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10th Annual Wills and Estates Conference

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Managing Risk in a Wills and Estates Practice

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Managing Negligence Risk

Claims in wills & estates are increasing

- Ageing population
- Blended families
- Increased individual wealth
- Use of trusts and companies
- Superannuation
- Succession law not a compulsory subject

Managing negligence risk

Outline

Estate planning

- Delay in drafting wills
- Gifts of real estate

Estate administration

- Delay in administering estate
- Identifying assets and liabilities
- Notice of intended distribution
- Incorrect distribution



Delay in drafting wills

Will drafting - delay

Is the delay yours or the client's?

- Is there urgency? Does the client want to make an informal will?
- Are you waiting for further instructions?
- Is the client reviewing a draft?
- Have you agreed on timing for next steps?
- Is the client unresponsive to your calls/emails?

Will drafting - delay

Talbot & Ors v Boyd Legal (A Firm) & Ors [2023] QSC 8

File note:

Kt wants to ▲ instructions and will advise when made up his mind. Been rethinking %'s in particular. Timing?
Leave till post hangar/following trip.

Will drafting - delay

Practice tips:

- If you have commitments that may delay the drafting or execution of a will in cases of ill health, potential loss of capacity or imminent travel you should decline to act.
- Take file notes of all instructions including matters yet to be decided by the testator.
- Confirm in writing if awaiting further instructions from client.
- In urgent cases offer the client the option of signing an informal testamentary doc (and use the words ‘I intend this document to form my will’ or ‘I intend this document to constitute my will’).



Gifts of real estate

Will drafting – gifts of real estate

Common issues:

- Jointly held property
- Property owned by companies/trusts

Will drafting – gifts of real estate

Wheatley v Lakshmanan [2022] NSWSC 583

Will: I GIVE DEVISE AND BEQUEATH the property situate at ...The Entrance Road, The Entrance in the State aforesaid, unencumbered, to my daughter VITTORIA ALEXIS WHEATLEY for her sole benefit absolutely, to be placed into a trust or superannuation fund of her choice.

Registered proprietor: Wheatley Investments Pty Ltd

Will drafting – gifts of real estate

Wheatley v Lakshmanan [2022] NSWSC 583

Ward P:

- no express provision in the Will directing the executor to exercise powers available to the deceased, as shareholder of Wheatley Investments, to cause the transfer of The Entrance Road Property
- the Will should not be construed in a fashion that might place the company directors in a position where their statutory duties as directors are in conflict with the deceased's intentions
- gift of property fails

Will drafting – gifts of real estate

Practice tips:

- Obtain title searches of real property the subject of a specific gift.
- Include title references in the description of the property in the will.
- If property co-owned as joint tenants advise about other options (e.g. gift of other assets or severing joint tenancy)
- If property owned by company controlled by client advise about other options (e.g. gift of shares or other assets or restructuring inter vivos)



Delay in administering estate

Delay in administering estate

Claim

- Solicitor executor
- Delay in obtaining grant of probate and then no steps taken for twelve months to prepare deceased's residence for sale
- Not sold within 2 years of death so CGT main residence exemption lost
- Application to ATO for extension of time unsuccessful

Delay in administering estate

Practice tips

- Develop and use checklists
- Regular file reviews
- If you are busy, delegate
- If you have a mental block, talk to a colleague
- Communicate with beneficiaries and manage expectations around time



Notice of intended distribution

Estate administration – Notice of intended distribution

***The Estate of Sylvia Yvonne Schutt* [2024] NSWSC 959**

Slattery J: An executor who acts in a peremptory way to distribute the estate without complying with the notice requirements under Probate and Administration Act 1898, ss 92 and 93, cannot avail himself of the protection afforded by those statutory provisions against personal liability after distribution of the estate. The evidence presently available to the Court suggests that William has neither complied with these statutory provisions before distribution, nor received judicial advice about his distribution. If his conduct of his executor's duties turns out to be erroneous and not reasonable and proper, then he may not be able to be indemnified out of the estate assets against his personal liability for errors that he may have made, unless the Court is prepared to excuse them.

Estate administration – Notice of intended distribution

Practice Tips

- Advise executor clients to publish a notice under s. 64 *Administration and Probate Act 1929* (ACT) or s. 92 *Probate and Administration Act 1898* (NSW).
- Do not distribute before expiry of notice or before 6 months after grant (ACT) or death (NSW).
- Do not distribute if executor has notice of an intended claim



Identification of assets and liabilities

Estate administration – identification of assets/liabilities

Commonly overlooked liabilities:

- Superannuation death benefits tax

Commonly overlooked assets:

- Choses in action

Estate administration – identification of assets/liabilities

Claim

- Will left estate equally to two sons
- Testator had guaranteed a loan to one of her sons and his wife
- Son's marriage failed and he defaulted on loan
- Estate liable to lender under guarantee

Estate administration – identification of assets/liabilities

Claim

- Executor instructed solicitor he did not want to set off amount paid under guarantee against son's entitlement
- Solicitor did not advise executor he would be personally liable to other son for shortfall in his entitlement
- Other son sued executor and executor sued solicitor

Estate administration – identification of assets/liabilities

Practice Tips

- It is the executor's obligation to identify and realise all assets and pay all liabilities in the estate
- Consider whether the estate has a claim against anyone
- If executor unsure whether to institute proceedings consider seeking judicial advice
- Identify and allow for all tax liabilities before distribution – take particular care where super is paid to the estate, and where CGT assets are realised or transferred to a K3 beneficiary



Incorrect distribution

Estate administration – Incorrect distribution

Claim

- Will left estate equally to two children, but provided for intervivos gift of \$20,000 to one child to be deducted from his share
- Solicitor advised that the \$20,000 should be added to the share of the other child, resulting in that child receiving \$40,000 more than sibling
- Should have added \$20,000 to estate and divided it equally between the children

Estate administration – Incorrect distribution

Claim

- Distribution made to bankrupt beneficiary
- Beneficiary spent the money
- Trustee in bankruptcy claimed the distribution from the solicitor

Estate administration – Incorrect distribution

Claim

- Beneficiary emailed bank account details.
- Email intercepted by cyber criminals and different bank account details substituted.
- Distribution paid to cyber criminal instead of beneficiary

Estate administration – Incorrect distribution

Practice Tips

- Re-read the will and take particular care with adjustment clauses
- Double check any proposed distribution
- Review by another solicitor/staff member if possible
- Search bankruptcy records prior to distribution
- Provide written advice to executor of consequences of distributing to bankrupt beneficiary
- Verify emailed bank account details

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