

WILL IT BE RIGHT?

Mistakes in the preparation of wills can be avoided with careful proofreading.

In the 2016-17 policy year, wills and estates claims accounted for 11.7 per cent of the total cost of claims and 8.4 per cent of the total number. In the previous 10-year period, these figures were 6.8 per cent and 3.2 per cent respectively. This spike is largely due to mistakes in the preparation of wills.

Avoid common mistakes

Examples of such mistakes include:

- failing to check instructions or making assumptions about ownership of land
- incorrect clauses or details left in the new will when a previous document is copied over
- failing to make amendments pursuant to instructions
- naming a beneficiary or describing an asset incorrectly
- internal inconsistencies such as leaving a life interest in a property and residue of the estate to the same person
- missing clauses or having the wrong draft of a will executed due to poor version control
- missing pages
- formatting error wording included in the executed will.

Many of these mistakes could have been avoided if the practitioner had recognised they were rushing and stopped to think more carefully.

Resist the temptation to copy across previous documents and think you can amend them to suit. Use proper precedents and a checklist.

Be disciplined in setting aside sufficient time for proofreading and do it when you can look at the document with fresh eyes. Printing the document and reading it aloud helps many practitioners.

When proofreading, think about the meaning of the clauses as well as checking the language. Road test the will to ensure it works the way it was intended. Where possible, have a colleague check the will, especially if clauses are unusual or complex or you have very little time between drafting and proofing.

Residuary clauses

Practitioners should ensure residuary clauses are given proper attention. LPLC has received claims when residuary clauses have been left out, such as where the will maker left numerous bequests and nobody at the firm remembered the “catch all” clause at the end in case anything had been forgotten. Always include a

residuary clause. Address the position of the will maker surviving and predeceasing their partner, with residuary clauses for both scenarios.

Even more claims are attributable to mangled residuary clauses. These mistakes are diverse in nature but inelegant drafting of the clause is often the problem. For example, one clause read “to pay or transfer six parts to such of them that survive me equally namely A, B, C, D and E” (five nominated beneficiaries). This resulted in confusion about whether six parts were to be shared between the five beneficiaries, or five beneficiaries were to receive six parts each.

Another mistake is failing to describe residuary beneficiaries adequately. In one claim, the will maker wished to leave the residuary of her estate to her siblings and their children in equal shares, except for one nephew who had predeceased her. She wanted to leave his share to his children. The clause was drawn as follows:

“to hold the balance then remaining . . . upon trust for such of my siblings and children and grandchildren of my siblings and descendants as shall survive me”.

The clause was ultimately considered to be too vague and wide. It was unclear whether “descendants” went beyond children of siblings and grandchildren of siblings, and there was no restriction limiting it to people alive at the time of the will maker’s death.

A junior lawyer had adapted the office precedent that used the words “and descendants” in the residuary clause but had not given them proper consideration.

There was no suggestion the will maker intended the class of beneficiaries to be that wide. ■

This column is provided by the **Legal Practitioners’ Liability Committee**.

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TIPS

- Develop and use proper precedents and checklists.
- Make proofreading a priority.
- Check the description of assets and beneficiaries.
- Consider the substantive meaning of clauses even when using a precedent.
- Road test your drafting to ensure clauses will do what is intended.
- Include an appropriate residuary clause in every will.

