

The future of solicitor's duty to willmaker

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Solicitors would be breaching their duty of care if they were to merely commit the client's testamentary wishes to paper, without properly advising on the effect.

The era of "simple" wills ended many moons ago. No will nowadays should go without some sort of clause about executor self-dealing or conflict, taxation, balancing of non-estate wealth, streaming or quarantining of life insurance or superannuation, definitions, various administrative powers, and so on.

Even where the will looks simple on its face, the considerations running through the will drafter's mind or the advice provided to clients never are.

In this litigious era, when individuals insist on blaming others for their own misfortunes, will drafters have been sued on a myriad of scenarios. As the misfortune is usually that of a beneficiary or executor, the paving of the path for such actions has not been easy as the will drafter's contract is with the willmaker and the tortious duties are owed to the willmaker. The willmaker is usually deceased when the misfortune comes to light and does not personally suffer a significant loss either as a result of the breach of contract or tort.

In the landmark decision of *Hill v Van Erp*,¹ the High Court settled that a solicitor is liable in negligence to a disappointed beneficiary who missed out on an inheritance due to a solicitor's negligence in the will preparation. The negligence arose out of the breach of the duty owed to the willmaker by the will drafter to exercise reasonable skill and care in the performance of the tasks necessary to create a valid and effective will, this duty coinciding with that owed to the intended beneficiary.

On the back of *Hill v Van Erp*, a variety of negligence cases followed which gradually extend the duty of the solicitor from the timely preparation of a valid will that is free from errors² to a duty to ensure that the willmaker's instructions can be

effectuated having regard to the broader circumstances.

By way of an example, the solicitor who prepared Mr Smeaton's will was found to be negligent and Mr Smeaton's children were awarded in excess of \$233,000 plus costs. Mr Smeaton's last will gave his interest in a property to his children. However, Mr Smeaton owned the property jointly with his wife, and on his death, she received the property by survivorship. The solicitor was liable to the children as he owed a duty to Mr Smeaton and to his children to ensure that the necessary steps were taken to carry out Mr Smeaton's intentions, including checking property ownership and severing the joint proprietorship on the property.³ This was upheld on appeal⁴ and also endorsed in a later case, *Vagg v McPhee*.⁵

Similarly in *Miller v Cooney*,⁶ a gift of property by will failed due to joint ownership. The NSW Court of Appeal held that a solicitor preparing a will is under a duty to check the property ownership so the willmaker's intentions can be given effect to, but on the very specific facts of the case, did not hold the solicitor liable as his retainer was quite narrow.

In *Fischer v Howe*,⁷ the deceased's son successfully sued the solicitor, claiming the difference between what he received under the last will, and what he would have received had the deceased executed her new will. He was awarded almost \$1m. The solicitor was held to have breached his duty of care to the son by not advising the client to sign a stop-gap will to cover her against an unexpected death. The client was in her 90s, but reasonably healthy. She died unexpectedly 10 days later.

The Court of Appeal⁸ confirmed the duty, but overturned this decision on the basis that the client had not entirely settled her

instructions and had consented to delay in the will preparation. The High Court dismissed the application for special leave to appeal.⁹

The duty of care has been further extended in the Tasmanian case of *Calvert v Badenach*¹⁰ where a solicitor was found to owe a duty to advise the willmaker about the ramifications of not making provision for an estranged daughter and the strategies available to minimise the risk of a claim. The Court of Appeal held that this duty extends to the intended beneficiary. The intended beneficiary was awarded compensation equivalent to the amount awarded to the daughter in the family provision claim plus legal costs.

Although the willmaker had not alerted the solicitor to the fact that he had a daughter, the court imputed this knowledge to the solicitor because his firm held a previous will which referred to the daughter. The solicitor was said to be under a duty to make enquiries as to family members who could make a claim for further provision, to advise about the rights of family members to bring claims, the impact that could have on the willmaker's testamentary intentions, and of possible steps he could consider to ensure that his testamentary wishes were not defeated.

The decision was overturned on appeal in the High Court¹¹ on the issue of causation, but the High Court affirmed that the solicitor's duties as outlined.

This case extends the solicitor's duty in will preparation to provide broader advice, even if no such advice is requested. Clients do not know what they do not know and the solicitor has a duty to alert them to the impact their testamentary wishes may have.

The courts will, no doubt, continue to expand the duty. From *Calvert v Badenach*, the logical next extension is to require solicitors to advise willmakers that the proposed will may be impractical and not capable of being given effect to.

Practising exclusively in this area, many impractical and problematic wills come across our desks. As clients' affairs and the legislative framework become more complex, this is likely to only increase.

In a recent matter, an elderly lady gifted her investment property valued at \$1m equally to her two nieces, and the residue of her estate valued at \$700,000 to her nephew. One of the nieces resided in Greece, never having been to Australia. She was impoverished and this gift from her aunt was life-changing. She did not wish to be a landlord in Australia. The nephew wished to buy her out as he needed to park his inheritance somewhere. The unnecessary implications of the will were the Victorian stamp duty payable by the nephew on the purchase of the 50% interest and foreign resident withholding tax payable by the niece on the sale. The executors have also been put to the expense and trouble of seeking counsel's advice on the structuring and documentation of the sale and CGT implications. The unnecessary taxes and expenses will be in the region of \$100,000.

The deceased widely announced that she had divided her estate equally between her nieces and nephew. As values of assets changed over time, the division was no longer equal — the nephew's \$700,000 was made up of a 2009 Mazda car and cash, while each niece received real estate with a gross value of \$500,000 and a post-CGT cost base. Moreover, as neither niece had an attachment to the property, there was no reason for them to have been specifically gifted it. The advice the deceased appears not to have received is that gifting her entire pool of assets equally to the nieces and nephew would be fairer and save money and hassle. It is difficult to imagine that had she could have ignored such advice. It may now be negligent of the current advisers not to advise the executors to look to recoup the losses from the will drafter.

In another matter, the deceased's will appointed his wife as the executor of his will, but his substantial estate was left to his five children from a previous relationship. The wife had her own significant assets and did not look to the deceased for provision. However, the

couple's family home was an estate asset. The wife wished to purchase it from the estate at fair market value. The common law rule against self-dealing prevented her from transacting with herself. The wife sought agreement of her stepchildren to buying the house from the estate. Consensus on the price could not be reached, and the matter proceeded to the court for directions. Significant costs were incurred by the children and the wife in obtaining the court's consent for the wife to purchase her home. This could have been avoided by either the will incorporating a basic self-dealing clause or nominating more than one executor, or the wife receiving advice from the estate solicitor to renounce probate so another person could administer the estate. Either solicitor may be looking at a negligence claim against them in the amount of the litigation costs.

In a fresh matter, the only asset of the husband and wife was their family home, valued at \$600,000 at the time of making the will and \$900,000 at the wife's date of death. The home was owned by them as tenants in common in equal shares. The couple made mirror wills leaving each other a life interest in their half of the home and on the death of the survivor, outright to their own children from a prior marriage. The wife was 81 years old at the time of her death and the husband was 86, this was a 30-year marriage. They had both been in receipt of the full age pension and had no savings. As is standard with life interest clauses, the will directed the husband to pay all the outgoings on the home, to insure it and to keep it in good order. The husband could not afford to do this on a single age pension. He also could not afford to pay for home help. He sought a reverse mortgage on the property but was ineligible as he only owned half. If the property was sold, he would not have sufficient funds to pay an accommodation bond for a satisfactory nursing home as the life interest is not portable. The husband is now bringing a claim against the wife's estate for proper maintenance and support. Given his parlous financial state and the courts' view that a spouse's claim is paramount, it is difficult to see how he would not succeed.

In a case like this, standard costs to mediation are \$25,000 and to trial are \$40,000, on each side. As the wife's estate has no other assets, both sides' legal costs will be paid from the sale of the house. As this situation could have had

no other outcome, the husband is likely to look to the will drafter to recoup his losses for failing to alert him to the obvious shortcoming of this testamentary plan.

These three wills are disastrously impractical, incurring high legal costs and destroying priceless family relationships. It is a high price to pay for the missing obvious advice having regard to the wider circumstances and practical implications. It is foreshadowed that courts will incorporate such practical advice into the solicitor's duty to advise.

Typically, in *Re Marks; Letcher v Indian*,¹² Joyce's estate was valued at \$1.3m. Her will gave detailed directions for the retention of her rural property, construction of units and renting out at a discounted rate to ex-servicemen or their widows. The executor applied to the court for directions as the estate clearly did not have sufficient funds to construct units or maintain them, and there was no evidence that ex-servicemen would choose to live in that rural location. The court was asked to rule whether the gift was practical, and if not, whether it was of a general charitable intention that could be applied *cy-près* for the benefit of another charity for ex-servicemen, or if it failed altogether (and the estate would then pass on intestacy to Joyce's 15 cousins). The court found the will direction to develop the land to be entirely impractical and was doomed from the outset:¹³

"[the] language and structure of the will ... did not disclose a ... wider, dominant charitable intent ... in such circumstances, the trust fails *ab initio* and cannot be applied *cy-près*. While such an outcome is not entirely satisfactory, the Court cannot apply the estate funds toward an organisation such as Carry On (Victoria) in circumstances where the will does not disclose that it was the deceased's intention to leave funds for the general purpose of benefiting ex-servicemen. Consequently, the residuary estate is to fall to the deceased's next of kin in accordance with s 53 of the *Administration and Probate Act 1958*."

In this poorly considered will, the will drafter missed an opportunity to guide Joyce towards a sensible outcome which would have benefited a worthy charity. As there, technically, is no disappointed beneficiary and the loss is difficult to quantify, the will drafter has narrowly escaped a negligence claim.

Will drafting is an exceedingly technical area requiring a high degree of professional skill and care. The future of the duty to clients reaches beyond ascertaining

capacity or absence of undue influence and preparation of a valid will without delay and errors. The duty extends to provision of practical advice about the impact, consequences and outcomes of the terms requested by client. Solicitors would be breaching their duty of care to the willmaker and the intended beneficiaries if they merely act as the willmaker's mouthpiece and simply commit the client's testamentary wishes to paper, without properly advising them on the effect of those instructions.

To adequately discharge their duty, solicitors at the very minimum should:

- meet the client face-to-face when taking instructions;
- establish the identity of the client;
- obtain detailed insight into the client's personal, family, financial and emotional circumstances;
- test the instructions by checking asset ownership, talking to the client's accountant and financial adviser;
- ask many broad questions about family relationships and past willmaking history;
- test drive the will and the outcome the client wishes to achieve;
- actively advise about the practical implications of the client's testamentary wishes; and
- document all instructions, advice, impressions and conversations.

It is also imperative to carefully set out the scope of the retainer to the client.

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References

- 1 [1997] HCA 9.
- 2 *White v Jones* [1995] 2 AC 187; *Maestrale v Aspite* [2012] NSWSC 1420; *Fischer v Howe* [2013] NSWSC 462; [2015] HCA 35; *Queensland Art Gallery v Henderson Trout* [2000] QCA 93; *Watts v Public Trustee* [1980] WAR 97; *Summerville v Walsh* [1998] NSWCA 222.
- 3 *Smeaton v Pattison* [2002] QSC 431.
- 4 *Smeaton v Pattison* [2003] QCA 341.
- 5 [2011] NSWSC 1584; [2013] NSWCA 29.
- 6 [2004] NSWCA 380.
- 7 [2013] NSWSC 462.
- 8 *Howe v Fischer* [2014] NSWCA 286.

- 9 *Fischer v Howe* [2015] HCA 35.
- 10 [2014] TASSC 61; [2015] TASFC 8.
- 11 *Badenach v Calvert* [2016] HCA 18.
- 12 [2017] VSC 665.
- 13 *Ibid* at [74].



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