Weather-proofing **wills and estates**

AUGUST 2015

LPLC
LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Contents

Introduction

Welcome to the first edition of *Weather-proofing wills and estates*. This booklet highlights the mistakes that are made by legal practitioners that lead to claims against them and offers recommendations on how to avoid those same mistakes.

The claims against legal practitioners in the wills and estates area have been relatively modest in recent times however we do see the same sorts of mistakes occurring regularly that could easily be avoided.

This is not a comprehensive text on how to prepare a will or wind up an estate, but rather a guide on how to avoid the hotspots where mistakes happen. The mistakes fall into distinct categories of preparation of wills, assessing testamentary capacity, dealing with family provision claims, administering estates and conflicts of interest. Each chapter deals with a category of mistakes. Examples are given of the sorts of mistakes we see and why they occur, as well as recommendations for what to do to avoid them.

At the end of the booklet is a checklist of all of the recommendations.

Mistakes in preparation of wills

Claims in this area of practice arise from:

> allegations of delay in the preparation of wills

> failing to properly understand and document the assets of the will maker

> simple drafting errors.

There are many cases where the will cannot be rectified and even in the instances where it is possible to have the will rectified, the cost of doing so is still sought from the legal practitioner responsible for drafting the will.

Below are some of the mistakes made.

1. Delay in preparation of a will

Delay creates a risk that disappointed beneficiaries who would have benefited from the intended will may make a claim because it was not finalised in time.

A decision of the Queensland Supreme Court of Appeal in *Queensland Art Gallery Board of Trustees v Henderson Trout (a firm)* [2000] QCA 093 held that duties may be owed to third party expectant beneficiaries, particularly if a solicitor had breached his or her duty by delaying in the preparation of the will and there was an intention on the part of the testator/ testatrix to benefit expectant beneficiaries. In this case, the court found as a matter of fact that there was a lack of firm intention by the testatrix to benefit the expectant beneficiaries. It was also far from certain that, even if the solicitors had prepared the will more quickly, the testatrix would have signed it.

However, see *Maestrale v Aspite* [2012] NSWSC 1420 where the solicitor owed a duty to the beneficiary to attend promptly in the event the testator's health deteriorated. There were clear and unambiguous instructions to draw the will.

EXAMPLE:

Inordinate delay

The solicitor received instructions from a long standing client to change his will leaving most of his estate, being a farm, to his son. The existing will left each child an equal share. The solicitor tried to dissuade the client from his proposed course of action, having warned of potential testator family maintenance (TFM) claims. He sent the client away to think about it. The client did enquire about the will from time to time when he saw the solicitor about other matters over the next four years, indicating he still wanted to go ahead with it. The solicitor held out from finalising the will hoping that the client would see the light and change his mind. The client died without the will being made. A proceeding was brought by the disappointed beneficiary, the son. There were arguments that the client may not have signed the will even if it had been prepared in time and the son's increased share may have been eroded by TFM claims of the other siblings. The proceeding settled with a payment to the son that took into account these arguments.

2. Inadequate instruction taking

Solicitors may fail to realise what assets fall outside the estate, such as superannuation and property held as joint tenants and in some instances, family trusts.

Superannuation

Today, superannuation may well be a significant asset to be distributed upon death. Moreover, superannuation funds differ and each fund is ultimately governed by its own trust deed. Advice on how superannuation will be dealt with on the death of a person cannot be safely or accurately given without reference to the superannuation trust deed. Clients need to be fully aware whether their superannuation has binding, non-binding or no nomination clauses and what that means.

EXAMPLE:

No record that advice was given about super

A practitioner took instructions from the testator that he wanted to leave two properties to two of his sons. There were other specific bequests, but the residual estate was to go to the two sons once they attained the age of 30. He wanted to leave his superannuation entitlements to his mother and step-father. The will contained a clause stating that the parents were to receive the superannuation payout in equal shares. The parents were also made executors of the estate.

The letter sent to the client with a copy of his will made no reference to the need to contact the superannuation trustees and the client took no steps to contact the trustees. On his death, the trustees allocated the death benefit to his sons and the mother of one of his sons. The practitioner had a policy of explaining to clients that as superannuation funds do not form part of the estate it was necessary to ensure that the correct recipients had been nominated as beneficiaries of the fund. Unfortunately, however, there was no evidence by way of file note or letter that this advice had been given.

It would have been a simple matter to have a pro forma paragraph in the letter sending out the will clarifying the situation again and making it imperative that the client contact the superannuation trustees and report back to the law firm.

Our recommendations

- ☑ Obtain details of the client's superannuation fund and policy.
- ☑ Determine whether the fund has binding, non-binding or no nominations. Review the superannuation fund trust deed if necessary.
- ☑ Alternatively, advise the client orally and in writing to contact the superannuation fund and obtain details of the nomination arrangements. This information should be confirmed in writing to the firm before the will is drawn and finalised.
- ☑ Give the client an oral and written explanation of what the form of nomination governing the fund means.
- ☑ Determine what nomination, if any, the client has made.
- ☑ When the will is finalised, confirm in writing whether the superannuation forms part of the estate or not and what steps the client needs to undertake with the superannuation fund in order to achieve his or her desired outcome.

Joint tenants vs tenants in common

Very often clients want to leave their half share in property to someone other than the other half interest owner. This seems to be increasingly so in the case of clients with blended families and second or subsequent marriages. This can lead to mistakes, such as:

- Failure by the solicitor to determine that the property is held as joint tenants because:
  - the client mistakenly thought they held the property as tenants in common and the solicitor did not verify this assumption
  - the client was not asked, often because the relationship between co-owners was not one where there would normally be joint proprietorship i.e. not spouses
  - the solicitor was only asked to make minor amendments to the existing will which was drawn by someone else and did not give consideration to the ownership rights of the property.
- The joint tenancy was not severed in time, due to either the other party not agreeing to the severance or delay in the solicitor's office.

In Victoria there are several ways to sever a joint tenancy:

- **By a course of dealing** by the joint tenants, showing a common intention that the joint tenancy be severed. This option usually results in there being an argument in court about whether the course of dealings was sufficient to show the intention after one of the joint tenants has died. There is no guarantee the court will agree.
- **By mutual agreement** of the joint tenants. The transfer is prepared with the consideration expressed as 'our desire to change our manner of holding'. The transfer must be lodged with the duplicate certificate of title.
- **By unilateral severance.** Section 72(3) of the Property Law Act permits a person to convey land to them. The consideration expressed on the transfer is: 'my desire to sever the joint proprietorship'. The practical problem to be overcome with this strategy is that obtaining the duplicate certificate of title from the other joint owner, their solicitor or the bank may be difficult. There are two ways around this:
  - the Registrar of Titles has power, pursuant to section 104 (5) of the Transfer of Land Act to dispense with the production of the duplicate certificate of title. We know of few instances where this discretion has been used but it may not be a speedy process.
  - seek an order from the Supreme Court if the bank or solicitor or other party refuses to produce it. The Supreme Court has power to compel production of the title. An originating motion and an affidavit in support would be needed.

Many will makers may not want to go down this somewhat controversial route. There is also the problem of who pays for these applications where the testator is on their death bed. However, clients need to be given the available options open to them in order to make an informed choice[1].

1 See *Vagg v McPhee* [2011] NSWSC 1584 for discussion on solicitor's duty to advise on severance of joint tenancy.

Our recommendations

- ☑ When taking instructions, ask how real property is held.
- ☑ Develop a clear layman's explanation of the difference between joint tenancy and tenancy in common.
- ☑ Seek instructions to conduct necessary searches to verify or clarify the position.
- ☑ Revisit the will maker's instructions in light of the search results.
- ☑ Canvass the methods and cost of severance of joint tenancy if that is the only way to achieve the will maker's intentions.
- ☑ Be aware of the methods of severance (see above).
- ☑ Keep file notes of the advice given in relation to severance and the instructions received.
- ☑ Act promptly if instructions to sever are provided.

Failure to advise on the need for an adjustment clause

A claim may arise if a practitioner fails to advise the will maker on the need to include an adjustment clause in the will.

A will maker's intention to provide an equal distribution between beneficiaries may be defeated if the value of 'non estate assets' is not taken into account when the will is prepared. This is particularly relevant to superannuation death benefits paid directly from the fund to a beneficiary and family trust loan account balances standing to the credit of a beneficiary.

EXAMPLE:

No adjustment clause included in the will

The will maker wanted her three children to benefit equally from her entire wealth. A will was prepared to this effect. No binding superannuation death benefit nominations had been prepared in favour of the estate and as a result, the superannuation fund retained discretion to pay the whole death benefit to the will maker's youngest child (who was still a financial dependant). This child also had a loan account balance standing to his credit in the will maker's family trust.

The will had no provision to adjust the estate distributions to take account of the additional benefits received by the youngest child from these non estate assets. As a result, the youngest child not only received an equal share of the estate distributed by the will, but also the benefit of the superannuation and the family trust allocations.

3. No or ineffective residuary clause

We see claims where the residuary clause is either left out or more often, mangled!

Residuary clauses can be left out where the will maker has left a multitude of bequests and nobody remembers the 'catch all' clause at the end just in case anything has been forgotten.

The types of mangled residuary clauses are diverse. Very often it is the inelegant drafting of the actual clause that is the problem.

EXAMPLES:

Confusion as to number of parts of residuary estate

One such 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).

Did this mean that six parts were to be shared between the five beneficiaries, or that five beneficiaries were to receive six parts each? As it transpired, the will maker had provided her solicitor with written instructions and it was clear that she wanted the last 30 parts of her estate to be divided equally between the five residuary beneficiaries i.e. six parts each. The clause should have read 'six parts to *each* of them that survive me, namely … *(and if more than one in equal shares)*'.

Inadequate description of residuary beneficiaries

In another example the will maker wished to leave the residuary of her estate to her siblings and their children in equal shares, except for the 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 descendents as shall survive me'.

This clause was ultimately considered to be too vague and too wide and there was much debate about what the word 'descendents' meant – did it go beyond children of siblings and grandchildren of siblings – and there was also no limit as to it being the people alive at the time of her death.

The junior solicitor in the office had adapted the office precedent which used the words 'and descendants' in the residuary clause without giving them proper consideration. There was no suggestion that the will maker ever intended the class of beneficiaries to be that wide.

Ultimately the will was rectified and the new clause read:

> *'to hold the balance then remaining (my residuary estate) upon trust for such of my siblings and children of my siblings as shall survive me and if more than one as tenants in common in equal shares for their sole use and benefit absolutely. Where a child of my siblings has pre-deceased me leaving child or children surviving, their children shall stand in the place of their deceased parent and shall take per stirpes and equally between them the share in my estate which their deceased parent would have taken had he or she survived me.'*

Gifts conditional upon who predeceases whom

We have also seen several claims where the will had a residuary clause but it only applied if one spouse predeceased the other (and not the other way around). Here is an example.

The insured was instructed to draw wills for a husband and wife by second marriage. The marital home was held as joint tenants but it was agreed that the property would be converted to tenants in common. The wife instructed that if she predeceased her husband she would leave her half share as a life interest to the husband and then her share would form part of her residuary estate. If her husband predeceased her, she intended to leave her share in equal portions to her four children and her husband's two children. The way the will was drafted meant that the residuary clauses **only** applied if her husband died before the testatrix and **didn't apply** if she predeceased him.

Our recommendations

- ☑ Ensure there is always a residuary clause in every will.
- ☑ Do not slavishly follow precedents without understanding the import of the words used.
- ☑ Address the position of both the will maker predeceasing their spouse (or residuary beneficiary) and the other way around, ensuring there are residuary clauses for both scenarios.
- ☑ 'Road test' or do test case scenarios on the residuary clause (as you would for a rental formulae in a lease) to ensure that it works the way it was intended.
- ☑ You should also have a 'second pair of eyes' review the will to ensure it operates the way the will maker intended it.

4. Drafting errors

Below are other drafting errors we have seen.

Simple oversight or formatting errors

> Making the bequest provision a subclause so that it only operated when the earlier part of the clause was triggered, rendering a bequest conditional. For example, a clause appointing a second executor if the first executor was unwilling or unable to act also contained a gifting clause, making the gift dependant on the appointment of the alternative executor.

> Clauses 'dropping out' of the will when multiple drafts were prepared so that some assets were not gifted, or leaving in clauses that had been superseded in subsequent drafts so that the asset is gifted twice.

Assets changed since previous will or inaccurate description of assets

> A new will prepared that gifted non-existent assets because the client only wanted to change some aspects of the previous will. Everyone overlooked the fact that other assets 'gifted' no longer belonged to the will maker.

> The asset left to a particular beneficiary was inaccurately described as 'all money in any bank accounts', when in fact most of the money was in an account with a financial institution that was not a bank.

The wrong name of the beneficiary

> Leaving assets to a charity but using the wrong name, which happened to be an amalgamation of the names of two charities. The solicitor did not check that the charity's name existed. It then became an issue as to which charity the client intended to leave the money to.

Testamentary capacity

Solicitors are at the forefront of the assessment of testamentary capacity. It is important to avoid a claim by the estate for the costs of a challenge to the will by reason of incapacity.

1. Capacity generally

Capacity is considered to be the cognitive capacity to understand and appreciate the contexts in which decisions are made and the decisions themselves, but not the actual outcomes of the choices made. It is said to be a legal concept, not a medical issue. Generally speaking, people above a certain age, depending on the decision being made, are presumed to have capacity unless it can be shown otherwise[2].

Capacity, in more recent times, is assessed for specific activities or decisions rather than a global assessment of 'capable' or 'incapable'. Someone may have capacity to decide where they want to live but may not have capacity to handle their financial affairs.

Capacity is also considered to have a time dimension. Capacity may be lost during a time of poor health and then return when the medical condition abates.

The assessment of incapacity involves two components, namely:

1. questions as to the person's ability to understand the decisions they are making

2. the presence of any cognitive impairment.

The first is a legal test and the second is a medical question. The existence of the cognitive impairment by itself is not sufficient to indicate incapacity. Evidence of cognitive impairment, or the lack of it, will assist a court in assessing a person's capacity, which is why medical evidence plays an important part in cases before a court on capacity, but it is not the only evidence considered by the court.

Solicitors assessing a client's testamentary capacity need to satisfy themselves as to '1' above. The courts have given many formulae for the questions that need to be answered depending on the issue to be decided. Where the client is unable to satisfy all of the questions relevant to capacity, solicitors should seek medical reports as to the issue of cognitive impairment to complete the assessment. When doing so, an appropriately qualified medical practitioner should be chosen and properly briefed as to the issues the client needs to understand in order to satisfy the test for capacity.

2 'Who can decide? The six step capacity assessment process' Eds Darzins P, Molloy DW, Strang D.

2. Cognitive impairment

There are many forms of cognitive impairment, which can broadly be described as brain failure, both congenital and acquired. Acquired brain failure includes traumatic brain injury, often from an accident, dementia or mental illness. There are over 100 causes of dementia with many different symptoms and degrees of symptoms. It is clear that a diagnosis of dementia does not always equate to incapacity, at least not in all life decisions.

3. Testamentary capacity considered in the courts

Assessment of testamentary capacity is in some cases not an easy task. The decision in *Banks v Goodfellow* is considered the foundation of the law of testamentary capacity.[3] The elements of the test are set out below under *Our recommendations*.

The courts have said that the will maker need not understand the legal effect of every clause of the will, nor do they have to have knowledge of every asset and its value.

In recent Victorian cases where the issue of testamentary capacity was in issue, the courts looked to evidence from the legal practitioner who attended the will maker, the will maker's regular general medical practitioner, specialist medical practitioners who attended the will maker at or around the time of making the will, evidence of the nurses and other hospital/nursing home staff if the will maker was in care, evidence of lay witnesses who saw the will maker regularly as well as medical evidence from expert medical practitioners who did not meet the will maker or who only met the will maker long after the will was made.[4]

The courts have accepted that the evidence of a treating medical practitioner is of more assistance to the court than that of a medical expert who never met the will maker.[5] In particular, the courts appear to put great weight on the evidence of the will maker's legal practitioner and any contemporaneous notes taken at the time.

3 *Foster & Ors v Meller & Anor* [2008] VSC 350; *Norris v Tuppen* [1999] VSC 228

4 *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64; *Kantor v Vosahlo* [2004] VSCA 235

5 *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64; *Kantor v Vosahlo* [2004] VSCA 235

Our recommendations

- ☑ Take comprehensive instructions from the will maker in person, on their own.
- ☑ Be ever mindful of the issue of capacity and satisfy yourself that the will maker meets the various elements of the test, that is, the will maker must[6]:
  - » be aware of and appreciate the significance of the act which the will maker is embarking upon
  - » be aware in general terms of the character, extent, and value of the estate with which the will maker is dealing
  - » be aware of those who might reasonably be thought to have claims upon the will maker bounty, and the basis for and nature of those claims
  - » have the ability to evaluate and discriminate between the respective strengths of those claims.
- ☑ Keep detailed file notes of the:
  - » instructions given by the will maker and the reasons for them
  - » explanation given by you before the will maker signed the will eg. whether you read each clause out to the will maker and they asked questions or the will maker read the will themself
  - » what enquiries you made of the will maker to satisfy yourself that the will maker had capacity.
- ☑ If you are in any doubt about capacity, the will maker should be asked to obtain a medical opinion.
- ☑ If the client is over a certain age (you should choose an age you think is appropriate) and the proposed will is in any way controversial, have a firm policy that medical opinions are always obtained in order to protect the will from later possible challenge.

---

6 *Foster & Ors v Meller & Anor* [2008] VSC 350; *Norris v Tuppen* [1999] VSC 228

☑ When you are seeking a medical opinion from a doctor, provide the doctor with a letter:

- » giving the doctor the client's relevant background and history including personal circumstances, financial circumstances and any relevant legal proceedings on foot.
- » giving the doctor relevant details of the legal test required.[7]
- » asking the doctor to give an opinion on:
  - – whether the client is suffering any condition that may affect cognition and if so, what it is
  - – whether in the doctor's opinion the extent of the cognitive impairment is such that the client could not:
    - – be aware of the nature and effect of a will
    - – be aware of the nature and extent of their assets
    - – assess who are the people who are natural beneficiaries, such as family and personal friends
    - – understand their obligations to provide for people who are dependent on them
    - – discriminate between the strengths of the claims of potential beneficiaries
    - – understand the consequences of their decisions about who they include.

---

7 See Law Institute of Victoria 'Outline of matters to consider when requesting a medical assessment of a person's cognitive capacity', available at http://www.liv.asn.au / PDF/ Membership /Sections/ Elder/2009CapacityAssessmentLetter

Family provision claims

1. Acting for claimants

Those seeking a further distribution from the estate than was provided for in the will need to make an application under the provisions in Part IV of the *Administration and Probate Act 1958* (Vic) entitled 'Family Provision'. These applications are commonly known as 'testator family maintenance' (TFM) claims or 'Part IV' claims.

In Victoria these applications must be made within 6 months after the date of the grant of probate or letters of administration, although the court may extend the time for bringing a claim provided that final distribution of the estate has not occurred (section 99). There is also provision for notice to be given of an intention to make an application in section 99A (which practitioners must read and comply with very carefully).

The claims against practitioners invariably relate to the claim being not made within the time frame. There are a variety of reasons why the deadline is missed.

- The client failed to provide the firm with funds in order to brief counsel to draw the application within time and the firm did not actively remind the client.
- The client failed to provide the firm with the promised information or evidence in order to prepare the application within time and the firm did not actively remind the client.
- The firm briefed a barrister to prepare an application but the barrister failed to do so within time and the firm did not prompt the barrister.
- The client went to see the firm at the last minute and it took the firm too long to do the necessary investigations.
- The firm was involved in lengthy negotiations with the estate's lawyers and failed to appreciate that the time limit was about to expire.
- Proceedings were issued challenging the capacity of the will maker and then abandoned (or lost) by which time a Part IV claim was out of time.
- There was a misunderstanding between client and lawyer as to the extent of the retainer. The practitioner thought he or she was only retained to give initial advice and the client was going away to think about the matter, so no dates were diarised. The client thought the practitioner was looking after their interests and would do something before the time expired.

> The practitioners misunderstood the time limits in other jurisdictions.[8]

In these claims the firm or the practitioner did not adequately keep track and manage the time limit. They may not have adequately set out the time frame for the clients in writing. They may have failed to promptly deal with their client's delay in a way that gave them a useable trail to show they were not bearing the risk of the time limit expiring. They may have failed to clearly set out the scope of the retainer. They may have failed to terminate the retainer in time when the client failed to respond.

Timing and knowledge of the relevant legislation is vitally important in this area of the law.

EXAMPLE

Missing s99A time limit

The practitioner acting for a claimant was in correspondence with the solicitors for the estate soon after probate had been granted, indicating that his client thought he had a valid Part IV claim. The practitioner then issued an originating motion five months and one week after probate was granted. However, he failed to inform the estate about the application and six months and three days after probate was granted the estate was distributed. The claimant's practitioner had failed to appreciate that time limit set out in section 99A of the *Administration and Probate Act*, namely, that he only had three months from the time he first notified the estate that his client intended to make an application, to not only make the application but to then notify the estate in writing that the application had been made. Failing to do so meant the estate could act without any regard to the earlier foreshadowed interest.

8 In **NSW** it is 12 months from death (section 58, *Succession Act 2006* (NSW)), in **Tasmania** it is three months from probate (section 11 *Testator Family Maintenance Act 1912* (Tas)), in **QLD** it is six months from death (section 44 *Succession Act 1981* (QLD)), in **SA** it is six months from probate (section 8 *Inheritance (Family Provision) Act 1972* (SA)), in **WA** it is six months from probate (section 7 *Family Provision Act 1972* (WA)), in **ACT** it is 12 months from probate section 9 *Family Provision Act 1969* (ACT)), and in **NT** it is 12 months from probate (section 9 *Family Provision Act 1970* (NT)).

Our recommendations

- ☑ Be familiar with the provisions of Part IV of the *Administration and Probate Act 1958* (Vic).
- ☑ When taking initial instructions from a potential Part IV claimant, ensure you clearly discuss with the client:
  - » the limited time in which the claimant has to make a decision and act
  - » the scope of your retainer
  - » what the claimant must do to move the matter forward
  - » the consequences of them not doing so.
- ☑ Always confirm the above matters in writing.
- ☑ Diarise the relevant dates by which action must be taken and relevant follow up times if the client is to provide information or payment.
- ☑ Do not be lulled into a false sense of security just because negotiations with the other side seem to be going well. You must either finalise negotiations or issue proceedings before the time limit expires.
- ☑ Always check the limitation dates in jurisdictions you are not acting in regularly – don't rely on your memory.

2. Acting for the estate

Subsection 99A(3) provides that an executor or administrator will not be subject to personal liability if they wait and distribute the estate after six months from the grant of probate or letters of administration, provided that they had not received notice of an intention to issue proceedings in writing in the previous three months or received notice in writing of an application.

Practitioners who act for estates and allow the executors or administrators to distribute the estate within six months of the grant of probate or letters of administration without proper warnings in relation to subsection 99A(3) expose themselves to a potential claim.

Many beneficiaries and executors are keen to obtain their inheritance and finalise the estate well within the six months. Advising them only orally of the requirements of subsection 99A(3) does not always resonate with them. That advice should be in writing.

The firm's precedent letter should carefully and clearly explain the consequences of distributing within six months.

Personal representatives who are keen to distribute within the six months should also be advised about the protection by means of advertising set out in section 33 of the *Trustee Act 1958* (Vic) along with the shortcomings of that procedure.

Practitioners should also be aware that they may face a claim if they delay in finalising an estate beyond the first six months, such that a potential Part IV claimant is able to obtain an extension of time to bring an application because the estate has not yet been distributed.

Our recommendations

- ☑ Advise executors or administrators orally and in writing of the consequences of distributing within six months of the grant of probate or letters of administration, making it clear that the executor or administrator will bear personal liability if they distribute the estate early and a subsequent claim is made.
- ☑ Pay careful attention to the time frame and diarise appropriate dates, including any dates relevant to any notices of intention to issue an application.
- ☑ Act promptly in the administration of the estate to enable it to be distributed as soon as possible after the expiry of the first six months.

Administration mistakes

Administering an estate can be a difficult job when the executors fail to do what is required of them and when the beneficiaries are ringing constantly wanting to know when they will get their money. This behaviour often contributes to the errors that occur in this area.

In many instances the behaviour occurs because the executors and beneficiaries don't understand what is expected of them, what is required to wind up an estate and most importantly, how long it will take. Firms who manage this well do several things.

- They give to the executors and the beneficiaries information booklets they have prepared explaining what happens and what is expected of the executor and beneficiaries. LPLC has prepared guides for executors and beneficiaries for practitioners to give to their clients. They are available on our website at www.lplc.com.au.
- They agree with the executors who will communicate with the beneficiaries and how often that will be done. Some firms prefer to be the contact with the beneficiaries and some prefer the executor to do it but either way having it clarified at the beginning makes things easier.

The major themes in administration mistakes in recent years are:

1. Delay in finalising estates
2. Finalising estates too quickly
3. Mistakes in dealing with assets
4. Dealing with real property incorrectly
5. Not protecting remainder beneficiaries' or infants' interests
6. Distribution other than as set out in the will

1. Delay in finalising estates

Delay may be caused by:

- multiple executors for an estate who cannot agree on various courses of action and take time to resolve the matter or take time to actually complete paperwork or provide information
- a perceived lack of communication by the firm or practitioner and a lack of understanding by the executors or beneficiaries about what is required to be done to finalise the estate.

These problems can be overcome by using information booklets or brochures that explain to executors and beneficiaries what is required to manage the estate and what is expected of them. A question and answer format is effective – one for beneficiaries and one for executors. Firms that write these guides for their clients will be able to tailor the information to best manage their client's expectations.

Firms should also spell out at the beginning of a matter when the firm will communicate with the executors and agree with the executors who will communicate with the beneficiaries and how often.

Lack of time limits

Delays also occur in firms where the practitioner leaves the winding up of the estate to 'last on the list' because it does not have set deadlines like litigation or sales of property or businesses. Consequently, it takes much longer than it should for work to be done on the matter.

Loss of experienced staff

Many firms have very capable, long standing clerks or practitioners in the wills and estates area. When those people leave, the amount of resources and time required to bring the next person up to speed can often be underestimated, resulting in delays in managing the work flow.

Undetected mental health issues

Our claims show that delays can sometimes occur when a staff member suffers from an undiagnosed mental illness. The illness can mean they are unable to deal with the workload they carry and no one realises they are not coping. Proper supervision, even for the most experienced of clerks or practitioners, is important to avoid this situation occurring.

Our recommendations

- ☑ Review your communication strategies.
  - » Set out at the start of the retainer how you will communicate with the executors, how often that will be, whether you will communicate with the beneficiaries or whether you expect the executors to do that.
  - » Write information booklets/brochures for executors and beneficiaries explaining what is required to manage the estate and what is expected of them and how long it will take.
  - » Have a summary on the inside of the file about your time and cost estimate and how often you are to communicate with the client. Regularly review these so you are doing what you said you would, and update the client on costs, particularly where the work involved is taking time or is outside the norm.
- ☑ Review how supervision is done.
  - » Elevate supervision on your firm's priority list!
  - » Audit how it is being done.
  - » Have regular meetings with staff to discuss how files are going, any unusual or tricky issues.
  - » Regularly review active file lists or inactive file lists to ensure that files are not stagnating.
  - » Encourage staff to raise concerns with files.
  - » Put in place appropriate training and mentoring for new staff.

2. Finalising estates too quickly

The converse of the previous category is finalising estates too quickly. One aspect of this is discussed in the *Family provision* section, when estates are distributed within six months and without the executor or administrator being adequately informed of the risk of being personally liable if a family provision (or TFM) claim is made.

The other problem with finalising the estate too quickly is failing to take into account all of the estate's debts. The most common example of this is a tax debt.

EXAMPLE

Tax debt overlooked

The practitioner was co-executor with one of the beneficiaries. The estate was realised and called in and specific bequests were paid. There was no appreciable delay but the estate managed to straddle two financial years. An accountant was asked to prepare the two tax returns and the beneficiary executor was given a copy of the returns and the accountant's assessment, which said the one return would involve a refund and the other would require a payment.

Soon after receipt of the refund the probate clerk organised for the estate to be finalised. The executors and the clerk forgot about the second tax assessment; which arrived after the estate had been finalised – requiring a payment of some $16,000. The practitioner sent letters to all the relevant beneficiaries informing them of the debt and asking for a return of the relevant amount.

A complaint was made to the LSC by the beneficiaries. Ultimately the matter was resolved with a half payment by LPLC and half by the co-executor.

Our recommendations

- ☑ Maintain a check list to ensure that all debts are accounted for and paid before finalising an estate.
- ☑ Recommend to executors that the estate not be finalised until all of the tax returns are received and all debts paid.

3. Mistakes in dealing with assets

The most common mistakes we see dealing with assets are:

> Delay in selling the asset (usually shares)

> Selling the asset (usually shares) without instructions.

Delay in selling assets

It is not hard to imagine how a claim for damages could be made if there is a delay in selling shares when the stock market is declining.

EXAMPLES:

Failed to sell all shares

The estate owned shares in a company that went through a reorganisation of shares just after the firm acting for the estate enquired as to the number of shares held by the estate. A week after the company confirmed the number of shares that number quadrupled. The firm failed to become aware of this, not entirely due to their own negligence, and so only one quarter of the shares was sold when instructed. Several months later the firm received a dividend cheque from the remaining shares, which was banked into trust without anyone thinking any more about the matter. This happened again six months later before the mistake was discovered. By then the share price had dropped dramatically. A claim was made against the firm for the lost opportunity to sell the remaining shares at the earlier, higher price.

Lost title delayed sale

Practitioners were instructed by the children to sell the family home after their mother had died. Just before settlement, the firm discovered that no one knew where the certificate of title was. It turned out the mother had become registered proprietor of the home as administrator of the father's estate, but nothing further had been done in relation to the estate or the title. The firm then had to track down who had acted in relation to the administration of the father's estate nine years earlier and then who had taken over the files when that firm closed. When the title was eventually found, the firm holding it refused to hand over the title without appropriate documentary proof of entitlement. Once the title was obtained it then had to be transferred into the names of the mother's executors before the sale could be completed. Settlement was ultimately delayed by four months. Much of this delay could have been avoided if the firm had started its investigations when first instructed.

Selling without instructions

Selling shares without clear written instructions has become a more common mistake in this area of law, perhaps because more estates contain share portfolios than in the past and it is easier to sell shares than other property.

EXAMPLE:

Shares sold without instructions

The junior law clerk arranged for shares to be sold because she thought she was required to call in all of the estate's assets as soon as possible. The letter she wrote to the broker with instructions to sell the shares was signed by an employee practitioner in the firm without proper consideration or instructions from the executor. The firm's lack of systems for supervision and training significantly contributed to this claim.

Our recommendations

- ☑ Act promptly when instructed to sell property, particularly shares.
- ☑ Always insist on written instructions from the executor when selling shares.
- ☑ When instructed to act in the sale of real estate, call for the certificate of title at the beginning and don't be put off by promises that it will be delivered later.

4. Dealing with real property incorrectly

Mistakes are made when transferring the property, such as:

- making a survivorship application when the property was held as tenants in common, with the result that the property was transferred to the life interest beneficiary absolutely (yes, amazingly it passed through the Titles Office without the mistake being picked up)
- transferring a property absolutely to the beneficiary-executor who was entitled to a life interest only.

5. Not protecting remainder beneficiaries' or infants' interests

A common situation we see is a request for an interim payment *'for the maintenance, education, benefit or advancement of the infant beneficiary'*.

When faced with a request like this:

- check it is allowed under the will. Don't take for granted what you think the will says
- accounts should be checked to ensure that the beneficiary is entitled to any of the amount being held and earlier requests have not consumed the beneficiary's entitlements
- of acting as an executor or trustee, enquiries should be made as to what the funds are to be used for and an assessment made as to whether that purpose matches the permission in the will. How far do you have to go to ensure that those payments are legitimate? Receipts should also be called for and kept
- you should also keep good records of amounts paid for reconciliation later.

6. Distribution other than as set out in the will

There are many instances where families agree that the distribution as set out in the will is not the most equitable or convenient or desirable of outcomes and agree to change it.

When this occurs all of the beneficiaries must sign a written agreement. The beneficiaries should all be referred off for independent legal advice and advised that there may be stamp duty and capital gains tax consequences of not disposing of the assets in accordance with the will.

EXAMPLE:

Failure to seek signed agreement

The practitioner was lulled into a false sense of security because the family was all in happy agreement how the assets were to be divided up. The practitioner wrote to all three beneficiaries at the one address confirming the arrangements, when they did not all live there. When relationships soured some years later, one of the beneficiaries was able to argue that he did not know of the arrangements as he had never received the letter.

Conflicts of interest

1. Solicitors acting as executors

The issues we see when legal practitioners act as executors of estates usually centre on the question of fees and charges the practitioner is entitled to make[9]. The will contains either:

- a clause entitling the practitioner to charge professional fees but is silent on claiming executor's commission
- a clause entitling the practitioner to claim executor's commission and professional fees but no percentage is specified for the commission
- a specific percentage that the practitioner can claim as executor's commission, but the beneficiaries argue later that it is too high or was improperly included in the will.

Allegations may be made by the beneficiaries that the practitioner failed to properly inform the beneficiaries of the necessary matters to allow them to make an informed choice as to what the practitioner was entitled to charge. What that necessary information is may vary from case to case but in *Walker & Ors v D'Alessandro*[10], Forrest J said the bare minimum was:

a. *The work that he has done to justify the commission. This should be done with particularity.*

b. *If he is invoicing the estate for legal fees and disbursements he ought to identify with particularity what constitutes the basis for same. Only then can a beneficiary accurately measure the 'pains and troubles' occasioned to the executor beyond the subject matter of those legal fees and disbursements.*

c. *That the beneficiaries are entitled to have this Court assess his commission pursuant to s65 of the Act. This needs to be explained fully.*

d. *That it is desirable that the beneficiaries seek independent legal advice as to their position on this issue of consent. In many cases where the beneficiaries are unsophisticated people and the issues are complex he ought to insist upon them receiving independent legal advice and ought not enter into any commission agreement until they have.*

9 An executor owes a fiduciary duty to the beneficiaries under the will. The *Administration and Probate Act 1958* (Vic) ('the Act') alters the common law position that a person in the position of a fiduciary is not entitled to benefit personally from that position. Section 65 provides the court may allow an executor to charge commission not exceeding 5% of the value of the estate. The amount is to be determined by considering the executors 'pains and troubles' and must be 'just and reasonable'.

10 The executor may also charge commission if the will specifically provides for it or if all of the beneficiaries agree. *Walker v D'Alessandro* [2010] VSC 15

The courts have also been scathing of practitioners who imply in their correspondence to the beneficiaries that if they do not agree to the suggested executor's commission they will have to wait a long time for their money and/or that it will cost them an exorbitant amount to seek the court's assessment[11].

For a further discussion on the difference between charging commission and charging professional fees see our bulletin 'Solicitor executors and their fees' on our website at www.lplc.com.au /bulletins.

2. Executors and conflict

In some instances, executors act in a manner where they prefer (usually) their own interests as beneficiaries rather than those of the estate and other beneficiaries. When this happens, practitioners acting for estates fall into one of several traps, namely:

- they do not appreciate the conflict in acting for the estate but taking instructions from the executor who is not acting in the best interests of the estate
- they appreciate the conflict but see themselves as bound to follow the instructions of the executor, regardless of his or her behaviour
- they appreciate the conflict but fail to warn the executor in emphatic terms that the executor cannot proceed on the basis proposed.

EXAMPLE:

Life interest tenant dissipated assets

The executor received a life interest in the unit owned by the testatrix, his mother. The remainder interest went to his children on his death. Unfortunately the executor decided the unit was too small for him and he sold it. He bought a larger property and borrowed more than half the sale price from the bank and only invested part of the proceeds of sale from the unit in the new property, having the balance paid into his bank account. He instructed the conveyancing clerk at the law firm handling the estate, and now the conveyance, that the new property was to be held in his and his new wife's name as tenants in common in equal shares. By the time the issue was discovered by the remaindermen, equity in the property had been dissipated by reason of the mortgage.

11 *Walker & Ors v D'Alessandro* [2010] VSC 15; *Re Estate of Zsuzanna Gray* [2010] VSC 173

> The firm had given the executor some advice about his obligations as life tenant at the time the estate was being administered. This advice was grossly inadequate as it failed to take into account the requirements of the *Settled Land Act 1958* (Vic).
>
> In any event, even the advice that was given was ignored by the executor. By the time the unit was sold, there was no further discussion about how the property should be treated and the law clerk was not aware of the issues.

Executors who behave badly raise the question of the obligations and duties that practitioners have in such circumstances. Simply stating that the practitioner was required to follow the instructions of the executor is often not appropriate. If the executor is acting in breach of trust or his or her fiduciary obligations then the practitioner is obliged to point this out to the executor. If the executor insists on continuing in breach then the practitioner should cease to act.

The vexed question is what should the practitioner tell the beneficiaries about the executor's actions? The practitioner is not acting for the beneficiaries, but for the estate, as represented by the executor. To tell the beneficiaries what the executor is doing or planning to do could be breaching client confidentiality obligations.

Failing to tell the beneficiaries that the executor may be acting inappropriately may expose the practitioner to arguments later that the practitioner owed the beneficiaries a duty to protect the assets of the estate and failed to do so. The law is unclear as to how far the duty to beneficiaries of a trust would extend.

When faced with such a dilemma practitioners should contact the LPLC to discuss the options.

Checklists

Preparation of wills

Superannuation

- ☐ Obtain details of the client's superannuation fund and policy.
- ☐ Determine whether the fund has binding, non-binding or no nominations. Review the superannuation fund trust deed if necessary.
- ☐ Alternatively, advise the client orally and in writing to contact the superannuation fund and obtain details of the nomination arrangements. The client should provide this information in writing to the firm before the will is drawn and finalised.
- ☐ Give the client an oral and written explanation of what the form of nomination governing the fund means.
- ☐ Determine what nomination if any, the client has made.
- ☐ When the will is finalised confirm in writing whether the superannuation forms part of the estate or not and what steps the client needs to undertake with the superannuation fund in order to achieve his or her desired outcome.

Real property

- ☐ When taking instructions ask how real property is held.
- ☐ Develop a clear layman's explanation of the difference between joint tenancy and tenancy in common.
- ☐ Seek instructions to conduct necessary searches to verify or clarify the position.
  - » Warn of the consequences if instructed not to conduct searches.
- ☐ Revisit the will maker's instructions in light of the search results.
- ☐ Canvass the methods and cost of severance of joint tenancy if that is the only way to achieve the will maker's intentions.
- ☐ Keep file notes of the advice given in relation to severance and the instructions received.
- ☐ Act promptly if instructions to sever are provided.

Adjustment clause

- ☐ Consider if an adjustment clause is required where the will maker's intention is to leave the estate equally to the beneficiaries but some assets may fall outside the estate.

Advising about risk of TFM (or Part IV) claims

- ☐ Where the client wants to leave a potential beneficiary out of the will or give them substantially less than other beneficiaries of similar relationship, advise the will maker orally and in writing of the potential for a testator family maintenance claim and the cost and consequences if such a claim is made.

Residuary clauses

- ☐ Ensure there is always a residuary clause in every will.
- ☐ Address the position of both the will maker predeceasing their spouse (or residuary beneficiary) and the other way around, ensuring there are residuary clauses for both scenarios.
- ☐ 'Road test' or do test case scenarios on the residuary clause to ensure that it works the way it was intended.
- ☐ Have a 'second pair of eyes' review the will to ensure it operates the way you intend it to.

Testamentary capacity

- ☐ Take comprehensive instructions from the will maker in person, on their own.
- ☐ Be ever mindful of the issue of capacity and satisfy yourself that the will maker meets the various elements of the test, that is, the will maker must[12]:
  - » be aware of and appreciate the significance of the act which they are embarking upon
  - » be aware in general terms of the character, extent and value of the estate with which they are dealing
  - » be aware of those who might reasonably be thought to have claims upon their bounty, and the basis for and nature of those claims
  - » have the ability to evaluate and discriminate between the respective strengths of those claims
- ☐ Keep detailed file notes of the:
  - » instructions given by the will maker and the reasons for them
  - » the explanation given by you before the will maker signed the will eg. whether you read each clause out to the will maker and they asked questions or the will maker read the will themself
  - » what enquiries you made of the will maker to satisfy yourself that the will maker had capacity.

12 *Foster & Ors v Meller & Anor* [2008] VSC 350; *Norris v Tuppen* [1999] VSC 228

- ☐ If you are in any doubt about capacity, the will maker should be asked to obtain a medical opinion.
- ☐ If the client is over a certain age (you should choose an age you think is appropriate) **and** the proposed will is in any way controversial, have a firm policy that medical opinions are always obtained in order to protect the will from later possible challenge.
- ☐ When you are seeking a medical opinion from a doctor, provide the doctor with a letter:
  - » giving the doctor the client's relevant background and history including personal circumstances, financial circumstances and any relevant legal proceedings on foot
  - » giving the doctor relevant details of the legal test required[13]
  - » asking the doctor to give an opinion on:
    - – whether the client is suffering any condition that may affect cognition and if so, what it is
    - – whether in the doctor's opinion the extent of the cognitive impairment is such that the client could not:
      - – be aware of the nature and effect of making a will
      - – be aware of the nature and extent of their assets
      - – assess who are the people who are natural beneficiaries, such as family and personal friends
      - – understand their obligations to provide for people who are dependent on them
      - – discriminate between the strengths of the claims of potential beneficiaries
      - – understand the consequences of their decisions about who they include.

13 See Law Institute of Victoria 'Outline of matters to consider when requesting a medical assessment of a person's cognitive capacity' available on the LIV website at www.liv.asn.au/ PDF/Membership/Sections/Elder/2009CapacityAssessmentLetter

Family provision claims

Acting for claimants – out of time TFM

- ☐ Be familiar with the provisions of Part IV of the *Administration and Probate Act 1958* (Vic) Act.
- ☐ When taking initial instructions from a potential Part IV claimant ensure you clearly discuss with the client:
  - » the eligibility requirements for a family provision claim at section 90 of the Act
  - » the limited time in which the claimant has to make a decision and act
  - » the scope of your retainer
  - » what the claimant must do to move the matter forward
  - » the consequences of them not doing so.
- ☐ Always confirm the above matters in writing.
- ☐ Diarise the relevant dates by which action must be taken and relevant follow up times if the client is to provide information or payment.
- ☐ Do not be lulled into a false sense of security just because negotiations with the other side seem to be going well. You must either finalise negotiations or issue proceedings before the time limit expires.
- ☐ Always check the limitation dates in jurisdictions you are not acting in regularly, don't rely on your memory.

Acting for the estate – premature distribution

- ☐ Advise executors or administrators orally and in writing of the consequences of distributing within six months of the grant of probate or letters of administration, making it clear that the executor or administrator will bear personal liability if they distribute the estate early and a subsequent claim is made.
- ☐ Pay careful attention to the time frame and diarise appropriate dates, including any dates relevant to any notices of intention to issue an application.
- ☐ Act promptly in the administration of the estate to enable it to be distributed as soon as possible after the expiry of the first six months.

Administration mistakes

Delay in finalising estates

- ☐ Set out at the start of the retainer how you will communicate with the executors, how often that will be, whether you will communicate with the beneficiaries or whether you expect the executors to do that.
- ☐ Give information booklets to executors and beneficiaries explaining what is required to manage the estate and what is expected of them and how long it will take.
- ☐ Have a summary on the inside of the file about your time and cost estimate and how often you are to communicate with the client. Regularly review these so you are doing what you said you would, and update the client on costs, particularly where the work involved is taking time or is outside the norm.
- ☐ Elevate supervision on your firm's priority list!
- ☐ Audit how it is being done.
- ☐ Have regular meetings with staff to discuss how files are going, any unusual or tricky issues.
- ☐ Regularly review active file lists or inactive file lists to ensure that files are not stagnating.
- ☐ Encourage staff to raise concerns with files.
- ☐ Put in place appropriate training and mentoring for new staff.

Finalising estates too quickly

- ☐ Maintain a check list to ensure that all debts are accounted for and paid before finalising an estate.
- ☐ Recommend to executors that the estate not be finalised until all of the tax returns are received and all debts paid.

Mistakes in dealing with assets

- ☐ Act promptly when instructed to sell property, particularly shares.
- ☐ Always insist on written instructions from the executor when selling shares.
- ☐ When instructed to act in the sale of real estate promptly call for the certificate of title if no mortgagee is involved and don't be put off by promises that it will be delivered later.

Dealing with real property incorrectly

- ☐ If instructing other staff members in relation to the transfer of property, ensure you describe the interest being transferred correctly.
- ☐ If there is to be a distribution of property, especially real property, other than as set out in the will, all beneficiaries:
  - » should be warned there could be stamp duty implications
  - » should be required to obtain independent legal advice
  - » must sign a written agreement evidencing the change.

LEGAL
PRACTITIONERS'
LIABILITY
COMMITTEE

Level 31, 570 Bourke Street
Melbourne VIC 3000
Telephone 9672 3800
Facsimile 9670 5538
www.lplc.com.au