Can a testator "arm" an executor to deal with assets they don't own?

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Presented on 6 May 2026 for
Equity Trustees' Sir Ninian Stephen lecture

The abridged version?

- Yes … but

Hendry v The Perpetual Executors and Trustees Association of Australia (1961) 106 CLR 256

- Partnership between two siblings, George and Catherine.
- George died leaving a will with bequests of "all my livestock", "all my real estate" and "the residue of my personal estate"
- George owned no land or livestock but the partnership did.
- Questions for the Court:
  - were the gifts of "all my livestock" and "the monies to arise from the sale conversion and getting in of my real estate" valid?

Taylor and Menzies JJ:

"The circumstances are therefore that a farmer who owned no livestock or real estate of his own but was a member of a partnership which owned both land and livestock left a will disposing of his livestock and the proceeds of his real estate and the question is whether those gifts are just meaningless or refer to his interests in the livestock and land of the partnership."

Taylor and Menzies JJ:

- "… the enquiry is not what rights did the plaintiff (being the executor of the estate) have by virtue of the partnership upon the death of the testator nor even what were the testator's rights as a partner but what did he mean when in his will he used the words "my livestock" and "my real estate" when he had none of his own but he was a member of a partnership which had both livestock and real estate. **This question is not to be answered by any strict legal analysis of the rights of the testator as a partner during his life and certainly not by considering the rights of his personal representative after death**. **What has to be done is to determine what the testator meant by his words in his will** and when the will is looked at in the light of the circumstances as they existed immediately before his death the conclusion is inevitable that he was dividing what he had into three parts, and that he was disposing separately of whatever interest he had in livestock (which could only be his partnership interest), of the net proceeds of whatever interest he had in land (which, again, could only be his partnership interest), and of the net proceeds of whatever interest he had in personalty other than livestock."

Re Bowcock (deceased); Box v Bowcock [1968] 2 NSWR 697

- Gift of three properties to the deceased's son – Alabama, Kelvinside and The Vale all situated near Scone, NSW.
- Kelvinside was owned by a company, Alabama Stud Pty Ltd.
- Alabama Stud had 2 shares, one held by the deceased and the other by Mr Moloney (one of the executors).
- Mr Moloney acknowledged that the deceased held the beneficial interest in his share.
- Clause in the Will directing trustees to provide for the management and conduct of other business and affairs of companies including accepting the office of Governing Director, Managing Director, Director, Manager, Secretary, Accountant, Auditor or any other office of position that it may be desirable for all or any of his trustees to accept.

Else-Mitchell J:

- It was "quite clear … that (the testator) imagined that it was his own property absolutely."
- "It is clear that (Kelvinside) was one of his stud properties near Scone and plainly one of the properties in respect of which he intended to confer a benefit on his son James Bowcock …"
- "The question of construction which I am required to determine, however, is whether the will can be effective to pass to James Bowcock, either by requiring the trustees to give effect to a transfer or in some other fashion the freehold estate in the property Kelvinside."

Else-Mitchell J:

- "The question, therefore, is whether the testator's intention being clear … the executors can be required to give effect to it. It is plain that the only beneficial interests in the issued shares in the company which owns Kelvinside are held on behalf of the trustees – that is, on behalf of the estate …. so (the trustees) have the sole control of the destiny of the company as the only shareholders."

- The executors were "quite capable of giving effect to the intention which the testator manifested".

Re O'Callaghan, deceased [1972] VR 248

- Deceased incorporated a company, W.E. O'Callaghan Pty Ltd, which owned various shares
- Deceased and wife were company's first directors – "permanent directors"
- Deceased held all shares except for one share held by his wife
- Wife died in 1940 and deceased remarried in 1942
- Wife's share transferred to second wife
- Company owned shares in Sheridan Close Ltd which entitled holder to occupy a particular flat in a property at Sheridan Close, Melbourne

Gowans J:

- "Before becoming involved in questions as to the power of the testator to make these particular dispositions, it is desirable to ascertain the general intentions of the testator as expressed in the will, and this is facilitated by observing the form of the general dispositions. There is not a direct gift of any property to any beneficiary. It is all done through the trustee. What the testator does is to give all the real and personal estate of which or to which he shall be seized possessed or entitled at his death or over which he shall then have power or disposition of appointment to his trustee. Included in this estate is, of course, not only such items of property as the furniture and household effects but also the beneficial estate in the parcel of shares he owned in (the Company) the whole of the capital issue. They would carry with them all the rights and powers and privileges which attach to them as shares in that company and all such as attach to them as the preponderating part of the capital of the company."

Gowans J:

- "The trustee is to hold the whole of this estate and each part of it, including these shares, in trust in accordance with the directions that follow."
- "… there is little room for any inference that the testator was under a mistake as to the title to the shares which stood in the name of (the Company), or as to who had the rights or privileges in relation to the occupancy of the flat."

- Rejected a submission about a shareholder with sufficient holding has an interest in the assets of a company, which is transmissible by will, analogous to an interest of a partner in the partnership assets or the interest of a beneficiary in an intestate estate.

Watson v Ralph (1982) 148 CLR 646

- Decision of Gibbs CJ, Mason, Aickin, Wilson and Brennan JJ
- Deceased and her husband conducted a partnership that held land at Whittlesea in Victoria.
- Clause in Will:

"… UPON TRUST to pay the income arising therefrom to my said husband during his lifetime and subject thereto to stand possessed of my residuary estate as to both capital and income UPON TRUST **if at the time of my death I shall be the owner of the freehold property situate at Whittlesea** in the State of Victoria owned at the date hereof jointly by my said husband and myself to transfer and/or to convey the same and any freehold property held in conjunction therewith to such of my daughters CORINNE FURNELL and JUDITH WATSON as shall be living at the death of the survivor of my said husband and myself as tenants in common in equal shares …"

Ireland v Retallack & Ors [2011] NSWSC 846

- Gift in Will of property, Glengowan, to deceased's daughter and gift of another property, Sunnyside, to a company that was the residuary beneficiary as trustee for a discretionary trust for the deceased's son.
- Both properties owned by a company.
- Deceased owned 99.9% of the shares, deceased's daughter owned 0.1% of the shares.
- Clause in Will:

  I DECLARE that my said executors will be entitled to manipulate the assets of my estate in order to transfer real property … (Glengowan)… to SANDRA JANE RETALLACK and the other real property … (Sunnyside) … to (the residuary beneficiary company).

- Issue of oppression of minority shareholder raised.

Pembroke J:

- "When the Testator used the expression "my estate" in his will, he referred, of course, to his shares in the Company and the land owned by himself. But he also intended to refer to the real property owned by the Company, namely Glengowan and Sunnyside."

- "The Testator, and hence his executor controls the Company. By reason of that control, the executor is in a position to give effect to the manifest intention of the Testator. In my view, subject to what follows, he is under a legal duty to do so."

Estate Reid; Roberts v Moses and Palmer [2018] NSWSC 1145

- Decision of Lindsay J
- Gift in Will to deceased's niece, Peta Roberts" of "income from the dividends received" from "my" shares in NAB and the Commonwealth Bank.
- Deceased owned some shares in NAB
- Deceased had two companies:
  - Vanreid Industries Pty Ltd which owned and controlled
  - Vanreid Enterprises Pty Ltd
- Vanreid Industries Pty Ltd was owned and controlled by the deceased.
- Vanreid Enterprises Pty Ltd owned NAB and Commonwealth Bank shares.

Deceased's Will:

- Residuary beneficiary of the estate was Vanreid Industries (which did not hold the shares).
- Trusted employee of deceased was the beneficiary of the deceased's shares in Vanreid Industries.
- So, the trusted employee owned and controlled by Vanreid Industries and Vanreid Enterprises.
- Gift of shares to trusted employee was said to be "subject to" the gift made to the deceased's daughter of "income from dividends received" on shares.

Lindsay J:

- Referred to decision of Dixon J in *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 418-419 in which Dixon J distinguished four classes of gift and talks about a beneficiary having an equitable duty to perform a condition which is annexed to the gift which they have accepted.

In the estate of the late Patrick Ambrose Tunchon [2019] NSWSC 802

- An application for judicial advice heard by Ward CJ in Eq (as she then was).
- Gift of property at Wahgunyah, Victoria to grandson in Will dated 3 June 2015
- Codicil dated 11 June 2015 changed the gift:
- To my grandson DARRELL BRIGGS –
  - All my shares in Nina Clothing Pty Ltd, or if, at the date of my death, the block of land hereafter mentioned has been transferred to me as a distribution in liquidation of the said company, then
  - My block of land at [xxx] Wahgunyah, Victoria

Further facts

- The block of land was registered in deceased's name.
- Evidence that Nina Clothing Pty Ltd had provided the entirety of the purchase price of the land.
- Nina Clothing Pty Ltd owed the deceased money (loan account).
- Ward CJ in Equity:
  - considered that the deceased "did not arm the executors with control of the Company in any conscious way – rather, the shares formed part of his estate and with the shares comes control of the Company."

Wheatley v Lakshmanan [2022] NSWSC 583

- Deceased had 2 daughters – Alexis and Erin
- Will left commercial property at The Entrance Road to Alexis.
- Property was owned by Wheatley Investments Pty Ltd.
- Deceased was sole shareholder and a director of company; Erin was the other director.
- After deceased's death, Ms Saba appointed as second director of Wheatley Investments Pty Ltd.
- Ward CJ in Equity (as she then was):
  - There was "force in the submission … that the Will should not be construed in a fashion that would or might place the directors of (the company) in a position where their statutory duties as directors are in conflict with the deceased's intentions."

Comino v Comino & Anor [2024] QSC 166

- Decision of Callaghan J.

- Gift in the will:
  - IN THE EVENT that I shall die possessed of the freehold residence at 723 Trouts Road, Aspley, Brisbane aforesaid owned by me and my said husband **STEPHEN COMINO** having predeceased me THEN I GIVE AND BEQUEATH the said house property and contents thereof equally between the said **ARTHUR STEPHEN COMINO** and the said **MARIA PENELOPE COMINO** as tenants in common in equal shares …"
- Residue left to Arthur and Maria and to the deceased's other son, Anthony.

Di Trapani & another v Di Trapani & others [2026] QSC 20

- Decision by McCafferty J.
- Application for judicial advice about the construction of Will.
- Will drafted by accountant.
- Was Glutolo Pty Ltd required as trustee of The Mario Di Trapani Discretionary Trust, to transfer assets out of the Trust?
- Deceased gave shares in Glutolo to the executors to enable them to deal with her assets in the Trust.
- Prior to her death, three directors of Glutolo, including the deceased.

McCafferty J:

- "The mere fact that the executors remain directors of Glutolo does not mean they were "armed" by (the deceased) with the power to transfer Trust assets to the estate."

- Moreover, the "gift" of the shareholding in Glutolo … did not carry with it management of the trustee. It is the directorship of the trustee company that decides the management of the Trust."

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"IT DEPENDS"

QUESTIONS?

Thank you for listening!

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