It is well established that a solicitor is liable to a person who does not receive an intended benefit under a will due to the solicitor’s negligent preparation, drawing or execution of the will. The leading English case is *White v Jones* [1] which was followed by the High Court in *Hill v Van Erp* [2].

The principle of law is stated by Lord Goff [3]:

“...that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor’s negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor.”

In *Vagg v McPhee* [4] the testatrix died on 14 March 2005 and in a will dated 27 January 2005, after gifts of specific items of personal property, left the residue of the estate to be divided equally between her five children.

At the date of death the testatrix lived in premises that she owned as joint tenant with her husband. The testatrix had separated from her husband in 2001 and had in that year obtained the following advice:

“It is wise to go through the process of severing a joint tenancy in case you die, otherwise the survivor of your or your spouse gets the whole property, unless Family Law proceedings have been filed.”

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[1] [1995] 2 AC 207
[2] [1997] HCA 9
[4] [2013] NSWCA 29
When the testatrix made her will in 2005 she gave instructions to a solicitor in the respondent law firm to include in her will a request that the house be sold and “the money received from that sale be given to our children for their education, to enable them to pay any HECS debts that they may have or incur.” The request was included in the will at clause 11.

The husband after the testatrix’s death did sell the home, but did not abide by the request and used the proceeds to purchase another property.

The five children sued the solicitor that had prepared the will. The major issue at trial was whether the testatrix had sought advice from the solicitor as to how she could avoid the operation of the right of survivorship and whether she was advised that that could be achieved by her unilaterally severing the joint tenancy.

The Court at first instance accepted the evidence of the solicitor that she had specifically informed the testatrix that as the property was owned by her and her husband as joint tenants it would vest in him by survivorship on her death unless she severed the joint tenancy.

On appeal the appellants’ case, inter alia, was that the testatrix was advised that nothing could be done to avoid her husband’s right of survivorship and that the primary judge was in error in accepting the evidence of the solicitor as it lacked any contemporaneous, corroborative documentary material supporting her account.

On appeal Tobias AJA [5] considered that the law establishing a duty is not yet settled and that “there must be some doubt as to whether a solicitor can ever be under a duty to seek instructions (not otherwise given) to deal with assets in a certain way in order to benefit intended beneficiaries under a will.”

The Court of Appeal found that there was no duty enforceable by the beneficiaries as the “request” as expressed in the will revealed that the testatrix understood that she could not dispose of her half interest in the property. The Court held that the principle of Hill v Van Erp did not cover the separate question of whether the testatrix wished to get in her half interest so as to be able to dispose of it.

The Court held that even if a duty did exist that the primary Judge’s acceptance of the solicitor’s evidence is not one which is readily open to appellate intervention in the present case.

Although this matter may lead to further clarification in the High Court, a lesson for solicitors is the continuing importance to keep notes of the instructions obtained and the advice given with follow up correspondence confirming that advice and the instructions received.

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[5]Vagg v McPhee at 53