Conflicts of Interest in Wills & Estate Matters

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The risk of conflict of interest is pervasive in wills & estates matters but will sometimes not be obvious. Practitioners should always give sufficient consideration to the possibility of conflicts arising, even in apparently simple situations such as "mirror" wills for couples.

Wills and estates can be fraught with conflicts and potential conflicts. Practitioners are frequently instructed to prepare wills for husbands and wives (whether those couples are married or in de facto relationships). Often the instructions will be for simple "mirror" wills that typically leave one partner's assets of the other (surviving) party and then to the couple's children. If the position really is as simple as genuine "mirror" wills then conflicts might seldom arise. That this is the case seems to be recognised in the Commentary to the Australian Solicitors' Conduct Rules (ASCR) which provide, in part, as follows:

"non-contentious matters

A solicitor or law practice can generally act for two or more parties in a non-contentious matter where those parties have identical interests. Solicitors must, however, be alert to those interests diverging. In appropriate circumstances, it may be possible for the clients themselves to resolve any difference. In other circumstances, independent advice may be necessary. However, if the interests truly diverge, the solicitor cannot continue to act for both parties." (ASCR Commentary to Rule 11)

Despite this, however, each spouse is a separate client and it doesn't take very much deviation from the standard "mirror" will situation for potential risks of conflicts to arise. Even in the simplest situation, it can be difficult to ascertain whether the parties have considered all their options or whether one is acting under the influence of the other, without speaking to each client individually. If the practitioner does see the clients individually, the practitioner might be asked to act adversely to the interests of the other. This is a clear red flag to the ability to continue to act for one client, and possibly, depending on the circumstances, both.

Further, either or both members of the couple might have been married before and either or both might have children from previous relationships. Unless there is complete equality in the way assets are treated and the way the children are treated, conflicts are possible.

The efficacy of a "mirror will" will be dependent on one party or the other not changing or revoking their side of the "mirror". If it is a matter of trust in an ongoing relationship then there may be no problem. What happens though if the instructions are to seek to make the wills irrevocable or otherwise mutually binding? The parties will need to consider their positions individually. What if, as will most certainly be the case, the circumstances of the surviving party change, for example, entering into a new relationship or requiring the liquidation of assets to fund a place in an aged care facility? What happens with assets acquired by the surviving spouse after the death of the first spouse? These sorts of complications make it necessary for the clients to be independently advised.

There are other possible areas of conflict of interest for practitioners in wills and estates, being conflicts between the client's interests and the solicitor's own interests, such as, for example, where the solicitor acts as executor. This is dealt with by Rule 12 of the ASCR.

The commentary of the ASCR in this regard provides the following important guidance:

"Solicitor acting as executor

Solicitors who prepare wills must not put themselves in a position of conflict between their fiduciary duty to the testator and their personal interest. ***Inclusion of a provision in a will appointing a solicitor as an executor and entitling the solicitor to an executors' commission is an example of such a potential conflict.*** *In these circumstances there is an obligation on the solicitor-executor to demonstrate the testator's fully informed consent to the entitlement to an executors' commission (Szmulewicz v Recht [2011] VSC 368 at [9] and [44] in relation to a financial benefit that would be obtained by a solicitor-executor under a clause in a will concerning executors commission, where the amount was significantly over and above what may be appropriate for a lay executor, or what the court would award).*

A solicitor who has been appointed under a will as both an executor and as solicitor to the estate (for which the solicitor is entitled to charge professional fees) must avoid conflicts between the role as an executor and the solicitor's personal interests arising from the role as solicitor for the estate. *The solicitor must carefully and transparently delineate between professional work undertaken as a solicitor for the estate and work undertaken in the role of executor. The fact that a solicitor-executor is entitled under a will to charge for professional work as a solicitor does not justify a claim against the estate for discharging executorial functions calculated by reference to professional costs as if those executorial functions were legal services*

(Re Will of Shannon [1977] 1 NSWLR 201 at [217]). A claim for executors' commission must relate to compensation for 'pains and troubles' as executor over and above what is compensated for by professional fees, to avoid the possibility of "double dipping" (Re Will and Estate of Foster (dec'd) [2012] VSC 315 at [29]).

When a will provides for the appointment of an executor also as a trustee, a fiduciary relationship exists between that executor-trustee and the beneficiaries. *Fully informed consent of the beneficiaries is required to be given to payment of a negotiated amount of executors' commission. In the case of a solicitor who is an executor-trustee this must include full disclosure of any legal fees and disbursements charged, the basis for those fees and disbursements, disclosure that the beneficiaries are entitled to have the court assess the executors' commission and, preferably, that the beneficiaries are advised to seek independent legal advice (Walker v D'Alessandro [2010] VSC 15, at [30]).*"

(Emphasis added)

Issues concerning conflict of interest are never easy and should never be glossed over.

RISK MANAGEMENT AND ECMS PROBATE APPLICATIONS

Since late November last year applications for the issue of a Grant of Probate or Letters of Administration in SA must exclusively be made through the ECMS (Electronic Court Management System) on the CourtSA website.

This system provides for the solicitor lodging the application (electronically) to, in effect, certify that the information in the application (e.g. as to the will and the assets disclosed) is true and correct. This certification replaces the Executor's Oath (sworn by the executor/client) previously used under the old system. Many practitioners even under the new system are having the executor/client execute a statutory declaration or provide a document equivalent to the Executor's Oath to the effect that the information provided to the solicitor as set out in the application is true and correct. **This is good practice and it is recommended that this occur for all ECMS applications so that the certification provided by the lodging solicitor is based on solid foundations.**

Another potential issue arising from the electronic probate system relates to caveats. If an application for probate is submitted (electronically) and the grant is issued quickly there is less time for practitioners who hold instructions to challenge the will propounded in the application to issue a caveat. When the system first started the time taken to issue the probate was a matter of days. Since then, however, that time has increased significantly and can now be many weeks. This may reduce the issue of time pressure in relation to the issue of caveats, however it is still a matter that should be borne in mind.