

## Siblings being siblings – an estate planning reminder

*by Keeli Cambourne, Deputy Editor SMSF Adviser and/ Matthew Burgess, Director, View Legal*

The way in which a will is drafted can determine whether a recipient will receive a “gift” as intended and can ultimately rest on how conditions under the documentation apply, says a legal expert.

Matthew Burgess, director of View Legal, said a recent case highlights this issue and, in particular, the difference between whether a condition in a will is precedent or subsequent.

“A threshold issue in this regard is that, traditionally, the courts have drawn an interpretational distinction between two types of conditions, namely conditions precedent and conditions subsequent,” he said.

“The distinction is important as if the condition precedent is void, the underlying gift will fail. Furthermore, if access to the gift to satisfy other gifts is required, this may be prohibited if a condition is a condition precedent.”

Burgess said that, in contrast, if the void condition is a condition subsequent, then the underlying gift simply takes effect as if it were, in fact, an unconditional gift (see *Egerton v Earl Brownlow* (1853) 4 HL Cas 1).

“A condition precedent is one that must be fulfilled before the gift can take effect, and a subsequent is one where a gift takes effect immediately but will end if the condition is not ultimately met,” he said.

“The case law considering the above distinction has tended to have a bias towards treating conditional gifts as subsequent, so as to allow the gift to be effective and avoid it failing. This said, the appropriate interpretation of any particular provision will almost always depend on the exact factual matrix (see *Gibb-Maitland v Perpetual Executors Trustee & Agency Co (WA) Ltd* [1947] HCA 35).”

As highlighted by the recent decision in *Boyd v Peeters* [2024] NSWSC 1035, Burgess said no historical case can truly provide any certain guidance for the construction of a particular will.

In this case, the substantive asset in a deceased estate was left to one sibling who was also executor under the will, provided they made a cash payment to their sibling.

To fund the cash payment, the sibling entitled to the property provided it as security to a financier to borrow sufficient funds to make the required payment.

The court held that the conduct of the sibling was permissible and specifically confirmed that in a will, generally, a condition precedent is one where the condition is construed as requiring performance before the beneficiary takes any interest in the property the subject of the gift.

“The court also stated that a condition subsequent is construed as operating only in defeasance of an interest given to a beneficiary (see *In re Cumings; Nicholls v Public Trustee (South Australia)* [1945] HCA 32),” Burgess said.

“It is always necessary to look at the precise words of the provision creating the condition and to ascertain the intention of the willmaker, noting that where a condition is capable of being performed immediately it is a condition precedent, but if time is required or expected it will be a condition subsequent (see *In re Porter*; *Logan v Northern Bank Ltd* [1975] NI 157).”

He continued that in this case, the relevant clause (clause 8, extracted below) was a condition subsequent; therefore, the sibling’s interest was held to have vested in possession prior to the condition being fulfilled, effectively allowing the property to be used for the purpose of meeting the condition of a payment to the other sibling.

“The suggestion that the sibling receiving the property (as executor of the estate) had acted in breach of fiduciary duties, by favouring their own interests and failing to act in the best interests of the beneficiaries in the estate was held to be incorrect,” Burgess said.

“The court specifically noted that the question of whether a person or entity acts as trustee or in some other capacity is relevant to the internal question, as between trustee and beneficiary, as to whether the trustee has a right of recoupment from the trust fund for any liability it may incur.”

He added that the question of what capacity a party is acting, however, is not an issue in which third parties usually have any legitimate involvement (see *AMP Capital Investors Ltd v Parsons Brinckerhoff Australia Pty Ltd*; *Retail Employees Superannuation Pty Ltd v AMP Capital Investors Ltd* [2013] NSWSC 1633).

“Given the will clearly permitted the executor to borrow (see clause 12, again extracted below), meant that the fact that the borrowings may have been in a personal capacity was essentially irrelevant and could not lead to an outcome that meant that there had been any breach of fiduciary duties,” he said.

“This conclusion was reinforced by the fact that the court held it unlikely that the willmaker would have wished for the relevant sibling to receive the property but be inhibited or limited as to the options of effectively being able to do so because they were unable to source the funds for the cash payment.”

Burgess said the court’s ruling meant that it was appropriate to read the relevant powers in the will as being drafted to help to facilitate the overall outcome (see the express power in clause 12.1(q) to “borrow, raise moneys from and to secure by mortgage ... the payment, repayment or advances of any money to any persons” and the power in clause 12.1(e) to “use ... or otherwise deal with any real or personal property ... on whatever terms as the trustee thinks fit”).

“Given the above conclusions, the final aspect of the aggrieved siblings’ application, being the removal of the sibling gifted the property as executor of the estate, was also rejected,” he said.

## **Extracts of will clauses**

### *8. Division and Distribution of Balance of Estate*

8.1. If at the date of my death I am the owner of the property situate and known as [XX] Murrays Road, Tennyson (“the Property”) I give to my daughter SAMANTHA GRACE PEETERS all my right title and interest in the Property provided that within two (2) years from the date of my death she pays to my son MATTHEW LEE BOYD an amount equivalent to one third of the market value of that property at the date of my death, such value to be determined by a qualified real estate valuer appointed by my Executor (“the

Consideration"). In the event that my son MATTHEW LEE BOYD predeceases me or fails to survive me for the said two (2) year period then the amount which would otherwise have been payable to him under this sub-clause of my Will shall be payable to his legal personal representative. If SAMANTHA GRACE PEETERS fails or decides not to pay the Consideration within the time specified in this sub-clause, then the Property shall form part of the remaining balance of my estate.

8.2. My Executor shall divide the balance of my estate not already dealt with under the preceding clauses of this Will ("the remaining balance") into one or more equal parts, sections or portions, and shall hold on trust in accordance with this Will, and dispose of such parts, sections or portions as outlined in this clause.  
My Children to be Beneficiaries

8.3. Each of my children MATTHEW LEE BOYD and SAMANTHA GRACE PEETERS who survive me by thirty (30) days shall be the beneficiaries of the trust for one such equal part.

## *12. Other Specific Powers of Executor and Trustee*

12.1. My Executor and the trustee of any trusts established by the terms of my Will shall have the following powers to:

(a) make loans to beneficiaries (having regard to the taxation and other implications) that are:

1. secured or unsecured;

1. subject to interest or interest-free; and

1. on whatever terms they consider appropriate;

(e) to hold, use, surrender, let, lease, take and grant options or rights in, or otherwise deal with any real or personal property and including, but not limited to, shares, units, debentures or securities of any company or trust on whatever terms as the trustee thinks fit;

(f) sell, lease, exchange or otherwise dispose of assets in my estate on such terms as they consider expedient as if they were the absolute beneficial owner;

(q) borrow, raise moneys from and to secure by mortgage, bill of sale, lien or charge (by way of fixed, floating, legal or equitable charge) the payment, repayment or advances of any money to any persons;

(r) delegate in writing the exercise of any powers or discretion and to execute any powers of attorney or other instruments necessary to effect the delegation;