Wills, Estates and Mistakes

We have seen an increase in estate related matters in recent years and our experience in resolving these claims has highlighted the risk of substantial claims in this area of law. We therefore set out some of these claims to alert practitioners to the risks and recurring themes we have seen at Law Claims recently.

There are many pitfalls which a practitioner must be careful to avoid in the wills and estates area.

Estate administration mistakes could potentially lead to substantial claims.

The cases set out below highlight the risks and recurring themes we see at Law Claims in this area of work:

1. **Drafting Error / Failure to Properly Document**

   **Case**
   It was the deceased’s intention that his estate revert to any children which he may have had at the time of his death if his wife had pre-deceased him and, if they all also pre-deceased him, to the children of his wife’s brother.

   The will drawn by the solicitor did not include the alternate provision for the deceased’s children and this error was not detected at the time of execution.

   The deceased and his wife later divorced. Following the deceased’s death he left two adult children surviving. As a result of the drafting error, the estate was to be distributed to the three adult children of the deceased’s brother-in-law.

   Instructions were taken from the Executor to lodge an application for rectification of the will. All affected parties consented (after having obtained their own legal advice) to rectification of the will and an order of rectification was subsequently made.

   **Comments**
   It is critical to document the client’s intent at the time of preparation of a will or estate plan. Suggestions include developing a comprehensive questionnaire to elicit the client’s wishes and having it reviewed with the client whilst having the client sign it. Keep a record of intent. Ensure you write confirming letters when clients are requesting something unusual or against your advice.
2. **Failure to Execute / Time Delay**

**Case**

The solicitor was provided with instructions to prepare a new will. The client wished to protect his substantial interests from a gambling spouse. The solicitor provided the client with the draft following the receipt of the initial instructions. The client had not provided instructions to the solicitor by the time he left on holidays. The solicitor had indicated to the client another solicitor was ready to complete the will as soon as final instructions were to hand. The client died two weeks after the solicitor returned from leave and before anyone had followed up the matter.

The parties reached a commercial settlement and agreed to a “Section 12 application”.

**Comments**

Solicitors need to move quickly whenever instructions are given to them to draft a will. There is some danger in leaving the testator to “mull over” any draft will. The solicitor should be clear in advising the testator that:

- If they wish to adopt the terms of the will, they should do so expeditiously;
- The failure to do so may prejudice the position of any intended beneficiary; and
- At the very least, consideration might be given to the testator creating a “holding” document reflective of his or her wishes, as an interim measure, and have that signed and witnessed.

3. **Time / Failure to Issue Proceedings**

**Case 1**

The solicitor was acting for a client in relation to the client’s father’s estate and sought advice on any possible claim under the *Inheritance (Family Provision) Act*. The client was the trustee named in the will. The client renounced the right to Probate and Letters of Administration. Eventually, the Public Trustee obtained a grant of Letters of Administration with the will annexed. The solicitor failed to issue proceedings under the *Inheritance (Family Provision) Act* within 6 months of the grant of administration.

**Case 2**

A solicitor failed to bring an application on behalf of the client pursuant to the *Inheritance (Family Provision) Act* for provision to be made from the estate of the client’s late father. Probate was granted and the whole of the estate was distributed with the client missing out on the inheritance. The client brought an action against the solicitor.

**Comments**

The above cases emphasise the need for every practitioner to use an effective diary system to note time limits, dates for reminders as well as fixed appointments, and to monitor grants of probate / administrations in estates in which their clients may have an interest.
4. Failure to Follow Instructions / Delay

Case 1  A solicitor was instructed to act in the administration of an estate which comprised a large parcel of shares. The deceased had left the residue of his estate to his widow. After Probate was obtained the solicitor was instructed to forward certain documentation to the share broker / financial adviser. The solicitor misunderstood the instructions from the executor and instructed the broker to sell the shares.

The executor, on learning of the sale immediately instructed the re-purchase of the shares.

There were significant ramifications including broker’s charges, capital gains tax and loss of income.

Case 2  A solicitor was the executor and trustee of an estate. Instructions were provided to the solicitor by one of the beneficiaries of the estate to sell shares to which she was entitled under the estate.

There was an inordinate delay in the sale of the shares. During the period of the delay the share price dropped significantly. As a result of the delay in the sale of the shares a claim was successfully made against the solicitor for the loss suffered namely, the loss in market value of the shares together with additional income tax incurred by the estate due to the late share sale.

Comments  A solicitor should confirm any instruction to sell shares in writing with the executor. Many estates comprise shares and solicitors need to be rigorous in their approach to the retention or disposal of them.

In case 2, the circumstances made it apparent to the solicitor that it was not necessary to undertake the additional steps of transferring the shares from the deceased to the executor and then to the beneficiaries before any sale.

Revise Your Precedents Used

It is also timely to issue warnings for practitioners to check their Attestation clauses. We draw practitioners’ attention to the requirements of Section 8 of the Wills Act.

We urge practitioners to check the precedents they are using. Attestation clauses based on early editions of Hutley’s precedents (prior to the 4th edition) will no longer comply with the requirements of Section 8.

For any queries about this, or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano on 8410 7677.