Solicitor negligence in will making – Are we clear?

'There is a precipice on either side of you – a precipice of caution and a precipice of over-daring.'[1]

On 11 May 2016 the High Court handed down its much anticipated decision in *Robert Badenach & Anor v Roger Wayne Calvert* [2016] HCA 18, allowing the appeal from the decision of the Full Court of the Supreme Court of Tasmania.

It has been a heady, if not headachy ride for solicitors monitoring the progression of the case from its decision in first instance, through appeal to the Full Court of the Tasmanian Supreme Court, to its final decision by the Full Court of the High Court.[2]

The matter explored the extent of a solicitor's duty of care to a beneficiary under a will to advise the testator of the options available to the testator in order to avoid exposing his estate to a claim under family provision legislation.

In March 2009 solicitor Robert Badenach took instructions for a will from Jeffrey Doddridge at a time when the testator was 77 and terminally ill, which was known to the solicitor. The will was executed on 26 March 2009. The testator left his entire estate to the plaintiff, Roger Calvert, "whom he treated like a son",[3] and with whom he held property as tenants in common.

The testator had a biological daughter and he did not provide for her. He did not instruct the solicitor as to the existence of the daughter, and the solicitor did not inquire as to the testator's family circumstances. Notably, the firm had drawn previous wills, one of which made reference to the existence of the daughter.

The testator died late in 2009. The daughter subsequently brought a successful claim for further provision from the estate and was awarded $200,000, plus costs. The plaintiff's claim for negligence rested on the assertion that "the solicitor and his firm were negligent in that they (a) failed to advise the testator of the risk of the daughter making a claim under the TFM Act [*Testator's Family Maintenance Act 1912* (Tas.)], and (b) failed to advise him of the options available for him to arrange his affairs so as to reduce or extinguish his estate, so as to avoid or partly avoid any claim which could disturb his testamentary wishes".[4]

The key to the decision was the scope of the client retainer and whether the interest of the beneficiary was co-extensive with that of the testator. While the High Court found that it was "a lot to expect for the price of a will"[5] to impose a requirement on a solicitor to advise a testator "that he could transfer some or all of his property during his lifetime so as to avoid exposing his estate to such a claim",[6] a prudent solicitor ought to make enquiry as to the family circumstances of the testator,[7] though the duty did not extend to a beneficiary where the interest of the beneficiary and the testator were not aligned as was the case here, with the beneficiary holding the property as tenants in common with the testator. In reaching its conclusion, the High Court reviewed the line of authority stemming from the seminal decision of *Hill v Van Erp* (1997) 188 CLR 159, finding *Hill v Van Erp* did not apply in this instance:

"[43]The duty recognised in *Hill v Van Erp* arose in circumstances where the interests of the testatrix and the intended beneficiary were aligned and where final testamentary instructions had been given to the solicitor. The solicitor's obligation was limited and well defined.

(…)

"[58] The duty of care which a solicitor who is retained to prepare a will owes to a person whom the testator intends to be a beneficiary is more narrowly sourced and more narrowly confined. The duty arises solely in tort by virtue of specific action that is required of the solicitor in performing the retainer. The duty plainly cannot extend to requiring the solicitor to take reasonable care for future and contingent interests of every prospective beneficiary when undertaking every action that might be expected of a solicitor in the performance of the solicitor's duty to the testator. If the tortious duty of care were to extend that far, it would have the potential to get in the way of performance of the solicitor's contractual duty to the testator. Extended to multiple prospective beneficiaries, it would be crippling.[*footnote omitted*]

"[59] The solicitor's duty of care is instead limited to a person whom the testator actually intends to benefit from the will and is confined to requiring the solicitor to take reasonable care to benefit that person in the manner and to the extent identified in the testator's instructions. The testator's instructions are critical. The existence of those instructions compels the solicitor to act for the benefit of the intended beneficiary to the extent necessary to give effect to them."

The takeaway point for solicitors is to identify the scope of their retainer with the client and, within that, raise the issues the client must consider.

Aquamation cremation alternative

In the July 2012 edition of Proctor, I published an article on alkaline hydrolysis[8] as a then new and some would say, greener, alternative to cremation. In 2012 New South Wales passed legislation to include alkaline hydrolysis in the definition of 'cremation' for deceased bodies disposed of in NSW.[9] Four years on and NSW now has its first Aquamation facility, which opened in Newcastle in May, offering families an alternative to cremation.[10]

Probate practice update – Brisbane Registry

As part of Queensland Law Society's consultation with the Supreme Court registries, we are pleased to advise of further practices that will assist the profession.

The registries receive many inquiries and endeavour to assist whenever possible. To that end, Supreme Court Registrar of Probate (Brisbane Registry) Leanne McDonnell is willing to give advice on procedural and practice matters, but not on legal matters.

with Christine Smyth

In particular, if practitioners have queries regarding unusual grant applications, Ms McDonnell invites practitioners to email the documents to the registry before filing and advertising, to reduce requisitions. The email address is wills&estates@justice.qld.gov.au.

Christine Smyth is deputy president of Queensland Law Society, a QLS accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, the *Proctor* editorial committee, STEP, and an associate member of the Tax Institute. Christine recently retired her position as a member of the QLS Succession Law Committee however remains as a guest.

Notes

1 British Prime Minister and wartime leader Sir Winston Churchill.

2 *Calvert v Badenach* [2014] TASSC 61, in the first instance;
Calvert v Badenach [2015] TASFC 8, Appeal, appeal allowed, Special Leave Granted
Badenach v Calvert [2015] HCATrans 279; hearing re above
Badenach v Calvert [2016] HCA 18, (judgement date 11 May 2016), Appeal from the Supreme Court of Tasmania.

3 At [2] *Calvert v Badenach* [2014] TASSC 61.

4 At [4] *Calvert v Badenach* [2014] TASSC 61.

5 At [66] *Badenach v Calvert* [2016] HCA 18, (judgement date 11 May 2016), Appeal from the Supreme Court of Tasmania.

6 As above.

7 At [27]-[30] *Badenach v Calvert* [2016] HCA 18, (judgement date 11 May 2016), Appeal from the Supreme Court of Tasmania.

8 For further reading, see C Smyth, 'Alkaline Hydrolysis —Alternative to Cremation' (2012) 14(9) REP 122.

9 See regulation 49 of the *Public Health Regulation 2012* (NSW), with the enactment of the *Public Health Regulation 2012* (NSW) enabling the commencement of the *Public Health Act 2010* (NSW), both of which took effect from 1 September 2012. The legislation governs the disposal of dead bodies in NSW.

10 mmdnewswire.com/aquamation-cremation-and-burial-131769.html.