

CASE UPDATE – WILL PREPARATION DUTIES

A recent Queensland decision is a timely reminder of practitioners' duties when preparing wills.

The Queensland ruling of *Talbot & Ors v Boyd Legal (A Firm) & Ors* [2023] QSC is a recent example of a professional negligence claim brought against practitioners by third party beneficiaries in the context of a large and complex estate with a variety of investment assets.

The case is a useful reminder of solicitors' duties when preparing wills. In particular, a practitioner's overriding duty is to prepare a will which accords with the client's instructions – even when the solicitor has advised against the inclusion of certain provisions. Further, when clients are considering updating their will, it is important to establish whether the client has a concluded testamentary intention to effect a new will. It's not part of the solicitor's duty to press a client to execute a new will if the client doesn't have a concluded testamentary intention.

In this case, the plaintiffs' claims were unsuccessful. The result turned on individual facts and the Court's acceptance of the evidence of the testator's solicitor. The decision is being appealed.

The facts

Mr Talbot died in a plane crash in Africa in 2010. He had investments in resource companies and properties in Australia and overseas. He was survived by his spouse Ms Talbot, their two infant children and two adult children from a former marriage.

Mr Talbot left a will dated 29 November 2002 that was prepared by Mr Boyd, a Queensland solicitor. It appointed a Texas businessman (Mr Bret) as sole executor and provided for the residue of Mr Talbot's estate to be distributed to the beneficiaries in specified shares.

From late 2007 Mr Talbot had liaised with Mr Boyd about preparing an updated will but it was never completed because he remained undecided on certain important matters, including the percentage allocations of his residual estate. In August 2010 probate of the will was granted to Mr Bret and he became the sole executor of the estate. There was no contest in relation to the grant of probate.

Ms Talbot became dissatisfied with Mr Bret's conduct as executor. Following a mediation in June 2012, Mr Bret agreed to resign as executor and Mr Boyd was appointed as replacement administrator (with the support of all beneficiaries). In 2015 Ms Talbot became dissatisfied with Mr Boyd's performance as administrator and wanted him removed. She alleged that Mr Boyd had delayed in the realisation of share investments held by the estate thus reducing her prospective distributions as a beneficiary. Mr Boyd denied her claims of maladministration and said he had followed the advice of professional advisers in relation to the timings of asset realisations.

Claims against the solicitors

Ms Talbot (and her two daughters) brought various claims including what is commonly referred to as disappointed beneficiary claims against Mr Boyd in relation to alleged negligent advice provided to Mr Talbot in preparing the will – including naming Mr Bret as sole executor, not advising Mr Talbot (after the execution of the will) that he should update his will and failing to produce an updated will or other testamentary document before his death. Ms Talbot also brought

a secondary claim against her own solicitors for failing to advise her of potential claims against Mr Boyd and not advising against Mr Boyd's appointment as a replacement administrator.

The decision

In a lengthy judgment, Boddice J dismissed all the plaintiffs' claims. The dismissal of the will preparation claims turned on factual findings that Mr Boyd had satisfactorily advised Mr Talbot of the risks of appointing a single overseas executor and that it would be preferable for him to appoint more than one Australian based executor. Mr Talbot didn't accept that advice and instructed Mr Boyd to prepare the will with Mr Bret as sole executor.

Boddice J observed that:

- the solicitor's role is to "obtain instructions, to advise in respect of those instructions, and thereafter to prepare the will in accordance with those instructions, even if they be contrary to the solicitor's advice"
- it was a matter for the testator to determine who was to be the executor of his estate and, having done so despite advice against it from Mr Boyd, there was no breach of duty by Mr Boyd preparing a will with that named executor
- practitioners don't have a duty to insist that a testator make a different will, rather the duty is "to use reasonable care and skill in giving effect to the client's testamentary intentions: *Badenach v Calvert*."

Boddice J further held that Mr Boyd's retainer came to an end following the will's execution and it then became the testator's responsibility to contact Mr Boyd if he wanted to update his will, ie, Mr Boyd had no continuing duty to advise Mr Talbot on the appropriateness of his will and whether it may need updating. Further, Mr Talbot never provided any finalised testamentary instructions to Mr Boyd in relation to an updated will or testamentary document. Boddice J accepted Mr Boyd's evidence that he had several discussions with Mr Talbot where he was undecided on the terms of a new will. Boddice J noted that attempts to hurry a client in relation to the execution of a will can be "fraught with danger".

The case against Ms Talbot's solicitors was also dismissed on the basis there had been no breach of duty. ■

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TIPS

- Solicitors have a duty to prepare a will in accordance with the client's instructions – even when the solicitor has advised against the inclusion of certain clauses. It is best practice to explain fully the implications and risks to the client and record that advice in writing.
- When clients are considering updating their will, it is important to establish whether the client has a concluded testamentary intention to effect a new will and properly explain to the client what is required to be able to complete the will.