

STAY ON THE ESTATE

Practitioners handling estate matters should not get involved in family disputes.

As disputes between family members arise frequently in estate matters, practitioners need to be alert to their duties to executors and beneficiaries as well as potential conflicts of interest.

LPLC has received claims where practitioners handling an estate were not proactive in distancing themselves from a dispute between beneficiaries. This left the door open to allegations they ignored a family member's rights or favoured one family member over another. Risk factors include situations where the practitioner has been the family solicitor for a long time and feels pressure to assist all family members. Mixed instructions from family members is another red flag.

Practitioners can be overly optimistic about resolving disputes quickly or be enticed by the prospect of additional fees for handling the dispute.

Dispute between co-executors

In one claim, a practitioner acted on a deceased estate where the deceased's son and daughter were her executors. The son was a longstanding client of the practitioner's firm in other matters. Before obtaining probate, the daughter alleged the son had misappropriated money from their mother's bank account during her lifetime. The mother had authorised her son to operate her bank account and he said the money was a gift for being his mother's primary caregiver.

The daughter was reluctant to sign the probate application without the money being included in the inventory of assets and liabilities. She claimed the practitioner offered to assist the siblings resolve their dispute and when he advised that the alleged debt did not need to be specified in the inventory, she agreed to proceed with probate.

The dispute continued and prior to distributing the assets the practitioner referred the siblings to independent lawyers. The son and daughter subsequently instructed the practitioner to hold an amount in a controlled money account pending resolution of their dispute and to distribute the rest of the estate.

The daughter then alleged the practitioner favoured her brother and gave negligent advice about the inventory and amount claimed by the son as a gift. She argued that signing the probate application was in effect an agreement that the estate had no claim on the alleged debt. She sued the practitioner claiming damages comprising 50 per cent of the alleged debt plus fees paid to another law firm for advice.

The practitioner eventually had the proceedings dismissed as the daughter had not brought proceedings against her brother.

Although the siblings received independent advice resulting in the practitioner holding money on trust pending resolution of the dispute, the practitioner should have recognised the potential conflict earlier when the daughter raised concerns. The daughter should have been referred for independent advice at that stage, with the practitioner staying clear of the dispute.

Dispute between executor and beneficiary

In another claim, two brothers were to share equally in their deceased mother's estate. One was sole executor. The other had lived with their mother and looked after her affairs pursuant to a power of attorney. The executor suspected his brother had been using their mother's money for his own purposes and instructed his practitioner to investigate.

The practitioner advised the executor that the estate potentially had a strong claim against the brother but the executor was not entitled to distribute the estate other than in accordance with the will unless his brother agreed, or steps were taken to prove the debt. This warning was not given in writing.

The executor argued he was entitled to his half-share of the estate plus half of the amount he alleged his brother had taken and instructed the practitioner to distribute accordingly. The practitioner acceded to the executor's demands by sending a cheque to the brother's lawyer with a letter referring to the executor's allegations. The practitioner later said this was intended to pressure the brother not to pursue any claim for his full half-share. No advice was given to the executor on the options of the estate suing the brother or the practitioner interpleading.

The brother obtained a freezing order against the executor but by this time the executor's whereabouts were unknown. The brother claimed the practitioner should not have made the distribution and was liable under the rule in *Barnes v Addy* (1874) LR 9 Ch App 244, whereby a trustee's responsibilities can be extended to third parties who knowingly receive property in breach of trust or knowingly assist in a breach. LPLC's panel lawyer thought the practitioner was exposed and the claim was settled. ■

This column is provided by the **Legal Practitioners' Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.



TIPS

When acting on an estate matter:

- be alert to potential conflicts of interest
- refer co-executors for independent advice when you receive mixed instructions
- do not advise co-executors on any issues in dispute
- be proactive to avoid delays in applying for probate
- make an interim distribution if appropriate.