

## Article Information

Author: Rod Jones, Sam Morphett

Service: Estate & Succession Planning

Sector: Private Clients

---

## Some strings attached: difficulties with conditional gifts

**A conditional gift in a Will is the gift of an asset, right or money to a beneficiary which is subject to, or affected by certain conditions specified in the Will. There are two types of conditional gifts:**

- **A condition precedent is a condition which requires an event to be satisfied before the gift takes effect. It could be monetary or contractual, such as a beneficiary paying a sum of money to another person, or non-monetary for example successfully graduating from University. If the beneficiary fails to meet the terms or requirements of the condition in the Will, then the gift is void.**
  - **A condition subsequent is a gift with an ongoing condition which, when it is no longer satisfied, terminates a gift which has already “vested”. An example is a right to receive income or use property, which terminates if a beneficiary ceases to reside in a particular residence.**
- 

If not correctly drafted, conditional gifts in Wills can cause significant complications, or simply be void. In general terms, a condition will not be effective if it is uncertain, impossible, repugnant, illegal or against public policy. Whether or not a particular gift will be void may require a careful consideration of the case law in this area, but examples of void conditions include those gifts requiring a change in religion, (some) restrictions on marriage, requiring the continuing use of a surname, restricting a beneficiary from challenging the will, or restricting a beneficiary from selling real property which is absolutely gifted to them.

Accordingly, the wording of a conditional gift needs to be carefully drafted to minimise the chances of a dispute over its interpretation, and to ensure that the outcome reflects the testator’s true wishes. In a recent, slightly unusual example of an “uncertain” condition, in the New South Wales Supreme Court case of *Hibbitt v Ziade*<sup>[1]</sup> a clause in the testator’s will read as follows:

*“I give the rest and residue of my estate to my trustee...to hold my residence at Tennyson Point together with all personal effects contained therein to Mrs Hibbitt and Mr Hibbitt or the survivor of them in return for caring for my two cats..”*

A dispute arose in relation to the interpretation of the gift, and in particular the underlined portion. It was contended that there was a condition precedent to the gift of the Tennyson Property, that the Hibbitts had to continue to care for the cats until both cats had died. Only then, it was contended, would the Hibbitts be entitled to received the deferred gift.

Ultimately, the Court rejected that argument, largely relying on the general principle that the Court will prefer a construction of a will which gives rise to an immediate, rather than deferred vesting of a gift (as well as the practical difficulties the conditional gift would have caused in these circumstances). This case is a useful reminder of the importance of properly considering whether a conditional gift is appropriate, and if so, that it is carefully drafted.

<sup>[1]</sup> [2022] NSWSC 904