



TOP 4 WILLS MISTAKES AND HOW TO NOT MAKE THEM

Common mistakes in wills drafting are often obvious when it is too late.

Mistakes made when drafting wills continue to be a source of professional negligence claims against practitioners. The types of mistakes are recurring and often obvious when looked at with fresh eyes. This column looks at the top four types of mistakes and how you can prevent them, or potentially fix the ones already made.

1. Not checking the property title

The LPLC sees claims where the practitioner relies on the client's understanding that they hold a property either as tenants in common or in their own name, without conducting a title search to check the position. After the client's death, it's discovered the property was held as joint tenants and the surviving tenant is entitled to the whole property instead of it going to the intended beneficiaries.

A variation of this is where it is later discovered that property to be bequeathed under the will was not personally owned by the willmaker as instructed but by a company controlled by them, or they only had a right to reside. Again, a title check could have clarified this.

2. Ineffective or missing residuary clause

The LPLC sees claims where residuary clauses are ambiguously drafted or inadvertently omitted from the will. In a recent example the willmaker intended to leave a life interest in property to his wife, if she survived him by more than 30 days, and then the remainder interest on her death to nominated friends and charities. While the will had a clause specifying what was to happen if the wife predeceased him, it omitted the clause dealing with the remainder interest in the event she outlived the willmaker by more than 30 days.

3. Ambiguous descriptions of beneficiaries

Using a collective term for beneficiaries such as "my children" without defining it leaves room for ambiguity as to whether it might also include stepchildren or adopted children. In these situations, the ambiguity may need to be resolved by costly court action with an uncertain outcome dependent on the court's findings about different issues. These claims often arise from poor communication with the client about their circumstances, particularly in blended families, and their testamentary intentions.

4. Drafting errors

Simple drafting mistakes can also result in the will not achieving the willmaker's intentions and a professional negligence claim by disappointed beneficiaries. Some recent mistakes have included errors in bequests, naming the wrong beneficiary, misdescribing assets, wrong dates and wrong cross references. Other examples include clauses "dropping out" of the will when preparing multiple drafts or leaving in clauses in subsequent drafts that should have been removed.

Strategies to avoid claims

- Obtain full instructions from the willmaker about their family arrangements and make detailed file notes. It may also help to draw a diagram of the family tree and assets to make checking and road-testing the will easier.

- Check the client's instructions about property ownership and do title searches. Build this small cost into your fees and communicate the value to the client. Getting this detail wrong can result in unfulfilled wishes and unintended financial consequences for those left behind, not to mention a potential claim against the firm.
- Use plain language in your drafting and think about the meaning and effect of each clause.
- If you do use collective references to beneficiaries, such as "children", define what this means.
- Always include residuary clauses. Test the will using various scenarios to determine that the assets are distributed as intended.
- Carefully proofread the will and have a second pair of eyes review it. A peer review of the draft will by a colleague before providing it to the client is good risk management.
- Send the draft will to the client with a covering letter confirming their instructions and advising on any relevant issues and risks.
- When executing the will, go through it again with the client to make sure they understand it. Record this process and who was present.
- To rectify mistakes and defend claims it is critical to have contemporaneous records of the willmaker's intentions and capacity, and the practitioner's advice. Review the firm's document retention procedures for estate planning files. They should be kept for at least seven years after the final distribution of the estate.

The reality is that mistakes may have already happened and be hibernating in the firm's deeds room. While reviewing all wills held in deeds may not be practical, some firms contact clients with wills in deeds every five years to ask if they would like to review and update them. This may help to spot any mistakes and prevent claims down the track. It is also a good client service and business development practice.

Further LPLC resources

Preparation of Wills Checklist

Testamentary Capacity Checklist

Tenants and Tenants in Common – client resource. ■

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TIPS

- Use plain language when drafting wills and invest in new precedents.
- Do title searches.
- Proofread and road test your wills to make sure they operate as intended.
- Carefully document the willmaker's instructions and provide written advice. Get the client to confirm their instructions and that they understand the advice in writing.
- Keep will files for at least seven years after the estate is distributed.
- Contact clients periodically to ask if they would like to review and update their will.