

# Wills Drafting Tips

Presented by Phil Nolan | Risk Manager | LPLC

# Quote

Death opens unknown doors.

*John Masefield*



# 5 key points

1. Obtain detailed instructions from the will maker
2. Keep good file notes
3. Obtain a title search for any real estate
4. Do test case scenarios on the will to ensure that it works as intended
5. Have a second set of eyes read the draft will



# Agenda

1. Introduction

3. New LPLC resources

5. Resources

2. Claims data

4. Drafting errors

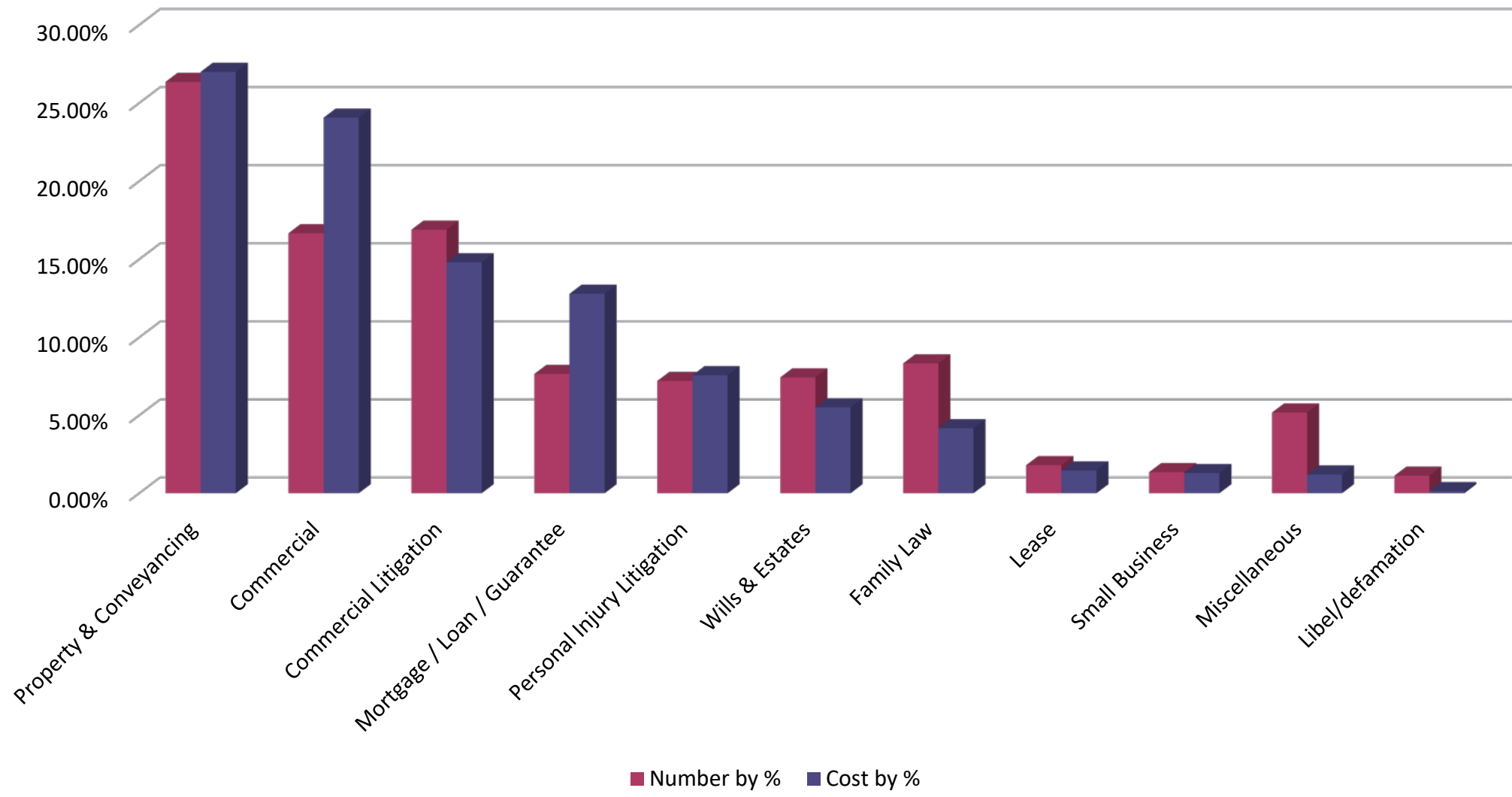
6. Wills and ethics

# INTRODUCTION

# CLAIMS DATA



# Claims statistics for 2020-2021



# Claims trends

- Not checking the certificate(s) of title
- Residuary clause issues
- Other drafting errors





# Poll

On what basis do you identify any real estate owned by the will maker:

- a) Rely on instructions
- b) Title search
- c) Rates notice
- d) Land tax assessment
- e) Lassi map
- f) Copy mortgage
- g) Name search



# Poll

Do you always do a title search for all real estate which may form part of the will maker's estate?

- a) Yes
- b) No





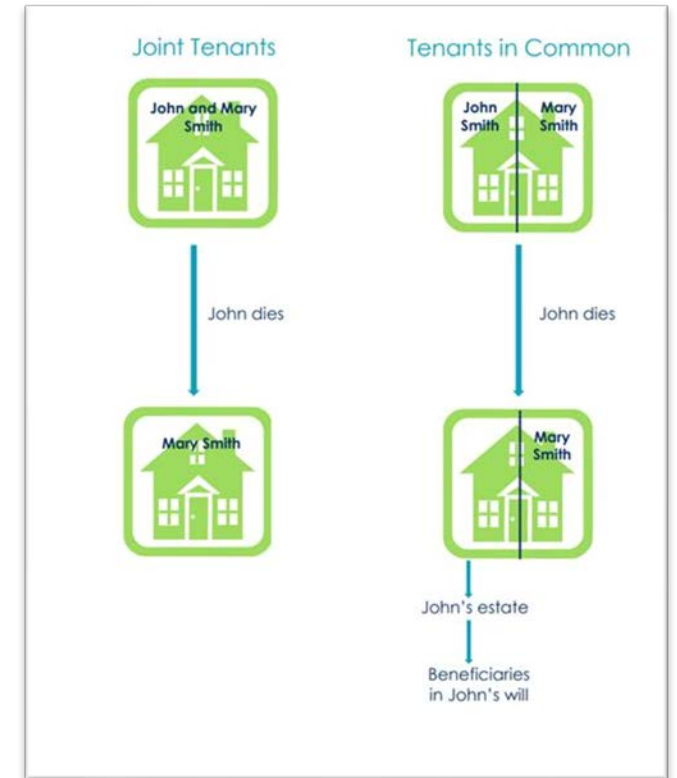
# Drafting wills - claims

- Not checking how the real property title was held
  - Second-time married
  - De facto
  - Separated
- Not checking whether the interest was freehold or leasehold (retirement village)
- Not checking ownership



# Lessons

- Build the cost of the title searches into your fees
- Use the LPLC visual aid when talking about joint tenants and tenants in common
- Audit your wills in deeds to look for life interest gifts or assumptions about the manner of holding
- Contact clients who have wills 5 years or older to suggest they review them



# NEW LPLC RESOURCES



# Hot topic

## Will instructions file note

It is a fundamental principle that the instructions must come from the testator.]

Date  Time Start  Time End  Units

Matter  Matter No.

Type of meeting (e.g. phone, face to face, video conference)

Location where face to face

Author

Attendee

Is this will urgent?  No

Yes,  
State reason(s):

Date in diary to follow up client about finalising will: ...../...../.....

# Hot topic

## Will instructions information

*To prepare your will we need to know specific information about you, your family and your assets. The information you provide will be kept confidential and only used for the purpose of preparing your will. We suggest you keep a copy of this form as the information will assist your executor(s) to identify your beneficiaries, assets and records and some questions have been included for this reason./*

### Your personal details

Birth certificate name		Also known as		Former name(s)	
Current residential address		Current occupation		If retired – occupation prior to retirement	
<input type="checkbox"/> Male	<input type="checkbox"/> Female	<input type="checkbox"/> Other	<input type="checkbox"/> Prefer not to say		
Date of birth		Place of birth (town and country)			



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# DRAFTING ERRORS



# Poll

What wills precedents do you use?

- a) Hutley's Australian wills precedents
- b) LEAP / By Lawyers precedents
- c) Own firm precedents
- d) Other – please specify (in the chat)



# Residuary clause issues

- Second time married
- Change in technology

## Examples

1. Two lines missed
2. Technology fail
3. Missing clause



# Residuary clause – missing words

*OUT of the money to arise from such calling in and conversion or out of my ready money my Trustee shall pay or provide for my debts and funeral and testamentary expenses and all probate estate and other duties payable by reason of my death in respect of my estate and shall invest the residue of such moneys and shall hold such investments and all parts of my said real and personal estate for the time being unconverted (hereinafter called “my residuary estate”) UPON TRUST as follows: to pay or transfer six parts to such of them that survive me equally namely A, B, C, D and E’ (five nominated beneficiaries).*

# Residuary clause – technology failure

*Subject to clause Error! Reference source not found* Out of the money to arise from such calling in and conversion or out of my ready money my Trustee shall pay or provide for my debts and funeral and testamentary expenses and all probate estate and other duties payable by reason of my death in respect of my estate and shall invest the residue of such moneys and shall hold such investments and all parts of my said real and personal estate for the time being unconverted (hereinafter called “my residuary estate”) UPON TRUST as follows:.....

# Residuary clause – missing



# Lessons

- Road test your wills to make sure they cover all the bases and residuary clauses exist for all permutations
- Proofread the will – you need someone with fresh eyes to ensure it operates the way the will maker intended it





# Poll

## Background

Peter has recently remarried, and his new wife is 6 months pregnant. Peter has two adult children from his previous marriage and his new wife has one toddler from a previous relationship.

Peter wants to make a will giving:

- 10% to his first wife
- 40% to his second wife
- Residue divided equally amongst his children



# Poll

## Question

How would you describe Peter's children in his will?

- a) Children
- b) Children and stepchildren
- c) Include name for each child



# Other drafting errors

- Sister/executor and her husband were to have a right to reside in the testator's property, but the will gave the right to the two executors
- The will correctly listed the street addresses of the properties but referred to the wrong lot numbers
- Reference to 'children' instead of 'stepchildren' or the 'husband's children'



# Other drafting errors

- Life interest and residue left to the same person
- Amending a will to add in a trust but not removing the clause leaving the assets to the son
- Spelling mistakes especially names of beneficiaries



# Other drafting errors

- Bequest clause in the wrong place
- Clause missing from the will because of multiple drafts
- Clause remaining in the will that should have been deleted



# Exercise

## Re-write this in plain English:

IN WITNESS WHEREOF I the testator  
hereinbefore named have hereunto set my  
hand to this my last will and testament typed  
upon this and the.....preceding pages  
this.....day of....



# Lessons

- Write in plain English and use good punctuation
- Do test case scenarios on the will to ensure that it works as intended
- Have a 'second pair of eyes' review the will
- Don't copy across previous documents and think you can amend them to suit. Use proper precedent documents – [www.theformtool.com](http://www.theformtool.com)



# Lessons

- Document management protocols

**For example:** systems that allow you to save documents in versions and print from the latest version

- Recognise when you are rushing things
- Don't be bullied by your client





# MORE LPLC RESOURCES



# More LPLC resources

- LPLC personal and succession law hub
- Practice Risk Guide: Weather-proofing Wills and Estates
- Guide for Executors
- Guide for Beneficiaries
- Helpline - Call me! - **03 9672 3800**



 Practice Risk Guides

**Weather-proofing  
Wills and Estates**

# DRAFTING WILLS – DO THE RIGHT THING



# Do the right thing

There are a number of ethical issues that may arise in relation to drafting wills.

## Help

If you have an ethical issue, contact LIV ethics:

Phone: 03 9607 9336

Email: [ethics@liv.asn.au](mailto:ethics@liv.asn.au)



# Poll

Is it ethical to receive instructions from a third party to draft a will?

**For example:** a child instructs you on the terms of a parent's will.

- a) Yes
- b) No
- c) Don't know



# Exercise

## Background

You receive instructions from a couple to draft mirror wills. They have an asset pool of about \$3m including their home and an investment property.

Their manner of holding is as tenants in common in equal shares for the real estate.

The wills are to provide that the other is their sole beneficiary.

The day after you send them the draft wills, one of them calls you and tells you they want to leave their interest in the investment property to their sister.

# Exercise

## Questions

- Can you continue to act?
- Can you inform the other will maker of the proposed change to their partner's will?





# REFLECTION

What have you learned from this session and materials that might help you and your colleagues in your work?





# Thank You

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