

WHERE THERE'S A WILL THERE'S AFFRAY

The drafting of wills for composite families can be complex and full of traps. Practitioners need to canvass all issues with the will-maker.

Most claims in wills and estates that relate to drafting errors involve will-makers who have been married more than once. It seems that the number of composite families and couples who have been married more than once is increasing. These complex family connections make for far more complex testamentary dispositions, which can expose legal practitioners to mistakes if they are not careful.

Typical second-time married will

The typical will for a couple who have been married before and who both have children from an earlier marriage involves leaving various specific assets to the will-maker's own children, then the house (or the will-maker's share in it) as a life interest to the spouse with residual to the will-maker's children or sometimes a combination of both spouses' children. Usually there is also a different combination of bequests if one spouse dies before the other.

For example, a husband and wife came in together to have wills drawn. They had been de facto partners for 30 years. The wife had two adult sons from an earlier marriage. She intended to give her de facto husband a life interest in their matrimonial home and the balance of her estate, worth over \$1 million, to her sons. The husband, who had very few assets and no children, left everything to his wife and, if she predeceased him, to his sister. The wife had arguably not made adequate provision for the husband, but the firm was in a conflict position in giving the husband any advice about it.

When taking instructions from both spouses for wills, practitioners should warn both parties at the beginning that they will have to be referred elsewhere if their instructions raise conflict issues.

Drafting mistakes

Mistakes have occurred in the drafting of wills, particularly where the arrangements are complex.

having someone else in the office cast a fresh set of eyes over the provisions and then discussing with the will-drafter what they mean.

Life interests

Many people seem to think that leaving a second spouse a life interest in the matrimonial home with the remainder going to the children is a good way to balance all interests. The problem some practitioners have highlighted to us is that often all the will says is that the beneficiary is entitled to a life interest, and nothing more. This leaves the life-interest holder having to comply with the provisions of the *Settled Land Act 1958* (Vic) in relation to disposition of the property when they get to the stage of needing to sell and move to more appropriate accommodation, such as a retirement village or nursing home.

Accommodation of this sort usually requires a substantial accommodation bond or other payment, which is necessarily funded from the sale of the person's home. Using proceeds of sale of property to buy a place in such accommodation may well be considered a "wasting asset" and not be permitted under the *Settled Land Act*. Without any direction in the will as to how the life-interest holder may deal with the property, they are left having to seek the consent of the trustees or the court if they want to sell the property and use the money for an accommodation bond in a nursing home or retirement village.

Many families can reach agreement on this, but there are some situations in which the life-interest holder is estranged from their step-children, who are the executors and residuary beneficiaries. Consent is often withheld, resulting in the life-interest holder having to seek the consent of the court in a contested hearing.

Practitioners taking instructions and drafting wills where life interests are being contemplated need to canvass all issues with the will-maker about what rights the life tenant should have to deal with the property and draft clear directions in the will as to what the life tenant is entitled to do. ●

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Conflict of interest

In many instances couples go to a solicitor to have both their wills drawn at the same time. There is often no conflict of interest in acting for both parties and drawing their wills, especially when they leave everything to each other and then to the children. From our experience with the claims we see and the queries we receive, there are times, particularly when couples have previously been married, when one of the parties seeks to leave a smaller than would be expected amount to their spouse and larger amount to their children. Often it is a life interest in the matrimonial home or a small amount of money. Practitioners should be alive to the issue of conflict in such situations.

For example:

- There is only a residuary clause for one set of outcomes, for example, when the will-maker's spouse dies first, but no residuary clause where the will-maker dies first.
- A life interest is left to the spouse and then the residuary clause also lists the spouse. The clause specifically leaving the remainder interest in the house to the children is accidentally omitted.
- No residuary clause is included at all.

Practitioners drawing complicated wills for couples who have been married before should ensure they "road test" the provisions of the will to ensure it covers all scenarios and that residuary clauses operate the way they are intended to. "Road testing" may involve

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