

The logo for K&L GATES is displayed in white, uppercase letters on a red rectangular background. The background of the entire slide is a dark blue field with a network of thin white lines connecting various points, some of which are bright blue bokeh lights and small red plus signs.

K&L GATES

Preparing a Will: Do the basics well

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Who are we?



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Wills are important!

- A will is often the most important document a person will ever make so we owe it to that person to ensure we get it right.
- LPLC regularly deal with claims arising from avoidable will making issues, often relating to lapses in the recording of instructions and/or drafting of the will.
- Get the basics right and avoid the time, cost and distress caused by a professional negligence claim.

Wills – a persistent exposure point for solicitors

- In FY2022/2023, LPLC received 44 claims arising from Wills & Estates issues.
- Professional negligence claims arising from Wills & Estates issues can create exposure in the millions of dollars, especially where the estate in question is wealthy.
- Issues in the drafting of a will often cannot be easily rectified, as they only become apparent after the will maker has died.
- **Today's objective – to refresh you on the key steps in preparing a will and to highlight some potential traps in doing so.**

The basics



Taking instructions

- Identity check
- Capacity check
- Influence check
- Recording instructions



Checking your instructions

- Instructions check
- Estate v non-estate assets



Drafting the will

- Precedents
- Be precise
- Double check your work!
- Making sure your client understands the effect of their proposed will by providing clear written advice on it



Executing the will

- Ensure execution is valid
- Remote execution and witnessing requirements

Taking instructions – your first opportunity to minimise risk

1

Who is instructing you? Is it the testator?

2

Does the testator have **testamentary capacity**?

3

Are the testator's **instructions unusual** or are they being **influenced or pressured** by someone else?

4

Document and confirm your instructions **in writing**

Checks on your potential client

- A will is a significant document, which usually stands to impact the position of multiple individuals and/or organisations.
- So, before taking any instructions to prepare a will, meet with the potential client in person and verify their identity.
- Then, make an assessment as to the testamentary capacity of the will maker:
 1. Does the will maker understand they are making a will and appreciate the significance and effect of doing so?
 2. Is the will maker aware of the nature, extent and value of the estate over which they have a disposing power?
 3. Is the will maker aware of the nature, extent and claims that could reasonably be made to their estate?
 4. Is the will maker able to freely evaluate and differentiate the strengths of those claims?

Checks on your potential client

- A solicitor taking instructions for a will has a duty to ensure the will maker has testamentary capacity and is giving instructions freely and voluntarily.
- *Bailey v Maddock* [2022] VSC 346 – helpful reminder of matters to consider when assessing the testamentary capacity of an elderly will maker.
- Take instructions from the will maker in person and alone (other than exceptional cases – for example, spouses wanting mutual wills in uncontroversial circumstances).
- If you suspect that the will maker is not giving instructions freely and voluntarily (eg they are being pressured by a family member) or if the instructions are highly unusual, carefully investigate the basis for those instructions.
- Trust your instincts – if you suspect the will maker is being unduly influenced, then do not be afraid to refuse to act. In so doing, document your reasons and if possible, confirm your position in writing to the potential client.

Taking your client's instructions

- As always, take a thorough file note of your client's instructions as to the contents of their proposed will. Consider recording the conference, if appropriate/desired.
- Some "checks":
 - Does the client have any previous will(s)?
 - If so, do those previous wills make any noticeably different provision to that contemplated in your instructions? Is someone being left out of the proposed new will?
 - Make enquiries as to the will maker's family and/or personal relationships.
 - Check whether assets and liabilities are held personally or through some other structure – identify which assets and liabilities form part of the will maker's estate.
- **Confirm your client's instructions in writing.**

Company and property searches – getting the estate assets right

- Assume that your clients do not understand or appreciate the difference between owing property as joint tenants or as tenants in common.
- If you can take steps to verify your client's instructions as to the physical address or title details for real property or their shareholding in a company, do so! Price the search costs in to your costs agreement.
- Examples of claims arising from a solicitor relying solely on their client's [incorrect] instructions on their assets:
 - a will purportedly gifted real property to a beneficiary, which gift failed because it was actually owned by a company associated with the will maker; and
 - a will gifted various parcels of real property to different beneficiaries, but the title references were incorrectly described such that certain parcels unintentionally formed part of the residuary estate.
- A solicitor's exposure may not be limited to the costs of an application to rectify the will in the above circumstances – a professional negligence claim may follow.

Non-estate assets

1

Superannuation

2

Company/Trust assets

3

Property owned as joint tenants / joint bank accounts

Ask yourself – does the client require estate planning assistance beyond the preparation of their will?

Drafting the will

- Precedents – use with caution.
- Be precise! Incorporate “back up” provisions in case the primary clause fails.
- For example:
 - **use verified title references** when referring to real property in a will rather than physical addresses or phrases such as “*my holiday house*”; and
 - **name the children and descendants** to receive gifts under the will and make clear provision for what is to occur if a named beneficiary pre-deceases the will maker (eg will their child/children inherit their gift/share?)
- Does the will establish a testamentary/discretionary trust? Ensure it does not conflict with the balance of the will, especially any specific gift clauses.
- Proof read your draft! This is especially critical if you have not personally drafted (ie the will has been prepared from a dictation or by another practitioner/assistant using precedents).

Life interest –v- right to reside

- Life interest: a right to receive income from a particular estate asset for the relevant beneficiary's lifetime, with the capital preserved for the benefit of the remainder beneficiaries.
- Right to reside: a right to live in a property for the time stipulated in the will.
- **Key distinction:** a life interest creates an equitable interest in the estate asset and subject to the terms of the will, a right to derive income from it in their lifetime.
- *McElligott v Public Trustee of Queensland* [2013] QSC 314 is a useful example of where problems arise in failing to precisely define whether a beneficiary has a life interest in property or instead, a right to reside in/occupy it.
- *McElligott* also highlights the importance of considering how potential estate liabilities may be met (and the implications they have for gifts under the will) when taking instructions.

The testator suggests appointing you as executor...

- Taking an appointment as an executor will result in you later having substantial obligations in relation to the will maker's estate and its beneficiaries. The request is often made because the will maker anticipates there will be familial issues!
- Potentially costly, emotional and elongated burden dealing with estate-related issues and beneficiaries, especially any that are disappointed, upset or impatient.
- Do not assume you will be entitled to commission as an executor (see section 49A of the *Wills Act 1997* (Vic) and section 65B of the *Administration and Probate Act 1958* (Vic)).
- Potential conflict issues:
 - Receiving commission; and
 - Executor draftsman – what if the terms of the will are disputed/challenged?

Advising your client on their will

- Provide your client with **written advice** on the terms and effect of their will.
- In so doing, confirm (perhaps again) the will maker's testamentary instructions.
- Still meet with the client to “road test” the effect of the draft will before finalising it – get them to explain the effect of the will to you.
- Obtain confirmation in writing from the client that they understand the terms and effect of the will and it accords with their instructions and is accurate.

Family provision claims

- Familiarise yourself with the persons eligible to make family provision claims pursuant to Part IV of the *Administration and Probate Act 1958* (Vic) – see section 90 for the definition of “eligible person” in that regard.
- If an “eligible person” is being left out of a will, document the reasons why they are being left out in detail and have the client set them out in a separate document (eg an affidavit) or indeed in the will itself.
- Advise the client as to the potential family provision claim that may be made against their estate.
- A clearly scoped retainer letter will assist in defining the extent of the advice to be provided to a will maker.
- Excluding children with a disability – the will maker should exercise caution.

Execution of the will



“In person” execution/witnessing

Still the best means of executing a will.

Avoid handwritten alterations to the will – quickly amend it!

Avoid witnesses who are beneficiaries (or their spouse or partner) if possible.

Check the will to ensure it is properly executed before the client/witnesses leave.



Remote execution/witnessing

A development from the COVID-19 pandemic. A “special witness” is required.

Re Curtis [2022] VSC 621 is the leading case.

Revisit any remotely executed wills to ensure the execution meets the procedure formulated in *Re Curtis*. If not, have the will re-executed.

Remote witnessing of wills

- Section 8A of the *Wills Act 1997* (Vic) sets out the remote execution procedure for wills.
- *Re Curtis* [2022] VSC 621 – a remotely executed and witnessed will during lockdown:
 - On 7 June 2021, Mr Curtis remotely executed his will before two witnesses using Zoom videoconferencing and DocuSign software.
 - The witnesses did not sight Mr Curtis operating the second laptop to execute the will using DocuSign (the second laptop was out of frame).
 - Mr Curtis died on 21 June 2022, leaving the 7 June 2021 will.
 - The Registrar of Probates referred the probate application to a Judge for determination in circumstances where there was uncertainty as to whether there was compliance with the remote execution procedure under the *Wills Act 1997* (Vic).
 - Specifically, were the witnesses required to specifically observe Mr Curtis operating the second laptop and applying his electronic signature on the will for the purposes of the remote execution procedure?

Remote witnessing of wills

- Key takeaways from *Re Curtis* [2022] VSC 621:
 - the Court must be satisfied that the detailed and complex remote witnessing procedure has been complied with in its entirety, which will require close attention from all participants but especially the solicitor;
 - cameras must be positioned so that they clearly show the relevant signatory operating the computer or other device being used to apply their signature to the will to the other signatories;
 - contemporaneously use the screen sharing function to demonstrate the application of the relevant signature to the will;
 - obtain oral confirmation from all participants as to the witnessing of the application of the signatures to the will;
 - recording the video conference is best practice – we consider it assisted the Court in ultimately deciding to admit the will as an informal will in this instance.

Helpful LPLC materials

- LPLC has prepared a number of helpful materials to assist you in taking instructions in relation to a will – for example:
 - [Will instructions file note](#)
 - [Preparing your will – instructions for your legal practitioner document](#)
 - [Preparation of wills checklist](#)
 - [Testamentary capacity checklist](#)
- REMEMBER – there is no “one size fits all” in this context, but the above materials flag critical issues on which you must obtain instructions.
- Use LPLC’s materials to develop your own checklists!

Record keeping

- Rule 14.2 of the Australian Solicitor Conduct Rules – client files/records *may* be destroyed 7 years after the completion or termination of the relevant engagement, **subject to** any client instructions of legal obligations to the contrary.
- *Public Trustee of Queensland as a Corporate Sole* [2012] QSC 178 – solicitors holding a will on behalf of a testator do so as a bailee.
- Adopt a common-sense approach and always consider the prospect of litigation as part of any decision to preserve or destroy client files/records. Litigation can arise well after 7 years since the completion or termination of the relevant engagement.
- Retain original wills and will instructions indefinitely – any document potentially of evidentiary value.
- “Digitise” your hard copy files.

Key takeaways from today

1

See your potential client alone and promptly make assessments as to testamentary capacity/undue influence.

2

Take detailed instructions from your client on their proposed will and confirm them in writing

3

Verify your client's instructions by reference to company and property searches

Key takeaways from today

4

Be precise when drafting wills and be cautious in using precedents. Double/triple check your work before sending it to the client!

5

Send a detailed letter of advice to your client when providing them with their draft will

6

Ensure the will is properly executed before allowing the client and/or witnesses to leave

Q&A



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