Will dated 15 August 2006.

The rub is that, because the Supreme Court proceedings arose out of the wording of the Will, all the costs of the contested hearing in the Supreme Court were ordered to be paid from the deceased’ s estate.

## The “daft” test

When the deceased signed his Will, the person who had prepared the Will at the Public Trustee was asked: “Are these pieces of paper in the safe deposit box legally binding?”. In substance, the answer given was “yes”. This is strictly correct, as the decision of the Supreme Court shows.

However, the deceased’s decision to make a Will with reference to letters of direction cost his estate, and that means his beneficiaries, many tens of thousands of dollars. So, in my opinion, the correct answer would have been: “Possibly, but you’d be daft to do it that way. Just think about the cost of making a new Will, if you want to change a gift, and compare it to the cost to your estate of doing it the way you propose”.

Proper estate planning and will drafting is like a stitch in time. It saves!

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## A court made will for a person without capacity

The 2008 wills legislation gave power to the Supreme Court to make a will for a person who didn't have the capacity to make one. This is particularly useful in three circumstances:

- firstly, where a person never had capacity to make a will. Usually that is because of an injury suffered before birth, at birth or shortly after birth,
- secondly, where a person had, but never used, the capacity to make a will. Usually this applies where a person suffers a brain injury as a young adult, and
- thirdly, where a person has had capacity, has used it to make a will, has lost capacity but there have been changes in the person's circumstances which mean that the will is no longer appropriate.

## Charles' story

At a young age Charles suffered brain damage consistent with shaken baby syndrome. This meant that he never had capacity to make a will.

Criminal action was never taken after Charles' parents, but they were removed as guardians for Charles and ordered to pay compensation to his financial manager.
If Charles died before his parents, which, because of his condition, seemed likely, his parents would receive Charles' estate, ie the compensation money they had paid by reason of the laws of intestacy.

The Court made a will for Charles whereby he gave his estate to his siblings.

## How to make life difficult without even trying # 239461

Members of families often make informal arrangements. These are arrangements which are neither reduced to writing nor the subject of legal advice. Mostly that occurs because these arrangements are not thought to create enforceable legal obligations.

But what happens when the arrangement is not honored, or it does not produce the outcome that is contemplated? Courts are often engaged at that stage to decide the legal effectiveness of the arrangement. That's not easy. If there is nothing in writing, recollections of conversations can differ, and if there is something in writing it is often imprecise from a legal perspective.

Commonly the arrangements involve important and valuable subjects, such as land - commonly a residence - lifetime care and accommodation, or significant sums of money. The family in these arrangements can be broad – for instance many disputes involve parents and children, but some included in-laws or siblings or separated spouses, or nieces, nephews and aunts and, even mistresses.

When making an informal arrangement it important to remember the stitch in time!

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