

SOLICITOR'S LIABILITY TO ESTATE BENEFICIARIES

Peter Moran is a partner and Toby Blyth is a senior associate at Colin Biggers & Paisley.



By Peter Moran and Toby Blyth

Practitioners will be aware of a raft of recent cases dealing with claims by disappointed beneficiaries. Liability can be long tail (occurring years after the will was drafted) and the costs well out of proportion to the fees charged. As the composition of families and the economy changes, practitioners are likely to see more claims. In this article we look at some common risk management issues for will drafters. The following case studies illustrate some of the risks that must be borne in mind when taking instructions. They are followed by practical tips to avoid similar outcomes.

Urgent instructions

Case study: A solicitor was called to visit a friend (who was also a longstanding client) in hospital with very serious burns. The client gave instructions for a will, which were written on a piece of paper, but the client died before he could sign it. The solicitor was found negligent for failing to consider/use an alternative procedure whereby the solicitor signs the will at the direction of the client: *Summerville v Walsh* NSWCA unreported 26.02.1998. Practitioners should note that the section of the *Succession Act* referred to in this case has since been repealed. For the current legislation please see s 8 of the *Succession Act*, which strictly speaking does not set out any specific form of informal will. (See also *Howe v Fischer* [2014] NSWCA 286).

Practice tip:

- Consider preparing an informal will if you are on notice that death is imminent.

Is it a long standing client or a new one?

Case studies: A solicitor had acted for the testator over a number of years and had prepared previous wills. One of those wills provided for a bequest to a long estranged daughter. The testator had two pieces of real estate purchased jointly with his step-son, and held as tenants in common. Probate included the testator's half share in each of the properties.

Snapshot

- Ensure your client has capacity
- Full instructions are essential.
- Take detailed (typed) notes and retain them indefinitely.
- Follow up with your client.
- Consider an informal will in appropriate cases.

The estranged daughter brought a family maintenance application for provision out of the estate which led to a reduction in the net value of the estate that the claimant had expected to receive. The step-son subsequently succeeded in establishing that the solicitor's negligence lost the testator the chance to arrange his assets to minimise the risk of a claim. This decision is currently subject to an Application for Special Leave to Appeal to the High Court: *Calvert v Badenach* [2015] TASFC 8.

In another case, a testatrix did not intend to dispose only of her one half interest in jointly owned property. Rather, her wish was to have her husband sell the property and distribute the *whole* of the sale proceeds to their children. No duty arises however until an unconditional intention to make a gift is formed and instructions are given to the solicitor accordingly: *Vagg v McPhee* [2013] NSWCA 29.

Practice tips:

- If you have acted for the client in the past, you will be expected to consider aspects of the testator's affairs that might not be expressly mentioned.
- You may have a positive duty to speak up and ask the testator even about things that s/he does not mention.

Does the client have capacity?

See Law Society of NSW, *When a client's capacity is in doubt, A practical guide for solicitors*.

Practice tip:

- *Succession Act* Part 2.2 Division 2

What instructions are essential?

Lawcover has seen many claims against solicitors by beneficiaries resulting from solicitors failing to understand the estate planning process and failing to take full and proper instructions from the testator. These are just two case studies: A solicitor omitted to confirm ownership of the testator's assets and was not aware those assets were held by a trust. The will drafted by the solicitor attempted to gift a number of the assets. The disappointed beneficiary successfully claimed the value of the assets from the solicitor.

In another case, a solicitor drafted a will on the basis that the testator was the beneficiary of an insurance policy and devised the proceeds of that policy to a specific beneficiary. The policy had different nominated beneficiaries and the disappointed beneficiary successfully claimed the value of the policy from the solicitor.

Practice tips:

- Obtain full asset and full liability details from the testator and check those details are correct.
- Take the time to understand the testator's asset structures.
- Make sure you have the necessary legal knowledge to advise the testator in respect of protective structures for vulnerable beneficiaries.

What is required to follow up?

Case study: A solicitor breached his duty to his client when he failed to respond to the beneficiary's calls for urgent attention to what he must have known or suspected related to his client's health and the unexecuted will. The solicitor didn't respond to the beneficiary's repeated requests that he return calls when a simple phone call would have satisfied the solicitor of the urgent need to discharge his duty to his client - to finalise his client's will. The testator died in the interim: *Maestrale v Aspote* [2012] NSWSC 1420.

Practice tips:

- Do not let calls from testators or their relatives go unreturned.
- If you are too busy do not take the matter on. **LSJ**