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LEGAL SERVICES

Passing over an executor

An executor makes decisions concerning the administration of the deceased's assets. Certain attributes are generally considered essential or highly desirable for an executor. These include:

- conscientiousness
- organisation skills
- ability to deal with tedious work
- ability to withstand unreasonable demands
- willingness to keep beneficiaries informed
- ability to delegate
- ability to work with others
- ability to take advice.

Because the executor has broad responsibilities over the affairs of a person who is no longer living on behalf of persons who may not know of their entitlements, ie beneficiaries, executors are personally liable for losses suffered by beneficiaries as a result of an executor's wrongful action.

Accordingly, a court will not grant probate to a person who, it considers, wouldn't be able to correctly and carefully perform its responsibilities. Also, if during the administration of the estate, the court learns that a person is not administering the estate in the best interests of beneficiaries, the court will remove the executor.

An extreme example of a court passing over a nominated executor occurred in the *Estate of Petta*. The Court listed 12 reasons for doing so, including:

- unreasonable delay in commencing the administration of the estate;
- failure to identify and value assets in the estate;
- failure to obtain legal advice about his responsibilities as executor;
- intermeddling in the estate's assets by using a bank account for his own benefit;
- acting in his own interests in conflict with the interest of beneficiaries;
- failing to communicate with beneficiaries.

Brett Whiteley was not alone

It is not just his art that has made Brett Whiteley well known. After his death it was asserted that Whiteley had prepared a homemade will which was so carelessly stored that it could not be found.

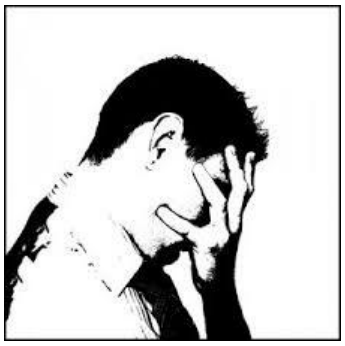
THE LAW SOCIETY OF NSW SPECIALIST ACCREDITATION

Leura "Ballygowan"
Tel 02 4784 2177 Fax 02 4784 2145
21 Grose Street Leura 2780
Email info@browne-link.com.au

It was cruel irony that a man so opposed to spending money on a properly prepared will had precipitated circumstances where his estate spent a fortune in legal costs establishing the contents of his will.

Unfortunately Whiteley's folly has not been well learned. On Leonie Warren's death a computer printout in the form of her will was found. It was dated but not signed or witnessed. There was evidence of her giving instructions for preparation of a will, that she then signed the will and that it had been properly witnessed. But no original was found and there was no evidence of what had happened to the original.

Then there was Sheila Stephens. Solicitor's records showed that she'd given instructions for a will, that a draft will had been prepared and sent to her, and that she later collected her original will. A copy of it could be found but no original.



Lastly, there was Jim North. He was such a diligent record keeper that he had a folder of personal papers which included a series of wills made by him over the last six years of his life. One was torn in half. Another was a carbon copy will.

But there was no original signed and properly witnessed will.

All these cases were decided between May and July 2014. Each involved a court considering whether an unsigned or copy document could be treated as the deceased's will. Each involved significant legal costs.

Each demonstrates the importance of carefully storing original wills.

The curse continues

It is said that home-made wills are a curse. Here are two more examples.

Patricia Driscoll made a proper Will in 1993. Later she wrote and signed a note which said "I wish to amend my Will to read – Michael may have the use of the house for as long as he needs it". In 2014, seven years after her death in 2007, the Court was asked to decide the legal effect of Mrs Driscoll's note. The Court held that it had testamentary effect: it was expressly drawn as an amendment to the Will. However the Court said that the wording "for as long as he needs it" had no objectively ascertainable meaning. It was entirely uncertain as there were no criteria by which "need" could be determined and no-one designated to determine the "need".

Meanwhile Shirley Hogben obtained a will form kit which she completed by making a gift of $1,000.00 to a football club, but nothing else. Her estate was intestate for the rest of her assets totalling $594,000. As a judge has said about these situations: "All this could have been avoided if the testator had consulted a lawyer and signed off on a will which reflected his [or her] wishes. There is no question but that engaging the services of a properly qualified and experienced lawyer to draft a will is money well spent."