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WEATHER-PROOFING
WILLS AND ESTATES

AN LPLC PRACTICE RISK GUIDE

LEGAL PRACTITIONERS' LIABILITY COMMITTEE

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CONTENTS

1. INTRODUCTION

This practice risk guide highlights the mistakes made by legal practitioners that lead to claims and offers recommendations on how to avoid those mistakes.

The claims against legal practitioners in the wills and estates area have been relatively modest in recent times however we regularly see the same types of mistakes 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. Each chapter deals with a category of mistakes, namely: preparation of wills, assessing testamentary capacity, dealing with family provision claims, administering estates and conflicts of interest. Real claims examples are given along with commentary on why they occur, as well as recommendations for what to do to avoid them.

2. 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 the loss is claimed from the firm responsible for drafting the will. If the will is rectified, the cost of doing so is still sought from the firm. Below are some of the mistakes made.

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.

In *Queensland Art Gallery Board of Trustees v Henderson Trout (a firm)*[1] the court held that duties may be owed to expectant beneficiaries. This was particularly so if a practitioner had breached their duty by delaying preparing the will and there was an intention on the part of the will-maker 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 will-maker to benefit the expectant beneficiaries. It was also far from certain that, even if the practitioner had prepared the will more quickly, the will-maker would have signed it.

However, see *Maestrale v Aspite*[2] where the practitioner owed a duty to the beneficiary to attend promptly in the event the will-maker's health deteriorated. There were clear and unambiguous instructions to draw the will.

[1] [2000] QCA 093

[2] [2012] NSWSC 1420

CLAIMS EXAMPLE

Inordinate delay

A practitioner received instructions from a long-standing client to change his will leaving most of his estate, a farm, to his son. The existing will left each child an equal share. The practitioner tried to dissuade the client from his proposed course of action, having warned of potential family provision 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 practitioner about other matters over the following four years, indicating he still wanted to go ahead with it. The practitioner 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 family provision claims of the other siblings. The proceeding settled with a payment to the son to account for these arguments.

INADEQUATE INSTRUCTION TAKING

Practitioners 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 is often 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 to address superannuation in a will 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.

CLAIMS EXAMPLE

No record that advice was given about super

A practitioner took instructions from the will-maker that he wanted to leave two properties to two of his sons and the residual estate once they attained the age of 30. There were also other specific bequests. The will contained a clause stating that his 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 to clarify how the funds would be dealt with on death. The client took no steps to contact the trustees. On his death, the trustees allocated the death benefit to the deceased's 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, 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.

Joint tenants v. tenants in common

Clients on occasion 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 blended families and second or subsequent marriages. This can lead to mistakes, such as:

- the practitioner failing 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 practitioner 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 practitioner was only asked to make minor amendments to the existing will which was drawn by someone else and did not consider the ownership rights of the property.
- the joint tenancy was not severed in time, either because the other party did not agree to the severance or delay in the practitioner'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 1958* (Vic) 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 practitioner 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 1958* (Vic) 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, practitioner or other party refuses to produce the title. 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 don't want to go down this somewhat controversial route. There is also the problem of who pays for these applications where the will-maker is on their death bed. However, clients need to be given the available options open to them in order to make an informed choice.

Adjustment clauses

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 considered 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.

CLAIMS 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.

NO OR INEFFECTIVE RESIDUARY CLAUSE

Claims occur 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.

CLAIMS 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 practitioner 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 descendants 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 'descendants' 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 practitioner 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.

CLAIMS EXAMPLE

Residuary clause only applied if husband died first

The insured was instructed to draw wills for a husband and wife by second marriage. The wife instructed that if she predeceased her husband, she would leave her half share in the marital home 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 her and **didn't apply** if she predeceased him.

DRAFTING EFFORS

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.

Leaving in clauses in subsequent drafts that should have been removed, so that an asset is gifted twice.

Assets changed since previous will or inaccurate description of assets

A new will was 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' in the will 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 practitioner 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.

OUR RECOMMENDATIONS

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. 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.

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[3].
- ❑ Always conduct 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. Consider having a proforma letter explaining these options.
- ❑ 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.

Adjustment clauses

- ❑ 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

[3] See diagram on tenants in common and joint tenants https://lplc.com.au/resources/client-resources/tenants-and-tenants-in-common-client-resource

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.

Testing and checking

- ❑ Do not slavishly follow precedents without understanding the import of the words used.
- ❑ Check names of beneficiaries especially charities.
- ❑ Define terms like ‘children’ if beneficiaries names are not used.
- ❑ Draw a diagram of the family tree and assets when taking instructions to make checking the will at the end easier.
- ❑ ‘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.

3. TESTAMENTARY CAPACITY

Practitioners 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.

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[4]. People above a certain age, depending on the decision being made, are presumed to have capacity unless it can be shown otherwise[5].

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.

[4] *Nicholson & Ors v Knaggs & Ors [2009] VSC 64*; Power v Smart [2018] WASC 168

[5] *Who can decide? The six-step capacity assessment process*, Eds Darzins P, Molloy DW, Strang D.

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.

Practitioners 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, practitioners 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.

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.

TESTAMENTARY CAPACITY CONSIDERED IN THE COURTS

Assessment of testamentary capacity is in some cases not an easy task. The decision in *Banks v Goodfellow* (1870) LR 5 QB 549 is considered the foundation of the law of testamentary capacity[6]. 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 more recent 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[7].

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[8]. 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.

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

[7] *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64; *Kantor v Vosahlo* [2004] VSCA 235; *Power v Smart* [2018] WASC 168; *Attwell v Morgan* [2019] WASC 182

[8] FN 7

OUR RECOMMENDATIONS

- Take comprehensive instructions from the will-maker in person, on their own.
- Always consider the issue of capacity and satisfy yourself that the will-maker meets the various elements of the test, that is, the will-maker must[9]:
    - 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's bounty, and the basis for and nature of those claims
    - be able 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 themselves
    - 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 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 possible challenge later.
- 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
    - relevant details of the legal test required[10]
    - 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 is not:
    - aware of the nature and effect of a will
    - aware of the nature and extent of their assets
    - able to assess who are their natural beneficiaries, such as family and personal friends
    - able to understand their obligations to provide for people who are dependent on them

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[9] FN 7, see also LIV Capacity Guidelines

[10] See Law Institute of Victoria 'Outline of matters to consider when requesting a medical assessment of a person's cognitive capacity', available at https://www.liv.asn.au/CapacityAssessmentLetter.aspx

- able to discriminate between the strengths of the claims of potential beneficiaries
- able to understand the consequences of their decisions about who they include.

4. FAMILY PROVISION CLAIMS

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 six 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). If notice of an intention to make an application under section 99A is given to the LPR then they should wait three months before distributing the estate. If six months since probate was granted expires during the three month waiting period a claimant will still have to apply to extend time to make a claim.

The claims against practitioners usually relate to the application not being 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 family provision claim was out of time
- there was a misunderstanding between client and practitioner 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[11].

[11] 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)*).

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.

Knowledge of the relevant legislation and systems to manage critical dates is vitally important in this area of the law.

CLAIMS EXAMPLE

Missing s.99A time limit

The practitioner acting for a claimant was in correspondence with the practitioners for the estate soon after probate had been granted, indicating that his client thought he had a valid family provision 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 the 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.

ACTING FOR THE ESTATE

Subsection 99A(3) of the *Administration and Probate Act* 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 that 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 personal liability consequences for the executor or administrator if they distribute too soon.

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.

Conversely, delay in finalising an estate beyond the first six months may give a potential family provision claimant an opportunity to obtain an extension of time to bring an application because the estate has not yet been distributed. Executors should be warned of the possibility if they are slow in giving instructions and practitioners should be conscious that delays on their part may result in a claim by affected beneficiaries.

OUR RECOMMENDATIONS

Acting for the claimant

- ❑ Be familiar with the provisions of Part IV of the *Administration and Probate Act 1958 (Vic)*.
- ❑ When taking initial instructions from a potential family provision 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 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

- ❑ 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.

5. 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 executors and beneficiaries. LPLC has on our website guides for executors and beneficiaries for practitioners to give to their clients

- 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.

DELAY IN FINALISING ESTATES

Delay may be caused by:

- multiple executors for an estate who cannot agree on what to do and take time to resolve the matter, or they 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 are welcome to use LPLC's guides referred to above or adapt them to their needs.

Firms should also agree at the start of a matter when the firm will communicate with the executors and 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 workflow.

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 clerks or practitioners, is important to avoid this situation occurring.

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 claim is made.

The other problem with finalising the estate too quickly is not accounting for all of the estate's debts. The most common example of this is a tax debt.

CLAIMS EXAMPLE

Tax debt overlooked

The practitioner was co-executor with one of the beneficiaries. The estate assets were 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. 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. The assessment arrived after the estate had been finalised and required a payment of $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 tax returns are received and all debts paid.

MISTAKES IN DEALING WITH ASSETS

The most common mistakes we see dealing with assets are:

- delay in selling the asset, usually shares
- selling the assets, usually shares, without instructions.

Delay in selling assets

Claims for damages are made if there is a delay in selling shares when the stock market is declining.

CLAIM 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 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 deceased's 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. The mother had become the 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 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.

CLAIMS 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.

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 without the mistake being picked up by Land Titles Victoria
- transferring a property absolutely to the beneficiary-executor who was entitled to a life interest only.

NOT PROTECTING REMAINDER BENEFICIARIES' OR INFANTS' INTERESTS

Interim payments '*for the maintenance, education, benefit or advancement of the infant beneficiary*' without proper checks being made to ensure it is allowed.

When faced with a request like this:

- physically check the will to ensure it is allowed rather than rely on your memory of what you think the will says
- check the estate accounts to ensure that the beneficiary is entitled to any of the amount being held and earlier requests have not consumed the beneficiary's entitlements
- if 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.

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 and agree to change it.

When this occurs all 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.

CLAIMS EXAMPLE

Failure to seek signed agreement

The practitioner was lulled into a false sense of security because the family was all in happy agreement about how the assets were to be divided up. The practitioner wrote to all three beneficiaries at the one address confirming the arrangements, even though 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.

DISTRIBUTING TO A BANKRUPT BENEFICIARY

The Bankruptcy Act 1966 (Cwlth) provides, at section 58(1)(b), "after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt" in the trustee in bankruptcy. The decision of *Official Trustee in Bankruptcy v Schultz* makes it clear that a beneficiary has a chose in action before the assets of the estate are received. That chose in action is a right to the proper administration of the estate by the executor or administrator, as well as an expectation that their bequeathed assets will pass to them subject to all liabilities and costs being paid. When the beneficiary becomes bankrupt the chose in action along with the "expected fruits of that chose in action" pass to the trustee in bankruptcy ([16]). If an executor or administrator knows that the beneficiary is bankrupt, the practitioner acting for the estate or the LPR should contact the trustee in bankruptcy to ascertain the value of that chose in action in the trustee's hands so that the proper amount from the bequest can be paid to the trustee. The inheritance may be more than is required to discharge the bankruptcy or there may be other complicating factors and this needs to be understood in order to determine where and when to pay the bequest.

The other issue executors or administrators can face with a bankrupt beneficiary is the pressure from a bankrupt to hold on to the money until they are discharged from bankruptcy. This should not be entertained as it is an attempt to defraud creditors of the bankrupt and the executor or administrator has an obligation to properly administer the estate. The interests that vest in the trustee in bankruptcy during the bankruptcy belong to the trustee even after the bankrupt is discharged, so holding on to the money will not change that.

OUR RECOMMENDATIONS

Practice management

- ❑ 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.
- ❑ Set a workflow system that reflects how you agreed to communicate with the client.
- ❑ Update the client on costs, particularly where the work involved is taking time or is outside the norm.
- ❑ 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 or use LPLC's guides.

Supervision

- ❑ 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.

Handling assets

- ❑ Act promptly when instructed to sell assets, particularly shares.
- ❑ Always insist on written instructions from the executor when selling assets, particularly 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.

Distributing the estate

- ❑ 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.
- ❑ 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.
- ❑ Review the details in the will before:
  - instructing the conveyancing clerk to transfer a property to ensure the current interest is transferred
  - paying any money on behalf of infant beneficiaries to ensure there is an entitlement to the money or it hasn't already been paid.
- ❑ If there is to be a distribution of property, especially real property, pursuant to a deed of family arrangement, 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.
- ❑ If a beneficiary is bankrupt, contact the trustee in bankruptcy before distributing the beneficiary's bequest to determine what sum is required to be paid to the trustee.
- ❑ Do not be involved in any attempts by a bankrupt to defraud their creditors by not informing the trustee in bankruptcy of the bankrupt's inheritance or by deliberately delaying distribution of an estate until after the bankrupt has been discharged from bankruptcy.

6. CONFLICTS OF INTEREST

PRACTITIONERS ACTING AS EXECUTORS

The issues we see when legal practitioners act as executors of estates usually centre on the question of what fees and charges the practitioner is entitled to make[12]. The reason for the question is 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 are often made by the beneficiaries that the practitioner failed to properly inform them of the relevant matters to allow them to make an informed choice as to what the practitioner was entitled to charge. What that relevant information is may vary from case to case but in *Walker & Ors v D'Alessandro*[13], Forrest J said the bare minimum was:

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[12] An executor owes a fiduciary duty to the beneficiaries under the will. The *Administration and Probate Act 1958* (Vic) 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'.

[13] *[2010] VSC 15*. The executor may also charge commission if the will specifically provides for it or if all of the beneficiaries agree

1. *The work that he has done to justify the commission. This should be done with particularity.*
2. *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.*
3. *That the beneficiaries are entitled to have this Court assess his commission pursuant to s65 of the Act. This needs to be explained fully.*
4. *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.*

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[14].

For a further discussion on the difference between charging commission and charging professional fees see LPLC's bulletin Practitioner executors and their fees.

EXECUTORS AND CONFLICT

In some instances, executors act in 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.

[14] *Walker & Ors v D'Alessandro [2010] VSC 15; [2010] VSC 173*

CLAIMS EXAMPLE

Life interest tenant dissipated assets

The executor received a life interest in the unit owned by his deceased 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 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.

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.

What are the obligations and duties of a practitioner acting for an estate when the executor is not acting in the best interests of the estate or in fact acting against the stated intentions of the will? 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.

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