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Will your \$440 will go to the High Court?

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A recent High Court case highlights
solicitors duties when drafting
Wills.

The High Court in *Badenach v Calvert* [2016] HCA 18 (18 May 2016) unanimously allowed an appeal from a decision of the Full Court of the Supreme Court of Tasmania in *Calvert v Badenach* [2015] TASFC 8 (24 July 2015).

In a welcome clarification of the law relating to solicitors duty of care when drafting wills the High Court held that the appellant solicitor did **not** owe a duty of care to a beneficiary under a will to advise the testator of the options available to the testator to avoid exposing his estate to a claim under the *Testator's Family Maintenance Act 1912 (TAS)* (**TFM Act**).

Background

Mr Doddridge (the testator) who was terminally ill gave instructions to Mr Badenach (the defendant solicitor) to prepare a will. For preparing the will the solicitor charged the testator the modest sum of \$440.

The testator left his entire estate to Mr Calvert (the plaintiff beneficiary). Mr Calvert was not related to the testator but was treated like a son. He was in fact the son of a woman who had been the testator's partner for many years.

The testator also had a daughter, for whom no provision was made in the will. Mr Doddridge was estranged from his daughter and they had not been in contact for many years.

The testator and the plaintiff owned the properties which made up the bulk of the estate as tenants in common.

After the testator's death the daughter made a claim under the *Testator's Family Maintenance Act 1912 (TAS)* (**TFM Act**). She was awarded the sum of \$200,000 along with interest and costs totalling approximately \$175,000 which was paid out of the estate. This reduced substantially the net value of the estate which the beneficiary had expected to receive.

The beneficiary sued the solicitor and the firm.

The beneficiary contended that the solicitor, when taking instructions from the testator about the will and then drawing it, owed the beneficiary a duty of care to ensure that the testator's instructions were given effect to; that is, to ensure that the beneficiary in fact **did** receive the whole of the estate which existed when the will was drawn.

One of the ways in which this could have occurred was for the tenancies in common to be converted into joint tenancies so that upon the testator's death the beneficiary would own the properties in their entirety.

The Trial Judge was not satisfied, on the balance of probabilities, that the testator would have joined the beneficiary in creating joint tenancies, and thus found that no causation of the loss of the beneficiary could be established.

The Court did not find it necessary to decide whether or not in the circumstances, the solicitor owed a duty to the beneficiary, because the Court was not satisfied that, even if he had been advised as to the circumventing the TFM legislation he would have, in fact, taken steps to create the joint tenancies or otherwise transfer assets as alleged by the beneficiary.

The beneficiary appealed and was successful by a unanimous decision of the Full Court.

In summary, the Full Court held that the duty of care by a solicitor to an intended beneficiary extended to:

- making enquiries about the existence of family members for whom no provision has been made under the will;
- advising the testator as to why that enquiry is being made;
- providing advice about the potential for a family provision claim, the impact it would have on the testator's wishes, and any possible steps should be considered to avoid that impact.

All three judges agreed that the duty owed to the intended beneficiary in tort should not be something less than the contractual duty owed to the testator. The loss suffered by the intended beneficiary as a result of the solicitor's breach of the "extended" duty was properly characterised as the loss of chance to obtain a better outcome under the will.

High Court Decision

The solicitor appealed to the High Court which held that the duty to the respondent beneficiary recognised by the Full Court did not arise. The interests of the client were **not coincident** with the interests of the respondent beneficiary and as such the solicitor **could not owe any duty** to the respondent beneficiary that was not co-extensive with the solicitor's duty to the client.

The scope of the duty owed by a solicitor to a testator will still depend on the circumstances of the case, the precise instructions provided and, the solicitor's actual or implied knowledge about the circumstances of the testator. It is imperative for the solicitor to make the necessary enquiries of the testator as required by individual circumstances.

The Court stated:

“The solicitor’s duty of care is instead limited to a person whom the testator actually intends to benefit from the will and is confined to requiring the solicitor to take reasonable care to benefit that person in the manner and to the extent identified in the testator’s instructions. The testator’s instructions are critical. The existence of those instructions compels the solicitor to act for the benefit of the intended beneficiary to the extent necessary to give effect to them”. [59]

The High Court has emphasised that the duty owed to a testator is more narrowly sourced and more narrowly confined to performing the specific action of preparing the will on the basis of the testator’s instructions to confer an intended benefit to particular beneficiaries, rather than a broader duty to take reasonable care for future contingent interests of a range of possible beneficiaries.

Notwithstanding the High Court’s clarification that a practitioner drafting a will will not always be found to owe a duty of care to an intended beneficiary, the case illustrates that there are still risks that must be borne in mind when taking instructions to prepare a will. It is fundamental though that the interests of the testator and beneficiary be aligned at the time of the alleged breach of duty for any duty of care to be owed to an intended beneficiary.

1013 words.