

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Catholic Parish of St Brigid Marrickville v Habib as Executor of the Estate of the late Tereza Efram [2022] NSWSC 1139

Supreme Court of New South Wales, Slattery J, 25 August 2022

Whether the gift of a residence sold before death was valid and not adeemed.

Key words: Will, New South Wales, Gift in Will, Proceeds of Sale, Specific Gift, General Gift, Ademption

1. Terza (Tereza) Efram (the testatrix) died on 22 June 2018, leaving a will made on 6 September 2001.
2. After appointing the defendant as the executor and trustee of her will, the testatrix, in clause 3 of her will, gave the plaintiff, the Catholic Parish of St Brigid at Marrickville (St Brigid's): "my principal place of residence and all furnishings but subject to any mortgage which may be registered against the said property at the date of my death".
3. Although when she made her will in 2001 the testatrix owned and lived in a residential property in Marrickville, Sydney, the property had been sold by the date of her death.
4. From April 2010 until the testatrix's death the New South Wales Trustee and Guardian (TAG) had managed her financial affairs under the [NSW Trustee and Guardian Act 2009](#) (the Act). In June 2010 the testatrix moved from her Marrickville property into various aged care facilities, and did not return to her home.
5. In 2011 the TAG sold the testatrix's Marrickville property and held the proceeds on trust for her. Her expenses in aged care were paid from her TAG account on her behalf. The remaining proceeds of \$554,515.01, which had been paid by TAG into the trust account of the testatrix's solicitors, were still able to be separately identified at the date of this hearing.
6. A gift in a will is adeemed if the testator disposes of the subject matter of the gift, or by a change in the ownership or nature of the property. St Brigid's sought a declaration that the testatrix's gift to it of the Marrickville property was not adeemed, and was valid by reason of the operation of [s 83](#) of the Act i.e. St Brigid's was seeking a declaration that it was entitled to the identifiable balance of the proceeds of sale of the Marrickville property.

7. The alternative was that the remaining proceeds of sale fell into the residue of the estate. The executor sought additional directions on this issue as the residuary beneficiaries named in the will, and any next of kin of the testatrix for the purposes of [Succession Act 2006](#) chapter 4, had not survived her.
8. The executor sought an order in the form of a Benjamin order, that the residue of the testatrix's estate be distributed to the Crown as bona vacantia, but without prejudice to the rights of any person to trace their share into the hands of the Crown, if it was later established that they had survived the testatrix.
9. The executor did not actively resist the application brought by St Brigid's. The executor took the view that he was the proper contradictor in the proceedings and assisted the court by advancing all relevant arguments to the Court to assist the Court to make a determination. The Attorney General, as cross defendant, put in a submitting appearance.
10. There was no issue as to the validity of the will as a whole.
11. If the gift in clause 3 of the will was general, it would not attach specifically to the Marrickville property. If it was specific, it could still be saved by [s 83](#) of the Act, which provides at subsection (2) that:

(2) The surplus money or other property arising as referred to in subsection (1) is taken to be of the same nature as the property sold, **mortgaged**, disposed of or dealt with.
12. The Court, in analysing the surrounding context, held that the gift was specific to the Marrickville property, but was saved from ademption by section 83 of the Act (at [102]).
13. As to whether there was an identifiable surplus, as required by the Act, the Court held that the proceeds of sale of the Marrickville property were effectively quarantined in fixed deposits that were redeemed and paid to the testatrix's solicitors, subject to some minor accounting issues, which were not material (at [108]).
14. Therefore, the gift in clause 3 remained valid, and St Brigid's was entitled to the clearly identifiable proceeds of the sale of the property.

IMPLICATIONS



The problem of ademption can be common, particularly in self-drawn wills. Will makers might make specific gifts of property, but then, over time, dispose of that property by sale or otherwise, or the property can be lost or destroyed. In that case, the gift is not available in the estate and is adeemed (from the Latin *adimere* to take away).

Courts will sometimes try to avoid ademption by finding that a gift is general in nature. This did not occur in this case. The gift was specific, but the proceeds were identifiable and saved by the statutory provision applying to protected persons.

A will maker can avoid ademption by having their will professionally drafted and by regularly updating their will. In general:

- It is preferable to leave a percentage of the residuary estate as a gift rather than specific assets;
- Where the bequest is for a particular property, the will maker should state in the will that the beneficiary should receive the sale proceeds of that specific property, or any property that was bought in substitution; and
- Where a will maker is unable to update their will to reflect the sale or loss of an asset because they no longer have testamentary capacity, an appropriate person can apply for a statutory will to ensure that a specific gift does not lapse due to ademption.

If the gift had been adeemed in this case, the executor had applied for an order to pay the estate to the Crown as bona vacantia (Latin for ownerless goods) because all the residuary beneficiaries and next of kin were dead. Estates are paid to the Crown where there are no possible claimants apparently living.

A Benjamin Order is made by the Court when a specific beneficiary is presumed to be dead, in which case, the executor can then distribute that part of the estate to any remaining beneficiaries, or when all the possible beneficiaries are presumed to be dead, in which case the estate assets are bona vacantia.

VIEW THE CASE



This case may be viewed at <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC//2022/1139.html>

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