Practitioner pitfalls in the area of Wills & Estates

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Claims arising from Wills and Estate work appear to be on the rise in Law Claims.

This area ranks fourth highest of the total notifications received in the last policy year.

Given the increasing value of real estate coupled with the transfer of wealth, professional negligence by practitioners working in this area can result in very substantial claims.

In today’s society with many blended families the drafting of wills can be complex and errors can easily arise if care is not taken.

An examination of Law Claims database reveals re-occurring themes in this area. This article touches upon circumstances which have led to notifications received by Law Claims in recent years. They include the following:

**Failure to Obtain Proper Instructions / Investigate and Enquire**

**Case:**
A practitioner prepared a will. At the time of taking the instructions it was noted that the client wanted to leave part of his estate to his ‘overseas friends’. At the initial interview, no specific instructions were provided by the client as to who constituted his ‘overseas friends’.

There was no final follow up by the practitioner and the client died before providing the required information.

The practitioner had to make application to the court seeking direction as to the construction of the residual clause in the will. The deceased’s brother, one of the beneficiary’s, subsequently issued proceedings asserting a loss as the result of the practitioner’s drafting of the will.

The matter was ultimately resolved with payment made by the practitioner within his firm’s excess. The excess is calculated at $3,000.00 per partner – a direct loss to the firm.

**TIP:** Take thorough instructions and ensure that detailed instructions are recorded and agreed. Use checklists and confirmation letters to the client to avoid errors.
LOST WILLS
We have paid claims in a number of matters where will files are inadvertently destroyed when they should have been kept indefinitely. Sometimes this occurs because a practitioner “dabbles” in this area and the ‘usual’ destruction process is applied without thinking. Lost will files result in an expensive and difficult exercise of rectification by proving the intentions of the testator in the absence of documentary evidence. Rectification costs are classified by Underwriters as a claims cost and therefore the firm’s excess payment is triggered by incurring these costs.

**TIP:** Review safe custody system to ensure no “failure” of same. Educate all staff members, especially those support staff closing and archiving files regarding requirements and safe custody of client files / property / documents. Wills and estate files do not follow the firm’s ‘usual’ policy of destruction.

DISTRIBUTION ERRORS

Case:
A practitioner made an error in the distribution of an Estate. Originally, the practitioner was instructed to apply for letters of administration by the de facto spouse of the deceased at the time of her death. The de facto died before the letters of administration were applied for. The de facto and the deceased had one child. The de facto also had two children from a previous relationship. The one child then instructed the practitioner to apply for letters of administration in the estate of her mother and, also gave instructions to apply for a grant of probate in the estate of her father.

The provisions of the *Administration & Probate Act* as to the division of intestate estates was amended during this matter. Unfortunately, the practitioner applied the incorrect legislation when distributing the assets. In this case, the estate should have been distributed in accordance with the old legislation, however, the practitioner incorrectly adopted the amended provisions. As a result, the other children received an over-payment from the estate.

The claim was settled with a payment being made on behalf of the insured of $20,000.00

**TIP:** Lack of knowledge of the law can be a trigger for a claim. Ensure you have a thorough understanding of the applicable law. Don’t dabble - if you do not have the expertise, and do not practise frequently in the area, refer the matter to a practitioner who does.

DOCUMENT PROBLEMS – FAILURE TO CHECK DOCUMENTS AND DRAFTING ERRORS

Many of these types of errors can be easily avoided.

Case:
The practitioner was instructed on the phone to draw wills for a husband and wife living in the country. The practitioner prepared the wills and sent them to the clients for signing. The wills were returned signed by the witnesses but not the testators. This was not noticed by the practitioner. The husband subsequently died.

An order had to be subsequently obtained by the Registrar of Probate to admit the unsigned will to probate.

Case:
The practitioner was instructed to provide legal advice in relation to the administration of the estate of a husband and wife. Both estates included a number of security holdings. Two of the security holdings were registered incorrectly in the name of the wife that were in fact assets of the estate of the husband. Rectification was achieved by the practitioner by seeking written confirmation from the executors of both estates as to the holdings. The practitioner at the firm’s cost rectified the error in the wife’s statement of assets and liabilities and, ensured that all relevant share registers had the correct owner details recorded.

**TIP:** Have someone else review the will to avoid a problem arising out of a failure to follow a client’s instructions. Document the will drafting instructions, review and confirm the instructions with the clients when the will is drafted and, do a final review of the instructions when the will drafting is completed.
**DELAY**

The classic case of practitioners taking instructions from a client who subsequently dies before signing his/her Will do present from time to time.

If a testator is elderly, in poor health or death is imminent and it is known to the practitioner (or ought to have been apparent) then there is a higher obligation to take all reasonable steps to give priority to complete the will quickly.

**TIP:** Ensure the client’s instructions when originally taken are documented, signed and witnessed pending the preparation of the will.