BROWNE·Linkenbagh
LEGAL SERVICES

# The Problem with Informality

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## Informal gifts before death

Picture this scenario: George Gibson is in hospital. He has no close relatives or friends. Michelle Hobbes attends the hospital to visit her father. She meets Mr Gibson and thereafter helps him a great deal in the eleven (11) months before his death. Shortly before his death, Gibson says to Ms. Hobbes: "When I go, you live here" and gave her the keys to his home unit.

He gave Ms Hobbes a bank passbook and bankcard that contained details of a fixed term investment with the bank. He said: "Take these, I don't need any more. Plenty there for you. Look after you". And he said: "Everything is yours".

Was it? Did Mr Gibson's actions and words gift the unit and bank accounts to Ms. Hobbes or were they ineffective for that purpose? The answer is a bit of both. The actions and words were held sufficient to transfer the proceeds of Mr Gibson's bank accounts to Ms. Hobbes but not the home unit.

## A way to shaft your kids

Patrick Carroll made a will leaving a third of his estate to his four (4) children provided they become baptised into the Catholic Church within three (3) months of his death. The relevant history is that after his then wife, and the children's mother, separated from Patrick, the wife bought up the children as Jehovah's Witness. Patrick expressed strong objections to the children's membership of that faith.

After Patrick's death, the children did not convert to Catholicism. Instead they challenged the validity of the conditional gift arguing that the condition was void for uncertainty or impossible or contrary to public policy. They argued that the gift should be treated as unconditional. The court disagreed. It determined that the gift was valid. As it had not been satisfied, the gift was given to the contingent beneficiaries named in the will rather than the children.

The moral is that if you want to shaft a person who has an expectation of benefit, make a gift to the person subject to a condition which is unlikely to be satisfied.

## More problems with home made wills 1

Barry Leaney made a proper will in August 1989. When he died in May 2013 an unsigned document was found. The document was headed "Power of Attorney". It then said:

FIRST

½ Ross & ½ Sonya

THEN: ½ Daniel, Brook & Peter Andriske

½ Michelle Woods, David Leaney and Nicole Leaney

Executors Sonya & Greg Andriske

If the document was meant to represent the deceased's testamentary disposition, and the fractions and names were intended to state the beneficiaries and their share of Leaney's estate, his $2.7 million would be divided very differently to that stated in his will. Unsurprisingly, the issue of whether the document amounted to a will found its' way to the Supreme Court where the Court found that the document was equivalent to Leaney's last will notwithstanding the heading "Power of Attorney". The cost of the proceedings for all parties was ordered to be paid from the deceased's estate. Of course, this made the document a very expensive Will!

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## Names: avoid a fight, get it right

Beryl Price left a Will which gave $250,000.00 to the Aboriginal Women's Tertiary Institute. That organisation didn't exist at her death and probably had never existed. She gave the rest of her estate to "Australia Conservation Foundation". There was no organisation by that name but, of course, there was a closely named organisation, "Australian Conservation Foundation Incorporated". What was to happen to these gifts? As a general rule, a gift to a non-existent institution lapses unless the Court can infer a general charitable intention that enables the gift to be applied as nearly as possible.

The Court decided that Beryl Price wanted the gift of $250,000.00 to benefit the education of indigenous women. Two organisations were identified that met that intention, and the Court approved payment of $125,000.00 to each. This involved re-writing the Will by not only naming different beneficiaries but doubling the number of beneficiaries and halving the amount of the gift. Similarly, the Court fixed the incorrect reference to the Australian Conservation Foundation Inc. So, all in all, a good outcome. Except that the court process meant that Beryl Price's badly drawn will cost the intended beneficiaries a small fortune.

## More problems with home made wills 2

In 1983, Rupert Burge made a will. He was given an unexecuted copy of the will. 24 years later, in 2007, he made hand-written changes on the unexecuted copy. He changed the name and address of the executor. He changed the beneficiaries of the entire estate, effectively disinheriting his wife. He wrote "cancelled as inapplicable" next to the appointment of a guardian for his minor children (who were then adults). He re-dated the document. He signed the last page, and signed or placed his signature near the changes. He retained the document when he changed his address.

However, he did not change the address stated on the document. He did not sign before two witnesses, even though there was a statement that he was signing before two witnesses at the place where he had signed. Having made two earlier proper wills, he was aware of that requirement for a properly made will. He did not store the altered document in an envelope marked "wills" where he stored his other earlier wills. After a two day contested hearing, the Supreme Court considered that the altered document should not be treated as the equivalent of a proper will. This means it was a very expensive and totally ineffective note.

## More problems with home made wills 3

Both Fernando and Elizabeth Masci had children from earlier marriages. They each wanted to benefit their own children after both their deaths. They completed a printed will form as a joint will; that is, they both made the same will. This is a difficult and unusual approach at the best of times. The Supreme Court judge said that they did it "poorly". Fernando died.


The Supreme Court was called on to make sense of the joint will. The court said that, under the will, Elizabeth did not inherit Fernando's estate; she only had a life interest. Secondly, the joint will meant that Elizabeth could not change the will now that Fernando was dead. It meant that jointly owned property was not owned by the surviving joint tenant, Elizabeth, but owned in equal shares. Lastly, as a child of both Fernando and Elizabeth were appointed as executors, and they couldn't get on, Elizabeth's daughter was removed. What a mess!

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