



What happens when a gift in your Will fails?

During your lifetime you'll likely acquire and dispose of assets on getting married or divorced, after having children or when you retire. But what happens when you gift one of those assets to a beneficiary in your Will and the asset no longer exists when you die or the person you left it to has died before you?

What is a Testamentary Gift?

A Testamentary Gift is a gift made in your Will of something you generally own at that time which you nominate be left to a specific person or entity. Usually, a Testamentary Gift will be in the form of:

- a Specific Gift such as an identified property, motor vehicle, piece of artwork or jewellery;
- a Pecuniary Gift being a stated amount of money; or
- a Residuary Gift being the balance or residue of your estate that is left after payment of all costs, debts and taxes and all other stated gifts have been distributed.

How Testamentary Gifts Fail

Testamentary Gifts commonly fail because:

- the intended beneficiary of the Testamentary Gift dies before you.
- the description of the item to be gifted is unclear.
- the nominated beneficiary of the gift is unclear.
- a Specific Gift is no longer owned by you at the time of death (known as "Ademption").

If a beneficiary dies before you, any Specific or Pecuniary Gift made to them in your Will generally lapses and will become part of the residue of your estate unless you've nominated an alternate beneficiary to receive it. If the deceased beneficiary was to receive a Residuary Gift of the balance of your estate, that gift will also fail if no alternate beneficiary has been nominated by you. The NSW Succession Act does provide that, in certain circumstances, the children of the originally named beneficiary may be entitled to receive the gift in place of their deceased parent. However, in respect to Residuary Gifts, if no alternate beneficiaries have been named or the deceased residuary beneficiary has no eligible children, the balance of your estate will be distributed to your "next of kin" under the Intestacy provisions of the Act. This may result in part of your estate passing to someone that you hadn't intended receive it.



In situations where the description of a gifted item, or the nominated beneficiary of a gift are unclear and are in dispute, unless the persons or entities laying claim to the gift can come to an agreement as to its distribution, the dispute will be determined by the Supreme Court on the application of any of the parties, or the deceased's executor.

The Rule of Ademption

The legal term 'Ademption' describes a circumstance where you make a gift of a specific asset in your Will to a beneficiary but at the time of your death you no longer own that asset. No matter if you've sold, discarded or destroyed it, or it's been lost or stolen, if at time of your death the asset is no longer part of your estate the Rule of Ademption applies and the gift fails. Your Will operates as if the gift was never made, and the beneficiary is not entitled to receive something else in place of the gift, or cash to the same value.

There are only a few exceptions to the Rule of Ademption including:

- If the nature of the asset gifted changes in name only (such as a gift of shares where the name of the company has changed between the date the Will and the date of death) the gift still takes effect;
- If the asset gifted is sold without the will maker's authority. For example, if shares were sold by a share broker without the will maker's authority, then the nominated beneficiary would inherit the proceeds of that share sale; and
- Under Section 22 of the NSW *Powers of Attorney Act 2003* where a will maker's Attorney sells the asset that was gifted to a beneficiary in the Will, then the beneficiary of that asset retains the interest in the proceeds of such sale on the will maker's death.

How to preserve your wishes

To prevent gifts failing it's prudent to update your Will as your assets or ownership structures change and to accommodate changes in your personal circumstances. It's also important to ensure you have a properly drafted Will which amongst other things:

- specifically states which items you are giving away and any conditions attached to these gifts;
- clearly identifies your intended beneficiary;
- provides for an alternate beneficiary if your originally nominated beneficiary dies before you; and
- empowers your executor to use their discretion to distribute a gift to another charitable organisation with similar aims to a charity which no longer exists at your death.

If you would like further information about Testamentary Gifts and preserving your wishes or want to discuss making a Will or having your current Will reviewed, please contact [Lisa Delalis](#) or [John Bateman](#) of our office 02 4731 5899 or email willstates@batemanbattersby.com.au.