BENDIGO LAW ASSOCIATION

SVENSON BARRISTERS CPD DAY 4 MARCH

'*Solicitors Duties in Drafting Wills and Managing Estates- To Whom are they Owed and Managing Risks.*'[1]

Carolyn Sparke QC[2]

A. <u>Negligence generally - circumstances which can give rise to liability</u>

1. Ever since *Hill v Van Erp* (1997) 188 CLR 159; 142 ALR 687 there is no doubt that legal practitioners in respect to the preparation of wills owe a duty of care to the intended beneficiaries, as well as the clients. The duty to clients arises by reason of the implied term in the contract of retainer, and the co-extensive duty of care in tort[3]. The duty to beneficiaries has been debated over the years , but it is now well-settled[4] that there is such a duty. However the scope of the duty is still the subjective debate.
2. All of this makes the solicitor a big target - for clients and occasionally other practitioners. The recent prompt for this paper is the decision of *Calvert v Badenach*, which involved a solicitor being found liable, then 'exonerated' by the High Court. Not something any practitioner wants to go through. More of that later.

3. In *Hill v Van Erp* the Court:- (in VERY short summary)

- accepted that the solicitor owed a duty to beneficiaries as well as the client, despite having no contractual relationship. It established sufficient proximity so as to establish a duty to the

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[1] Many f the issues in the paper can be explored in more detail. For a detailed overview of the matters to be considered when taking instructions see C Rowland, B Allan and J Wenning, *Hutley's Australian Will Precedents* , 7th ed, LexisNexis Butterworths, Sydney, 2009, and <u>(Lexis Nexis, Wills Probate and Administration</u> <u>Service Victoria, Boaden et al.</u>

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[3] *Astley v Austrust [1997] 197 CLR 1; Hawkins v Clayton [1988] 164 CLR*

[4] really, since *White v Jones [1995] 2 AC 207*

beneficiaries based on the fact that the very reason the client went to see the solicitor was to effect testamentary intentions in favour of that beneficiary. The duty to the testator in contract was coextensive with the duty to the beneficiary. (a debate which rose again in *Calvert v Badenach*, below)

- rejected the argument that there was no loss by the beneficiary (the beneficiary not having actually lost anything other than the *prospect* of an inheritance), as the beneficiary lost 'an assured benefit'

4. Comments on the scope of the solicitors' Duty:-

- The duty to a disappointed beneficiary is co-extensive with the duty to the client to carry out testamentary intentions (a breach of contractual duty to the client will amount to a breach of duty of care to intended beneficiary)
- the retainer with the client may limit the duty to the client and consequently to the beneficiary *White v Jones [1995] 2 AC 207,* at 268G-H; *Trusted v Clifford Chance [2000] WTLR 1219, at 1256); Miller v Cooney*, infra.
- Founding the duty requires the client to have (a) decided to confer on the intended beneficiary a particular testamentary benefit; and (b) retained a solicitor for that purpose (*Trusted v Clifford Chance [2000] WTLR 1219, at 1256-7).*
- if the testator has retained a solicitor who fails in their duty to the client, then on face of it the beneficiary has suffered a compensable loss. (*Hill v Van Erp; X v Woolcombe Yonge [2001] WTLR 301, at 307*)
- Remedy – the solicitor will be required to pay the underpaid wronged beneficiary. The overpaid wrongful recipient keeps their payment, and the solicitor has to pay again. (less any adjustment – as in *Meastrale v Aspite* (below)– for the amount which a family provision claim will have reduced the amount which would have been paid to the disappointed beneficiary. **B.**

Specific aspects of solicitors' potential liability.

5. This paper considers areas of negligence or of solicitors being liable for costs:- B1.

Taking instructions - see the client personally

B2.

response to possible incapacity and influence

B3.

getting the assets right

B4.

drafting

B5.

Timing - how long is too long? delay and signing instructions

B6.

Problems with execution

B7. Various other duties

Calvert v Badenach –'planning' advice about other steps to avoid claims

B1. TAKING INSTRUCTIONS - SEEING THE CLIENT

Golden rule - see the client personally and without others present

6. The fundamental rule when preparing wills is that the practitioner must see the client at least once, either at the time the instructions are provided or when the client signs the will. See *In the Estate of Tucker (dec'd)* [1962] SASR 99 ; *Re Estate of Sharman, ex parte Versluis* (SC(NSW), Young J, No 120066/98, 5 July 1999, unreported, BC9903891) .
7. It is said that if the client does not want to meet with the practitioner then the practitioner should refuse to accept the instructions. See "Guide to drafting wills and trusts" (1987) 61 *LIJ* 619 by Michael White.
8. The initial instruction taking session enables the practitioner to:
   - obtain if necessary suitable identification from the client so as to establish identity;
   - gain an insight and understanding of the client's financial position;
   - ascertain the client's relationship with family and others;
   - assess whether there is a possibility that the will may be challenged on the basis of a testator's family maintenance claim;
   - assess whether the client possesses the requisite testamentary capacity and is not suffering from undue influence.
9. Lawyers need to be particularly careful where the client is elderly and feeble.
10. A solicitor will be criticised if they take instructions from a Testator introduced by a client, where the client is a beneficiary. In Santow J made the following oft-repeated comments in *Pates v Craig and the Public Trustee*[5] at 37-8 :

> "It is clear that a conflict of interest may arise between the interests of an intended principal beneficiary seeking to procure a will in his or her favour and the interests of the testator. The testator should be assisted by his or her legal adviser only in making a valid will. This means, inter alia, that the natural objects of the testator's bounty must be capable of being appreciated, by the testator, even though the testator may choose to exercise that capacity so as to omit such objects or disfavour them. In such circumstances the legal practitioner would be expected to give advice to the intended testator on a number of matters. Some of these may be potentially contrary to the interests of the proposed beneficiary. The legal practitioner should take such steps as are reasonably practicable to enable that practitioner to give proper consideration to any matters going to the validity of the proposed will and then should advise and act in conformity with that consideration. Such a conflict will especially arise where there is reason to fear lack of testamentary capacity on the part of the testator by reasons such as fragility, illness or advanced age. Further, in

[5] *Pates v Craig and the Public Trustee (Estate of the late Joyce Jean Cole) Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995*

such context the solicitor could not prudently rely on the informed consent of both clients to act in such a transaction where their interests conflict, there being doubts about the capacity of the testator to give such informed consent.

It should perhaps be recognised by the relevant professional body as a rule if [sic] ethics, that a legal practitioner must avoid such a conflict of interest when preparing a will, either by not acting, or by procuring additional, truly independent advice, where this is in circumstances where an intended principal or major beneficiary is an established client and where the will is instigated by that client. This would be so in any event, but especially so where the circumstances are such as to raise doubts about the intending testator's testamentary capacity, or as to the validity of the will on other grounds. "

In *Pates v Craig & Public Trustee* Mrs Pates' own solicitor drafted a new will for a 73 year old testatrix in which she appointed Mrs Pates (who was her informal carer), as executor and sole beneficiary. Mrs Pates arranged for her solicitor to visit the testatrix at home to take instructions, and the T and Mrs Pates attended the solicitor's office to sign the will, in Mrs Pates' presence. . The solicitor's evidence was that the testatrix was lucid and clear at the time of the meeting, but admitted that she did not take any precautions in respect of the will even though the testatrix was old and frail, lived in untidy conditions and wanted to leave her assets to an established client of the solicitor. The Court did not accept the evidence of the solicitor or Mrs Pates that the T wanted Mrs Pates to benefit. The Court found that the T was suffering from a deteriorating dementia and was not able to make a rational decision about the 'ordinary aspects of her existence'. Whilst there was no evidence of 'influence', the evidence as a whole raised doubts about the testatrix's testamentary capacity at the time the will was made. The executor had not satisfied the Court that the will ought to be admitted to probate.

<u>Solicitors Conflict of interest</u>

11. The solicitor will not be assisting the determination of capacity if the solicitor has a conflict of interest. In *Dickman v Holley* the will was vitiated by undue influence, lack of capacity and want of knowledge and approval. The solicitor who had produced the documents (which favoured the Salvation Army in whose care home the deceased resided) also had the Salvation Army Property Trust for a client (and a landlord). The case was not one of negligence against the solicitor, but the solicitor was criticised in the manner of instruction-taking (at [165]):-

    "….His duty to Mrs Simpson included making inquiries relevant to her testamentary capacity, including as to whether she appreciated who had claims on her bounty and was able to evaluate those claims. This would have included inquiring who was or were the beneficiary or beneficiaries of any existing will. Bringing Mrs Simpson's mind to bear on the question of who, other than the Salvation Army, might have claims on her estate was potentially not in the interests of his established client. It is clear from Mr Hopper's evidence that he relied upon his "own test" as to testamentary capacity that he did not make the appropriate inquiries…."

12. This commentator's view is that the solicitor was lucky not to have been a target for proceedings for negligence or for costs.

13. **Lesson** – be very clear about who the client is, and make sure instructions are freely coming from the actual testator. Power of Attorney

14. Whilst an attorney under power cannot give instructions for a will, beware the attorney who gives instructions for other transactions. As demonstrated by *McFee v Reilly [2018] NSWCA 322* (see below under 'various other duties'), taking instructions for an *inter vivos* transaction which undermined the will, caused the solicitor to be liable to the disappointed beneficiary.

B2. CAPACITY

15. Testing - If an elderly client wishes to exclude certain family members or any major beneficiaries named in a prior will the practitioner should suggest to the client that his or her medical practitioner prepare a note confirming that the client possesses sufficient testamentary capacity to make a new will. In some circumstances it may be advisable to have the medical practitioner witness the will, particularly if the client is in hospital at the time the will is made: *O'Connell v Shortland* (1989) 51 SASR 337 . In Sherrin, Barlow & Warrington, *Williams on Wills* , 7th ed, Butterworths, London, 1995 the authors state at page 41 that in respect to those clients suffering old age or the near approach of death at any age:

> [a] desirable safeguard in such circumstances is for the will to be witnessed by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and finding.

Instruction-taking guidance

16. ***Ryan; Estate of Ryan, Re v Dalton;*** **[2017] NSWSC 1007** set out the guidance a Judge expected of a will-making solicitor dealing with an elderly client:-

17. In the Judgment of Justice Kunc His Honour commented, in a postscript on the issue of capacity at paragraph 107 and 108 as follows:

> "[107] (3) In all cases instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way? The questions and answers should be carefully recorded in a file note.
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> (4) In case of anyone:
>
> (a) over 70;
> (b) being cared for by someone;
> (c) who resides in a nursing home or similar facility; or
> (d) about whom for any other reason the solicitor might have concern about capacity, the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as a result of any diagnosis, behaviour, medication or the like. Again, full file notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.
>
> [108] I emphasise that the foregoing is offered only as suggested basic precautions which may identify problems which need to be addressed. In many cases which do come before the Court the evidence of the solicitor will be critical. For that reason, it is

essential that solicitors make full, contemporaneous file notes of their attendances on the client and any other persons and retain those file notes indefinitely. "

18. This case (as do many others) stressed the importance of keeping accurate file notes. A solicitor, being conscious that the capacity of her client might be called into question, kept detailed notes of her interactions with the testator. Despite the care in taking instructions, the Court was not satisfied that the solicitor had discharged on the balance of probabilities the burden of demonstrating that the will was made by a free and capable testator.

19. Practitioners are reminded that sometimes, even where they have the view that the will maker had capacity, the Court, upon all of the evidence, may find otherwise. The genuine belief of the solicitor will not displace the Court's role. People with impaired faculties may be able to conceal their shortcomings so that a professional wren such as solicitor may fail to detect the defects in their mental capacity. Even with an assessment by a medical expert , the task is one of the trial judge, taking into account all of the evidence including the lay evidence. The evidence of an expert medical expert evidence, or of an attesting witness, is not, on its own decisive. (see [178])

20. In ***Chant v Curcuruto; Chant v Curcuruto*** **[2021] NSWSC 751** the Court commented that, despite the solicitor's belief as to capacity, it could be possibly mistaken and, if certain "red flags" are ignored, the solicitor may find him/herself in the position of having drafted a Will without capacity. In this case, the husband/wife will makers were not known to the solicitor. There was good deal of evidence about capacity in the years around the time the will was made (about her having dementia, paranoia and lack of insight), not much of which will have been known to the solicitor. The scenario involved (put overly simply) wills made by a husband and wife who had fallen in and fallen out with two groups of friends/neighbours. Powers of attorney had been changed and there were allegations between the groups of the willmakers' money having been taken.

21. The solicitor had limited experience but was alert to the question of capacity and had read the Law Society's capacity assessment guidelines before meeting the will makers. She had received the initial client contact from friends, but did take instructions directly from the willmakers. The transcript of the file notes shows some apparently sensible comments, as well as some 'closed' questions asked by the solicitor. Some of those instructions included the suggestion that their previous solicitor was in a relationship with the mother of one of the former friends and that the person had used that relationship to force the signing of a power of attorney to them. That ought to have altered as to capacity problems.

22. The wills contained gifts which were very different to prior wills, changing completely from one set of friends to another between the former will in 2015 and 2017. The husband and wife gave instructions different to each other. There were gaps in the instructions at the time the wills were drafted. The draft wills were taken to the willmakers in hospital and left with a message about contacting the solicitor if charges were required. The solicitor was not involved in the execution of the wills.

23. The 'former friends' through their solicitor , sent the will making solicitor a report as to lack of capacity and flagged an application to NCAT to revoke a power of attorney. The solicitor sought instructions from the friends, but not from the willmakers. The solicitor and friends spoke about getting another independent medical report, but did not actually do so. A solicitor would ordinarily seek the opinion of a medical expert when concerned about capacity, if they did not want to accept the medical report sent to them.(at [424]) That was not done.

24. The will makers were in their 80s, the wife was in hospital, the wills change completely from one set of friends to another between 2015 and 2017; the pattern of will-making had changed (previously having been a number of gifts to various people, now being one substantial gift to one set of friends), that one of the beneficiaries had not perviously received benefit at all;;

25. In the face of that, the solicitor nonetheless said she maintained confidence in her assessment of capacity.

26. The Court considered they were all 'red flags' and put little weight on the solicitor's evidence.

B2.1 When in doubt - what to do?

Lesson - either (a) make the will or (b) clearly decline the instructions.

27. Clients who present with doubtful capacity put any solicitor in a difficult position, especially if a person's frail health means they can be anticipated to soon lose capacity, or die. If the solicitor makes the will and a court finds capacity lacking, is the solicitor exposed to a costs risk?. If the will is not prepared, the intended beneficiaries could sue for not completing the retainer and losing the opportunity to make a will. In can be difficult, as the solicitor, to assess whether there are capacity issues[6].

When in doubt - make the will

28. In *Ryan v Public Trustee* [2000] 1 NZLR 700 it was held that, where a solicitor (or other professional will maker) is confronted by a client whose testamentary capacity is in doubt, the solicitor or will maker owes a duty to the client to investigate the client's capacity with a doctor. Ellis J, at 719 , ventured the opinion that if the client's capacity was still in doubt after all due inquiries have been made, the solicitor should make the will accompanied by a full record of medical and/or other opinions obtained so that the court may, if necessary, later adjudicate on the matter. Otherwise, the client could be deprived of the opportunity of making a will that is later found to be valid. (accepted in *Brown v Wade* [2010] WASC 367 at [142])

29. The Court said there was a 'presumption of competency', and not a prima facie assumption that a client is incompetent. [at 717–718 per Ellis J].

30. In *Public Trustee v Till* (infra) which were costs proceedings arising out of the making of an incapable will, the Court rejected the argument that the solicitor should have refrained from making the will. That was partly based on the facts but also on the concept that it was the role of the Court, not the solicitor, to determine whether the Testator had capacity.

31. There are certainly cases where a person under an administration order, with known dementia or other issues[7], have been found to have had capacity.

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[6] There are some very useful resources :-

- the Law Institute Victoria 'LIV Capacity Guidelines & Toolkit' launched on 1 September 2015 and available on the LIV website.
- the NSW Law Society 'capacity guidelines' (https://www.lawsociety.com.au/ForSolictors/professionalstandards/Ethics/Protocolsguidelines/Clientcapacityguidelines/index.htm)

[7] eg: *Seale v Cross* [2003] WASC 237.; *Re Brokenshire (dec'd); The Equity Trustees Executors & Agency Co Ltd v Worts (1998) 8 VR 659* where a testatrix suffered arthritis, falls, and hearing loss and mild

32. In *Till*, the Court considered submissions about the keeping of notes by solicitors. The Court commented on , but made no determination about, the keeping of 'negative' notes which might serve ultimate to undermine capacity. The Court then said:

> "…On the other hand, there could be no difficulty in the solicitor, with the client's instructions, obtaining medical advice about testamentary capacity, and upon it being confirmed, retaining that evidence to support the validity of the will if required. As well, there could be no problem, and it would no doubt be regarded as good practice, in having a medical adviser witness the will and being in a position to confirm that the testator had testamentary capacity at the relevant time. … Thus, it seems that the duty in such a case is to make and keep notes, advise the client of the prospects of the will being invalid for want of capacity, and the costs to the estate. If they wish to proceed, execute the will."

33. Obviously the notes, whether positive or negative, would be produced in any proceedings. The duty of a lawyer to the Court is higher than the duty to the client.

34. Good notes will help to establish the capacity of a will maker. For example, in ***Bell v NSW Trustee & Guardian: Estate of Hickey [2020] NSWSC 1164***, it was held that the deceased, despite having suffered a debilitating brain injury as a teenager which had left him with an intellectual impairment, still possessed the requisite capacity to provide rational instructions for the fair distribution of his estate.

When client clearly incapable - no negligence to decline retainer and fail to make the will.

36. *In Hall v Estate of Bruce Bennett [2003] WTLR 827 ; 2003 Can LII 7157 (ON C.A.*) - the Appeal Court found the solicitor properly declined to prepare a will where the testator lacked capacity. The testator was terminally ill in hospital, was only awake for a few minutes at a time. He gave instructions in a brief lucid moment, but the solicitor declined to follow those instructions and the testator died later that day. Initially the solicitor was found negligent on reasoning similar to that of *Ryan* (supra). However, the Appeal Court accepted that:-

- given that the testator did not remember the full extent of his estate and was not alert enough to sign, the solicitor did not in fact have sufficient instructions to prepare a Will. The evidence of lack of capacity was 'overwhelming'. Indeed, one Judge commented that there was a duty to decline the retainer.
- In coming to this decision, the Court of Appeal found that there was no retainer to prepare a will and, as such, there was no duty owed to the disappointed beneficiary.

37. **Lesson** - Liability assumes a retainer - if there is no retainer to draft a will, there will be no liability.

38. In these circumstances, where possible:-

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dementia; a person under administration may make a will: *Norris v Tuppen* [1999] VSC 228. [66] and [339]; *RE THE FULL BOARD OF THE GUARDIANSHIP AND ADMINISTRATION BOARD [2003] WASCA 268 (but subject to statute in each state)*

- a medical opinion or a capacity assessment should be obtained.
- document all advice given to the testator.
- take copious notes should be taken on all aspects of the will preparation, including extensive notes on issues relating to capacity and any advice given.
- give clear direction as to whether or not you are accepting instructions to draft the will.

B2.2. What about costs

Lesson - as a general rule, making a will for a client who is later found incapable will not expose the will-making solicitor to a risk of costs where there is nothing to alert the solicitor to incapacity. However, taking instructions for a third party could expose the will-making solicitor to costs.

Testamentary capacity challenges

39. What of the costs of the proceeding, if a testamentary capacity enquiry is necessary as a result of the will being made.

40. The issue arose in *Worbv -v- Rosser [2000] PNLR 140; [1999]2 LLoyds Rep (PN) 972* and in the dual cases of *Knox v Till [1999] 2 NZLR 753 and Public Trustee v Till* [2001] 2 NZLR 508, each case being one where the deceased's final will documents (made with solicitors) were found invalid due to lack of capacity.

41. In *Worby v Rosse*r, the final (1989) will document failed due to want of capacity, lack of knowledge and approval and undue influence of the accountant/beneficiary. Costs orders were made at trial against various people who had supported the invalid final will, but those orders were unenforceable. The beneficiaries under the penultimate (1983) probated will sued the will-drafting solicitor, for the costs which had reduced the estate. That claim was struck out on the basis that it ought to be the executor who brings such proceedings.

42. In th*e Till* proceedings, costs had been incurred in the proceedings by both the executor and the actual beneficiaries. In *Knox v Till [1999] 2 NZLR 753* the beneficiaries under the penultimate probated will sued the will-making solicitor for the costs incurred by the estate as a result of the solicitor having made the invalid will. The court struck out that claim, on the basis that the solicitors for the testator owed no duty to the beneficiaries under the penultimate will.

43. In *Public Trustee v Till* [2001] 2 NZLR 508 The executor of the penultimate probated will sued the will-drafting solicitors for causing loss to the estate by failing to consider capacity and failing to advise as to the consequences of having no capacity. The solicitor had not made any enquiries about medical reports as to capacity and the like, as the testator presented competently and the solicitor did not doubt the testator's capacity. In fact the testator was found incapable, based on a variety of memory lapses and medical evidence of dementia, not necessarily apparent to the solicitor The Court rejected the notion that there was any duty to refrain from making the will, as it stood against the solicitor's duty to carry out the instructions of the client. In that case there was no evidence which would alert a reasonably competent practitioner to the lack of capacity, so no negligence arose. If capacity had been considered, and some warning given, it was speculative was to what the Testator might have done.

44. Consider the (untested) scenario where a solicitor was alerted to a potential capacity problem - "Family member - aunt is in hospital after a fall, the doctors say she is no good now but will probably come good later. solicitor - OK, when she comes good get a doctor's report and let me know if she wants to do anything about her will." a few months later family member contacts solicitor to come and see aunty, no doctor's report is obtained, solicitor thanks aunty is fine and makes no enquiries about capacity. The later capacity proceedings involve extensive costs and evidence of medical and lay people about the surrounding circumstances. Ought the solicitor be liable?

Knowledge and approval challenges

45. Whilst this is not a primer into the law of 'knowledge and approval', it is an area where solicitors have been sued for costs . *Sifri v Clough v Willis [2007] WTLR 1453* was a case in which a later will failed due to lack of knowledge and approval because the solicitor had taken instructions from the Testator's wife. The later will (favouring the wife/widow) failed and an earlier will (favouring the daughter) succeeded.

The claimant daughter did not obtain an award of costs in the probate action. She subsequently brought negligence proceedings against the solicitor, who had prepared the Will, to recover damages equal to her costs, on the grounds that the solicitor had failed to ascertain from the testator what his true instructions were, and that he had taken instructions from the testator's widow. The solicitor accepted liability. As the Judge commented, if a solicitor fails to take instructions from the proposed testator, takes them instead from a third party, and does not check to see he has understood his instructions properly, and does not keep proper notes of his instructions, it is reasonably foreseeable that a challenge to whatever Wills are executed as a result will ensue, and that the costs thereby incurred are foreseeable.

B3. GETTING THE ASSETS RIGHT

Set out below are some instances of solicitors founds liable for getting the assets wrong, and others where they were not .

Lesson - check, don't just accept the client's statements re ownership of assets
- provide advice about survivorship } so that the client can take
- provide advice about any other asset structures } other steps as they require

Note - the duty will be limited if the solicitor has a limited retainer

B3.1 LIABILITY FOUND

B3.1.1 Joint tenancy:-

46. **Lesson** - check, don't just accept the client's statements re ownership of assets

In *Kecskemeti v Rubens Rabin & Company, The Times, 31 Dec 1992*, both the solicitor and the testator wrongly believed that the properties were subject to tenancies in common. They were both wrong and the intended gift failed by reason of survivorship. The defendant solicitor was held to have acted in breach of duty in failing to ascertain the true interest of the

testator in two properties which he wished to dispose of by Will. It was no defence that the solicitor was acting on his client's instructions.

47. **Lesson** - if instructed to do so, when in doubt, take steps to sever the joint tenancy (if available)[8].

48. *Carr-Glynn v Frearsons* [1999] Ch 326; [1998] 4 All ER 225; [1999] 2 WLR 1046 The client in her will left her share in a particular property to the plaintiff. The practitioner at the initial conference raised with the client the issue of whether the client's interest in the property was held jointly or as tenant in common. The client did not know on what basis her interest was registered. The practitioner further advised the client in writing after the will had been executed that the correct manner in which the property was held should be verified because if the property was held jointly then the gift to the intended beneficiary would fail. The client confirmed that she would check the situation. This apparently was not done and the practitioner did not pursue this matter.

    It was held by the Court of Appeal that the solicitor's duty was to ensure that the client's instructions were given effect. This included a duty to the intended beneficiary to ensure he received what the testator intended him to receive. In the circumstances of the case, the Court of Appeal noted that a competent solicitor would have advised the testator to serve a notice of severance of the joint tenancy in any event. The plaintiff therefore recovered damages that would put him in the same position as if effect had been given to the testator's wishes.

49. SO - a belts and braces approach - seek instructions to sever the tenancy even before awaiting searches.

50. *Smeaton v Pattison* [2002] QSC 431

    T wanted to leave his half share in property jointly owned with his wife to his children. Under Queensland law, it is possible to unilaterally sever a Joint tenancy by registration of a transfer of land (s 59 Land Title Act 1994). Such a transfer must be served on the other joint proprietors. The solicitor failed to advise T of the requirement to serve the transfer. The bequest in T's will of his interest in the land to his children failed. The solicitor was found liable in negligence in proceedings brought by T's children.

B3.1.2 Other assets:-

51. Clients often have control over assets they do not actually own. The solicitor has a duty to ascertain true ownership

52. *Earl v. Wilhelm (2000) 189 Sask R. 71 (Court of Appeal)* the lawyer had previously incorporated the testator's farming operation for tax purposes. Subsequently, the same lawyer drafted a will for the testator, making several bequests of the farmland which had already been

[8] Of course, steps may not be available. e.g.: *Corin v Patton*, where a joint proprietor attempted to sever that joint tenancy by declaring a trust over the half interest in the property. However, the title was not available so that testator was unable to do all things required of the registered proprietor before death. The transaction – to a volunteer–was not completed at the date of death.

transferred to the corporation. Those bequests failed and the residual beneficiaries inherited the land. The will-drafting solicitor was held liable.

53. Here, the solicitor was on notice that the T did not own the company asset. However, the Court commented that more was required of a solicitor than to simply enquire of him what he wishes and then to record and prepare the Will without anything further. A solicitor has greater obligations than a "parts counterman or order-taker". The public is entitled to expect more from the legal profession.

54. **Lesson** - Do not rely on the testator to properly describe corporate assets or the title to a piece of land. For example, the lawyer has an obligation where practicable to confirm that real property forms part of the testator's estate and is not registered in the name of a corporation. Similarly, the solicitor should confirm ownership registration of shares and other assets.

B3.2. INSTANCES OF NO LIABILITY

55. The duty is constrained by the retainer. The solicitor may not be able if their retainer is limited, for example:-

- Instructions not settled, or fell short of the alleged duty to advise -

limited retainer

No instructions about Joint tenancy

56. ***Vagg -v- McPhee {2013] NSWCA 29; (2013) 85 NSWLR 154 (re: joint tenancy)***

Here, instructions were not given about severance and solicitor did not need to seek them. The testator understood joint tenancy and did not seek to go further - no duty.

The testator gave will instructions that a property (jointly owned) be sold and the proceeds used for the children's education. Solicitor advised, and she understood, that joint tenancy passed the property to the Survivor. The children brought proceedings alleging a duty to advise her, and seek further instructions, to serve a notice to sever the joint tenancy.

The claim was dismissed, and an appeal failed. The testator understood the nature of joint tenancy and that that the clause in her will had no legal effect if she died first and her husband did not agree. It was therefore doubtful that she would have pursued a severance of the tenancy had she been advised. On the analysis of Basten J, it would have been stretching liability principles to advise her about getting in the property interest when it was not an integral part of that Will and she has not sought such advice.

A Joint Tenancy Cannot Be Severed by a Will

57. It has long been accepted that a joint tenant cannot make a Will that disposes of/gifts an asset

they hold as a joint tenant, nor can a Will sever a joint tenancy. Any severance must take place during the lifetime of the joint tenants, and any provision in the Will which purports to make a gift of a joint interest is simply ineffective[9].

58. ***Cong v Shen (No 3)*** [2021] NSWSC 947

Mr Cong had three children from a former marriage, three children from a current marriage and a range of jointly owned property. He executed his last Will, contemporaneously with a deed, under which provision was to be made for his three adult children in varying amounts, at his wife's discretion (within specified ranges), depending on the outcome of anticipated zoning changes for several properties in which Mr Cong owned an interest.

Mr Cong owned the properties as a joint tenant with Ms Shen, his wife.

After Mr Cong's death, a dispute between the family members arose. The Court dealt wth a range of issues, but confirmed the the will, and the deed, did not have the effect of severing the joint tenancies.

Instructions not settled

59. For a case in which there was no duty due to a lack of settled instructions see *Queensland Art Gallery v Henderson Trout [2000] QCA 93 (see below)*.

Limited retainer to change will, CF make new will

60. *Miller v Cooney* [2004] NSWCA 380

Where Instructions were limited to particular alteration of previous will - no liability for failure to make further enquiries to ascertain whether the deceased was the registered proprietor of properties)

Here, A and B, who were married to each other, and owned two properties as joint proprietors. They had made wills in 1989. In 1998 A and B wanted to make some changes to their wills and went to C, a solicitor. In her will, B wanted the properties to be left between other family members. B died first, in 1999. As the properties were jointly owned, A took them by survivorship. The beneficiaries in B's will sued C in negligence. At trial, C succeeded, the judge finding that it went beyond C's retainer to check the previous instructions for the will that was being amended and it was only important to ascertain what property formed part of the estate if there was any doubt about this at the time the instructions were obtained. The Court of Appeal in New South Wales agreed with the trial judge. C did not know, and had no reason to believe that B was not the registered proprietor of the properties. Was C under a duty to inquire as to the ownership of the properties? As C was merely retained to alter beneficiaries in a will that had previously been drawn by another lawyer, there

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[9] Unless that gift/disposal is upon the death of the surviving joint tenant.
See: Megarry & Wade, The Law of Real Property (Sweet & Maxwell, 9th ed, 2019), [12-038] citing *Swift & Neale v Roberts* [1764] EngR 50; (1764) 3 Burr 1488 at 1496, cited in *Public Trustee v Taylor & Ors* [2020] SASC 122 (2 July 2020).

was nothing in the circumstances to put C on inquiry as to the correctness of the prior will.

Causation - would client have given instructions/ accepted advice had it been raised?

61. It is at this juncture that *Calvert v Badenach* shows one important feature - causation - to what degree can the court be satisfied that the Testator would have followed the advice said to be required? — In C*arr-Glynn*, the court accepted that if advice had been given about severance, the testatrix would likely have taken it given that she was likely to die before the intended beneficiary. In *Vagg v McPhee*, the court held otherwise, given that that Testatrix had been advised, understood and not enquired any further. iI order to found liability, the Court must hold that, if the testator had been properly advised , they would have made arrangements to ensure that effect was given to his wishes.

62. See *Calvert v Badenach* below.

B4. GET THE DRAFTING RIGHT

63. There is no doubt that a solicitor owes duties to the beneficiaries to get the drafting right so that it matches the intention of the testator. (*Walker v G H Medlicott & Son* [1999] 1 WLR 727; [1999] 1 All ER 685)

B5. TIMING - HOW LONG IS TOO LONG?

Lesson - prepare the will as soon as possible.

64. If the client is elderly or ill then this matter should be attended to without delay. At the very latest (unless there are other circumstances) the practitioner should endeavour to forward the draft will to the client no later than one week after taking instructions. See *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 (where the solicitor took instructions from an elderly client who was physically frail. The client died 10 days after the instructions were given but before the draft will was sent to the client. The court found that the solicitor had been negligent)

65. *White v Jones* [1993] 3 WLR 730 (The firm received written instructions from a client to prepare a new will. Eight weeks later the client died before a draft will was sent to the client. The firm was found to be negligent (by a 3-2 majority) even though the firm had been in contact with the deceased on a number of occasions prior to his death, and had even made an appointment to see the deceased in order to have the will executed. The deceased died 4 days before the appointment to execute the will was scheduled to take place. The deceased had not been provided with a draft will prior to his death.)

66. The Court went further than just talking about the timing - In the event that the client dies before the will is drafted and forwarded to the client, then the solicitor has duty to advise them of those instructions - see Richardson J in *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at 49

> A solicitor who had had instructions to draft a new will but who had failed to carry out those instructions would be under a duty to the personal representatives to advise them of those instructions whether or not that might lead to claims against the solicitor by the estate and/or by disappointed beneficiaries.

67. *Maestrale v Aspite [2012] NSWSC1420* - there was disputed evidence about what he solicitor was told, but the court found that the solicitor had been given instructions to prepare a will by an elderly but not apparently unwell man. He was terminally , but not imminently., ill. He Court found no liable from a delay in initial preparation of the will, but in failing to respond to two messages left over two days (the client dying a few days later) where it ought to have been apparent that client's health could be an issue.

68. CF *Queensland Art Gallery v Henderson Trout* [2000] QCA 93. The question was whether a firm of solicitors was negligent in not carrying out their client's instructions to prepare a will which significantly benefited the art gallery before the client died. You get a sense that the testator had 'played' the art gallery and it was found that the client had no fixed intention to benefit the gallery when discussing her will with the solicitors, and the client terminated her solicitor's retainer shortly before she died, before a will had been made. Chesterman J found (confirmed on appeal) that there had been no negligence or breach of retainer. After considering *Hill v Van Erp, above* , Chesterman J said [41]:

> ... any duty owed by a solicitor to an intended beneficiary is derived from and is no more extensive than the duty owed by the solicitor to the client. Unless there be a breach of that duty the solicitor cannot be liable to the disappointed beneficiary.

69. **Lesson** – good file notes about what you as the will-drafter have been told and what advice you have given

B5.1. Reasonable delay due to need to get advice

70. In *Rosenberg Estate v. Black (2001 Carswell Ont 4504*), the Court considered liability for delay in relation to preparation of a will as a component of drawing up a complex estate plan. The Court here distinguished the facts from *White v. Jones* insofar as the retainer did not encompass merely a simple will, but rather a number of interdependent documentary tasks as part of the overall estate plan.

71. In the context of the retainer, the duty owed involved a number of tasks in addition to the drawing up of the will. In considering the solicitors' administration of all the required, interdependent tasks, the Court determined that they were not negligent

72. In *Molinski v. Mitchell (1995 CarswellBC 453*), the Court had to consider whether a solicitor was negligent in his duty of expeditiously executing a will where he had determined that his client, the testator, first needed independent legal advice on the matter of an intended gift to the solicitor before the solicitor could go further in drawing up the will. The Court said:-

> "The court will not impose a duty on a solicitor to a third party when that duty conflicts with his duty to his client, the testator. The delay and possibly the non-execution of the will occurred because of the defendant's advice that the testator obtain independent advice and execute the will before an independent solicitor. Taking those steps with such results cannot be said to be in breach of a duty of care to the plaintiff because not to take such steps would be in breach of the solicitor's duty to his client, in these circumstances, to ensure that he receive independent advice."

73. Accordingly, in this case, at issue was " a conflict of duties". The Court held, that the duty to ensure independent legal advice in the circumstances were sufficient to delay the execution of the will. Ultimately, the duty owed to a potential beneficiary cannot outweigh that owed to the solicitor's actual client, the testator.

B5.2. If the will cant be done soon - what of getting the client to sign instructions?

74. *Howe v Fischer [2014] NSWCA 286*

The Testator saw solicitor shortly before Easter - elderly but not in ill health. Arranged with solicitor to meet again after Easter, about two weeks hence, wanted her son present as well. There was an issue as to whether she had a settled testamentary intention – she wanted to remove her previous executor but had not instructed as to a replacement, The testator took a turn for the worse and died before completing all drafting.

75. The question was whether the solicitor at first instance should have the client sign the will instructions as a stopgap. Initially the NSWSC held that the solicitor was negligent for failing to offer that option to the testator (she being elderly, having had a fall the year before and reliance on care). It was overturned in the Court of Appeal. The Court found that the retainer did not extend beyond a duty to make a formal will.

76. The High Court denied special leave.

77. In *Maestrale* the Court stated that the solicitor ought to have considered an informal will.

78. This remains an option which should be considered, however, it is fraught with problems and probably only appropriate in simple situations. It requires a settled dispositive intention (the mere act of saying 'no' to signing instructions may demonstrate there was none) and needs to be simple so that it does not create ambiguities of construction and incomplete management powers.

B6. EXECUTION

B6.1 *'Interested' Witnessing resulting in invalid gift*

79. The seminal case of *Hill v Van Erp* involved a solicitor who did not ensure that an 'interested beneficiary'[10] did not not witness the will, with the result that beneficiary lost their interest and sued the solicitor. (whilst the rule has largely been abolished, the case is seminal in Australia for establishing that the duty to a beneficiary was correlative to the duty to the testator client)

B6.2 Checking or supervising execution

80. The duty goes further than just the witnessing of a will drafted by the solicitor - If a practitioner takes instructions to prepare a will, it is assumed the practitioner will do everything that is necessary to prepare a will which properly reflects the intentions of the client. This duty also extends to ensuring that the will is properly executed. The duty exists irrespective of whether execution of the will is supervised by the practitioner: *Watts v Public Trustee* [1980] WAR 97 .

There, the client executed the will without a representative from the trustee company being present. The will was witnessed by a beneficiary named in the will. The trustee company did not pick up this fact when the will was returned to it for safe keeping. The trustee company had also failed to properly advise the client about the witness beneficiary provisions when the

[10] The 'interested witness' prohibition has been abolished in most jurisdictions - eg: s 15 *Wills Act (ACT)* but there are other ways in which witnessing can be defective,

will was initially sent to the client for execution. The trustee company was found to have been negligent.

81. Query the effect that has on the 'online' or 'will-kit' will-providers.

B6.3 Testator failed to follow instructions about execution

82. In *Esterhuizen v Allied Dunbar Assurance [1998]2 FLR 668* a solicitor was held liable where the will had been sent to the client, with instructions about execution, but the client failed to follow them. The Court held that, even thought the client had not asked for assistance, the solicitor's duty was to assist with execution, but inviting the client to their office, or attending on the client.

CF

83. *Gray v Richards Butler [2000] WTLR 143*, where the client failed to follow 'most comprehensive' instructions about witnessing. The solicitor was not negligent, as they are expected to deal only with a reasonably foreseeable lack of ability of a client to follow instructions.

B6.4 Other forms of execution

84. Don't forget the ability to make a marksman's will, or read a will to a blind person. A person in a hospital bed *in extremis*, can still make a will and the solicitor (assuming instructions can be obtained) should strive to do so.

B7, Various other duties to beneficiaries.

85. Solicitors have been found liable for failing to advise about marriage revoking a will, the effect of a mutual will, post-death failure to inform executor of custody of a will, and questions have arisen about financial planning advice to the testator and to the executor after death.

86. **Lesson** – everything you do as a will-drafting and advising solicitor can be dangerous.

Inter vivos transaction which undermines the will

87. Whilst a competent testator , and their solicitor, owes no duties to beneficiaries under a will to preserve their assets, it is different for an incapacitated testator. There is a good reason why the law has been slow to allow an attorney to have unfettered access to an incapacitated testator's will, as hey may make decisions in eir own interests rather than that of the testator.

88. A practitioner was held liable both to the incapacitated by still living testator and to the disappointed beneficiary, in **McFee v Reilly [2018] NSWCA 322**.

89. The testator lost capacity. His wife, who was also his attorney, used the Power to transfer farm property 'Baronga' to their daughters. (She had a variety of justifications for it, none of

which impressed the Court.) The intended devisee (the son[11]) therefore did not receive the property. The Court held that the transaction was a breach of her fiduciary duties to her husband under her power of attorney.

90. For present purposes, the interesting aspect of the case is as to the solicitor's role. He:-

    a. knew what was in the testator's will (as he had asked for copy) and thus knew the property was not left to the daughters

    b. knew that he was acting for the testator (as he had been consulted for the testator's "estate planing" purposes

    c. took instructions from the attorney and one of the daughters

91. The Court held that the solicitor who oversaw the transaction was liable in negligence to the son (intended beneficiary) for failing in his duty to protect the testator's intentions. His Honour Leeming, JA, stated :- at paragraph 137 of his Decision:

> [137] Accordingly, where a practitioner has prepared the incapable client's Will previously, or is aware of the contents of that Will, they cannot act on the instructions of an attorney appointed under a Power of Attorney to complete a transaction that would invalidate the terms of the now incapable testator's Will. To do so would be a breach of the fiduciary duty of the attorney and a breach of the duty of care of the practitioner to the incapable testator. It is considered that duty of care now extends to a practitioner taking instructions from an attorney authorised by a Power of Attorney to be satisfied that the attorney's actions are in the best interests of the principal, unless specific authorisation is otherwise contained within the Power of Attorney.

Family provision claims - Advice about estate planning

92. A solicitor has a duty to <u>advise</u> a testator about family provisions claims. (see below). Taking proper instructions about such claims also has other effects - it may force the client to consider the appropriateness of their intended gifts; it may also assist in assessing the rationality of the client's decision-making. Practitioners have a duty to raise the possibility, if relevant, of the will being challenged by a testator's family maintenance claim. At the same time, if there is a discussion about asset rearrangement, the practitioner would need to canvass and appreciate the loss of security and the possible capital gains tax and stamp duty ramifications involved.

C. BUT MAYBE IT"S NOT ALL BAD …… *ROBERT BADENACH & ANOR v ROGER WAYNE CALVERT [2016] HCA 18 (overturning Calvert v Badenach [2015] TASFC 8)*

93. There have been a few cases which have considered alleged duties to beneficiaries. They have been slow to extend liability beyond any liability which is co-extensive with the duty to the

[11] the wi actually omitted the son sue to a clerical error, which was another issue in the case, for present purposes, the son was the intended beneficiary and to whom the duty was owed.

client (and that is now one of the issues before the High court). The question is raised from time to time about advice given - or not given - to a testator in their lifetime about their assets sand their will, and whether that creates a liability to beneficiaries who are 'in' or 'out' of a will as a result. All of the cases set out above are cases where the duty was to the testator client to carry out their wishes in various ways and the various breaches of duty meant they failed to carry out the testator's wishes and therefore deprived the beneficiary of their benefit. *Calvert v Badenach* sought to go further and deal with whether the solicitor ought to have given the testator advice about rearranging assets in his lifetime.

94. The previous position was , in effect, that a solicitor had a duty to advise a testator about family provision claims, although it fell short of owing a duty to persuade them into doing anything in particular. In *Sutherland v Public Trustee* [1980] 2 NZLR 536:-

> The plaintiffs were the client's stepchildren. Although the stepchildren had been included in the client's prior will he had instructed the Public Trustee to make a new will excluding the stepchildren. The practitioner who prepared the will raised the issue with the client whether any of the stepchildren should be included in the new will. The client was adamant that they were not to be included at all. After the death of the client the stepchildren initiated an action against the practitioner claiming that the practitioner owed them a duty of care. The court was of the view that there was no duty of care on the part of a practitioner to persons whom the client had deliberately decided not to include as beneficiaries in his will. There was no duty on the solicitor to persuade the testator to actively leave something to the omitted beneficiaries.

Other instances where Courts refused to extend the duty of care to advice given in lifetime

95. In *Graham -v- Bonnycastle (2004) 243 DLR (4th}* 617 it was held there was no duty owed by the solicitor in the taking of instructions for a new will, to the beneficiaries under a previous will.

96. In *Cancer Research Campaign -v- Ernest Brown & Co [1998] PNLR 592* it was held there was no duty of care to charity beneficiaries to advise the testator about tax mitigation upon an inheritance.

97. *Clarke -v- Bruce Lance & Co (a firm) [1988] 1 AIJ.E.R. 364* held that a solicitor did NOT owe a duty to a beneficiary under a will, when acting for the testator in an *inter vivos* transaction which affected the value of the estate.

BADENACH & ANOR v CALVERT [2016] HCA 18

98. The testator owned property as co-tenant (tenant in common) with the plaintiff Mr Calvert and intended to leave him his estate. He gave instructions to that effect and a will was drafted. The testator left out an estranged adult daughter. She later made a TFM claim and was successful[12] as to $200,000. The plaintiff /disappointed beneficiary sued the solicitor for:-

- failing to advise the testator about the prospects of a family provision claim being made, - failing to advise the testator that he could, and ought, arrange his affairs to divest himself, or transfer, his assets, at the very least by creating a joint tenancy over the properties.

[12] *Worlage v Doddridge*

99. He failed at first instance. Although the Court accepted that there was a duty to provide advice, there was no evidence of a retainer extending to 'planning' issues. Further, there was no evidence that, had the solicitor had a conversation with the testator about taking other steps, that the testator would have given those instructions. Therefore there was no causation.

100. The Court of appeal disagreed (*Calvert v Badenach [2015] TASFC 8)*. It held that the duty of the solicitor was to enquire and provide advice. Each of the three judges gave separate judgements, but the typical view was expressed by Tennant J at [21] and [22]:

> "… in my view, the duty of care owed by the respondents to the testator was much more extensive than that which the learned trial judge set out. The first respondent owed a duty of care to the testator to, not only enquire of him whether he had any children, but also to advise him why that enquiry was being made, the potential for a TFM claim, the impact that could have on his expressed wishes, and of possible steps he could consider to avoid that impact. It did not need to extend to ensuring any such advice was accepted and acted upon." "

101. The High Court has heard and determined the appeal in this matter, in favour of the solicitor. The Court held that, in the circumstances of the present case, a 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) ("the TFM Act").

102. The High Court held, in short, that the interests of the client were not coincident with the interests of the claimant and the proposed duty did not arise.

103. Those who were paying attention to the main body of the paper will have noted that the foundation of the 'disappointed beneficiary' cases relies upon there being a duty to the beneficiary which is co-extensive with the duty to the client. The duty to the client is to carry out the testators intentions, see that the will is properly executed, see that assets are properly identified and so on. All of those duties also create a duty to the same degree to the intended beneficiary.

104. In *Calvert*, the duty of the solicitor is to make the will. That is what they did. The intent of the will was defeated by a claim outside the will. That circumstance does not create a duty on the solicitor to anticipate claims beyond instructions. The solicitor could not owe any duty to the respondent any more than was co-extensive with the solicitor's duty to the client.

105. The Court also took the view that causation issues are relevant. How can it be known whether and to what degree any advice about assets would have been taken?

106. The perils of such a duty are numerous -

107. How far can you go to extend the duty to *inter vivos* transactions, outside the retainer? Taking any advice cannot be assumed in relation to inter *vivos* transactions – duty will be payable, reducing the value of the asset, or may affect intended gifts to others. What about public policy issues - ought solicitors to have a duty to advise a person how to avoid their 'moral obligations'. If so, does it lead to a potential incoherence in the law?

D. FIXING PROBLEMS

108. Sometimes, all is not lost when the badly executed or badly drafted will comes to light. This is not a paper on informal wills or rectification *per se*, but simply to alert practitioners to those options.

D1. informal will

109. The badly witnessed will (the erroneously witnessed husband-wife mirror wills, for example) ***may*** be able to admitted as 'informal wills' in the right circumstances. (s *11A Wills Act (ACT)*)[13].

110. If the error comes about due to the solicitor's failure to properly ensure witnessing was done, the solicitor may well be paying the costs incurred for applications made to court (see *Taylor v Haygarth* (SC(NSW), Hodgson J, No 100959/94, 7 October 1994, unreported, BC9403563) and *In the Estate of Davis* (SC (NSW), Hodgson J, 28 July 1994, unreported) .

D2 Rectification

111. All Australian jurisdictions have a power to rectify a will where the will does not match the testator's instructions by reason of a 'clerical error'. (s *12A Wills act (ACT)*)

112. The law is clear that if an error has been made in drafting the will to match the instructions, so that an application to the Court is required to rectify the will (31 *Wills Act 1997*), that the solicitor will be liable for the costs of that application. (Better the costs of the application than the potential negligence action.)

113. There is also a question of mitigating the loss caused by the negligence. The disappointed beneficiary in *Medlicott* was told he ought to have brought action against the solicitor to rectify before suing for negligence. Theoretically , rectification ought to be easier to achieve – errors by reason of 'clerical error' or miscommunication are not necessarily negligent.

114. However, at the core of both a rectification and negligence action is the question of establishing the testator's actual intentions. If the rectification cannot be carried out because there is insufficient evidence of the .instructions, the negligence action cannot be maintained. (Ironically, it is a live question as to whether the solicitor would be negligent in keeping file notes so bad that the instructions cannot be ascertained, as in *ANZ Trustees v Hamlet [2010] VSC 207*.
(a rectification case, not a negligence case, but the question is there to be asked)

115. This commentator's view is that the solicitor has an obligation to inform beneficiaries of the error if it is discovered.

D3. Court-made will

116. Where a client lacks capacity, consider whether a court-made will is appropriate. Again, a topic in its own right.

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[13] "…if the Supreme Court is satisfied that the deceased person intended the document or part of the document to constitute his or her will, an amendment of his or her will or the revocation of his or her will respectively."

117.E. ETHICAL ISSUES

Solicitors occasionally get caught up in ethical issues. Some of them are revealed already, in the comments above about the manner in which solitaires are expected to take instructions. Each Law Society has guidelines about the manner in which instructions ought to be taken.

118.E1.Solicitor as Beneficiary

Lesson - In short, don't draft the will.

119.Every state has professional conduct rules which deal with obtaining a benefit under a will, or being entitled to take a commission as executor. The *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* has been adopted in ACT and in Victoria. The prior rules contained similar restrictions. Rule 12 provides that a solicitor must not act where there is a conflict between the duty to the client and the solicitor's own interests, the provides various exceptions. A solicitor may draw a will under which the solicitor obtains a benefit, for family members of associated people. (Rule 12.4.2)

120.The lawyer will also be subject to the 'suspicious circumstances' allegations - in which the onus is on the solicitor/drafter/beneficiary to show that the will is a proper one. Even if entirely innocent, the solicitor may well be left paying the costs of the fight.

121.In *In the Estate of Osment; Child v Osment* [1914] P 129 at 132 , Sir Samuel Evans stated:

> It is well established that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and cause it to be vigilant and jealous in examining the evidence in support of the instructions for the will; it ought not to pronounce for the document unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

122.In some instances, the Registrar of Probates may require the lawyer to file an affidavit of good conscience setting out the reasons why the lawyer prepared the will.

123.In others (*Daulizio*) The beneficiary-drafter , who had been a legal officer at a trust company, was left paying all of the parties' costs, even though the gift itself survived.

124.If you must draft the will, you must refer the client to get independent legal advice. (In *Re A Solicitor* [1975] QB 475; [1974] 3 All ER 853; *Nock v Austin*)

E2. Solicitor as executor – commission and costs

125.The *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* essentially provide (Rule 12.4.1) that it is a breach of the rules to draft a will under which a solicitor may take a commission unless the client is first advised in writing of the obligation, and the entitlement to appoint a person who may claim no commission.

126.Judges have variously praised and rebuked practitioners for having themselves appointed executor in wills that they prepare. In *IMO Will and Estate of William Creswell Foster [2012] VSC 315* at paragraph 29 Daly AsJ praised the practitioner involved for taking on an important role and "providing a valuable service to the community" for becoming an executor in a difficult family situation where there was no suitably qualified family member and instead a great deal of hostility. On the other hand, Master Evans in the case of In the Will of Mary Irene McClung [2006] VSC 209 stated:

"Given the very real potential for a conflict arising between the interests of the client and the interests of the solicitor on such an occasion, it would be preferable that solicitors declined to act as executors. At the very least, the solicitors [sic] code of conduct should provide very clear guidelines as to the proper course of conduct on such an occasion and require the provision of written advice in relation to the decision to appoint a solicitor as executor."

127. Professional misconduct and overcharging – In *Victorian Legal services Commissioner v Ng [2016] VCAT 1237* a solicitor's practicing certificate was suspended when acting as attorney for a client. After the client lost capacity, solicitor 'sent himself' a letter (placed on file, not actually sent to anyone) stating that he would charge 'an establishment fee, annual fees and an 'extra service fee' " for acing. He charged $210,000 over the next two years, including $100,000 commission. He pleaded guilty to professional misconduct for acting in a position of conflict, charging commission to which he had no entitlement and not being frank with VCAT when seeking to be removed as attorney. His practicing certificate was suspended for 5 months and he was ordered to pay costs.

128. Beware the solicitor trying to 'persuade' beneficiaries into agreeing with the commission. In ***Walker v D'Alessandro*** **[2010] VCS 15**, the beneficiaries of an estate agreed to a certain commission, but without advice. Once advised they changed their views. the Court was critical of correspondence from the solicitor which told the benefits what was the usual potion that the whole estate would be held up if the commission was not agreed, The solicitor acting as executor has a fiduciary duty toward the beneficiaries and had breached it by trying to obtain their agreement to commission, which was of this own benefit, without them getting their own legal advice.

E3. Issues arising out of doubtful capacity - between a rock and a hard place

129. **W**hat to do where there are doubts about capacity to give instructions?

LITIGATION

- *Goddard Elliot (a firm) v Fritsch [201]) VSC 87* was a case in which counsel and solicitors were sued for negligence after an unfavourable Family Law settlement was entered into by a client who said he lacked capacity at the time. Mr F had a known history of depression, observed in affidavits in the Family Law proceedings and by the solicitor acting. Counsel thought he was 'coping well' and had no doubts about his ability to give instructions. He received psychiatric treatment about six months before the scheduled hearing date. The trial was complex and some evidence had not been properly prepared for trial. Mr F had perjured himself in an affidavit. Mr F became withdrawn during the preparation period. Counsel asked his psychiatrist for an opinion, as a foundation to seek an adjournment. (a psychiatrist said he had major depression and chronic PTSD , was not well, had periods of confusion. However, he did not say outright that he could not give instructions, and it did say his cognitive function was intact. He was 'at the end of his tether') Counsel sought an ethical ruling from the Bar ethics committee saying that he had capacity to give instructions , but was reluctant to accept advice and when he did so, he appeared to do so without any 'real acceptance'. Senior and Junior Counsel differed in their view of his abilities. The view of the ethics committee was that the ability to take instructions was guided by medical reports rather than an ethical question. Ultimately they did not withdraw. At the door of the court (one week after the latest psych report) the case settled, and they 'signed him up' on the settlement as being entered into against their recommendation.

The solicitor was found negligent for inadequate preparation of the case.

On the question of capacity, the Court affirmed the principle that a solicitor is an officer of the court and has primary responsibility to ensure that their client can instruct. A solicitor who persists in acting for a client without capacity is liable to have costs awarded against them even if there is no impropriety. [at 550]
The extent of capacity required is not determined on a fixed standard, and a person may lack capacity to give instructions, but be capable of the ordinary tasks of life. It is the *Gibbons v Wright* standard of being able to understand the general nature of what he is doing by his participation in the act or document, and the legal consequences of it. (at [554-555]) The court adopted the test described in *White v Fell* - does the person have capacity to – understand they have a problem; seek advice and describe the problem to that advisor; to understand and make decisions on the advice they are given.
The Court spent some time discussing the role of the Court in intervening if a person apparently lacks capacity. (at [562-567]).
The Court adopted the view that, if a client's capacity was doubtful, to the extent that the lawyer could not satisfy him/herself of the client's ability to give instructions, an adjournment should be sought for referral to the relevant administration board. (at [568 -569])
Ultimately the solicitor was found negligent for acting on the instructions of the client, when he did not have capacity to give instructions.
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130.Comment from an ethics standpoint:-

In ethical ruling (LIV R4568. 2008) - Solicitors had doubts about client capacity to give instructions to settle a claim by paying some of her estate share to trust for children. They were also concerned about her capacity to manage her own affairs. A doctor assessed her and was unable to say that client had capacity. They sought advice about whether an administrator ought be appointed over her affairs.
The ethical ruling was that - the firm should form a view about capacity, seeking medical opinion (or further opinion) where possible; if the client refuses to consent to medical assessment, the firm can cease to act (giving reasons); if the firm forms a view the client has no capacity, the firm may apply for an administrator/litigation guardian (the ruling is unclear) and if the client refuses, the firm may cease to act (giving reasons).

131.What about a difficult client? the obligation is to make it as simple as possible for the client to give instructions:-

consider a ruling sought by a solicitor acting for a client in relating to a Mental Health Board application. Client refused to go to the solicitor office, insisting on seeing solicitor at home, but that posed OHS issues so the solicitor did not what to go and was not able to take instructions.

The ethical ruling was:- (LIV R4764 , 2013)
- practitioner is not required to act if can't get proper instructions
- practitioner has obligation to make it easy to take instructions - eg: use folders with coloured tabs, try and confer by skype.

E4. ETHICAL issues and the perils of allowing a beneficiary to 'assist' with instructions.

132. *LEGAL PROFESSION COMPLAINTS COMMITTEE and WELLS [2014] WASAT* 112 (16 December 2014)

The practitioner received instructions from an interested beneficiary of a will and donee of an enduring power of attorney to attend at a hospice. Two doctors had told the interested beneficiary of the lack of capacity. When the practitioner attended the hospice the following day, the patient's lack of capacity was obvious and he had doubts about the patient's capacity. The practitioner declined an offer from a doctor to answer questions about the patient's condition. He purported to take instructions from, and then supervise, the witnessing of the will and enduring power of attorney despite his doubts as to capacity.
The practitioner disregarded the basic obligations of a practitioner where there is a doubt as to a patient's capacity.
The practitioner was found to have engaged in professional misconduct.
The practitioner was also found to be incompetent.

Ultimately, after the WASAT hearing, the Supreme Court determined an application in relation to his practicing certificate and ordered that his practicing certificate be suspended with a recommendation that the practitioner's name be removed from the roll of persons admitted to the legal profession.

Ouch!

The estate was tiny, and the interested beneficiary the long term best friend. Perhaps it was tempting for the practitioner to act just to 'help out'.

133. Whilst there was no ethical breach, there was a good deal of embarrassment for a solicitor who made a will in the presence of a beneficiary in *Brown v Guss [2014] VSC 251*. (The decision is well worth a read both in terms of the Court's findings in relation to the actions of various practitioners, but also as a great recap of the law relating to undue influence, capacity and want of knowledge and approval.) In the case there was evidence that two "warring" branches of the family (children and grandchildren of the testatrix) were each discussing the contents of the deceased's will variously with her and with her solicitors. Upon the death of the testatrix each alleged the other had exerted undue influence (among many other allegations!) on the deceased.

There was one lawyer, Mr N, initially retained to prepare the will. He saw the testatrix whilst a beneficiary (Antony Guss) was present – and that beneficiary took an active part in the instruction taking process. The lawyer's retainer was purportedly terminated by the other (warring) beneficiary.
Ultimately the lawyer became concerned about the position he now found himself in, seeing clearly the conflict between the competing beneficiaries and he wrote to the deceased as follows:

"Our advice in all of the circumstances is that, because the conversations I have had with both Simon Brown and Anthony [sic] Guss, each of whom has a conflicting interest in the terms of your will, may give rise to a perception of conflict on my part, and/or the firm's part, if we were to continue to act for you, it would be better if we withdrew from the matter, ceased to act, and advised you to appoint another solicitor."

134. McMillan J. considered the contents of the letter and said:

"Such were the circumstances that Mr N found himself that he, correctly, informed the deceased that he could no longer act for her and gave her detailed reasons for why this was the case. Surprisingly, however, he did not come to this conclusion earlier when he was dealing only with Antony Guss and the deceased [the beneficiary who sat in on the conference]. Be that as it may, it was ultimately his decision to end his retainer." [emphasis added]

Delivery up of will to attorney?

135. Assuming the testator client does not have capacity to give instructions to release a will, does the client's attorney have the right to obtain a copy.
The general view of the LIV is that the will ought not be delivered up unless taking possession of the will is within the scope of the power of attorney.
Certainly not where the power only permits payment of day to day bills (R4613. 2009)

- Where a family member is disposing of a major asset for a disabled person, the client should be told to go to VCAT (in Victoria) to get an administration order. Section 53 of the GA act has the effect of preserving the status of any asset if disposed of by a person under administration.

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March 2022

Guidelines and suggestions for managing risk

My thanks to Warwick Gilbertson, solicitor, of Turnbull Hill, lawyers, for this set of guidelines he presented at a seminar recently.

1. Make a full and detailed note of instructions;

2. Take greater care with clients who are seriously ill, about to travel overseas or persons you have not seen before.

3. Think about what information is necessary from client;

4. Promptly return calls from testators or their relatives;

5. Have a plan in place if alerted and put on notice of imminent ill-health and/or death, particularly on weekends (eg should you allow clients to have your mobile telephone number and what message is on your emails when your office is shut);

6. Familiarise yourself with copies of previous Wills particularly those held by your office, including ascertaining the whereabouts of the

7. Obtain and be familiar with trust deeds, superannuation deeds, company constitutions, shareholders agreements and/or unitholders agreements, financial statements, binding death benefit nominations, etc, insurance policy details;

8. When considering the client's capacity or incapacity remember advising about court authorised Wills where there is a lack of capacity: *Division 2 Succession Act 2006 (NSW)*;

9. Currently under the Covid 19 pandemic, the capacity to enter into Wills, the remote signing guidelines and/or the preparation of notes and documentation to prove sufficiently an informal Will: (Covid-1 Witnessing of Documents) Regulation 2020 (NSW). *(Refer NSW Law Society Guidelines – electronic witnessing under Park 2B of the Electronic Transactions Act 2000)*.

10. Preparation of an informal Will where you are on notice of imminent death, ill- health, failing capacity or departure overseas;

11. Be honest with your own level of expertise and your capacity or not to advise in respect of steps that can be taken to protect or provide for vulnerable beneficiaries;

12. Promptly prepare the Will;

13. With complicated Wills (particularly Testamentary Trust Wills), give the testator time to consider and reflect on its contents.

What should notes of instructions include?

The note taking and recording of what occurred in your interview with a client should include consideration of the following which will vary according to the circumstances:

1. the family structure;

2. family history;

3. details of testator's concerns;

4. photo identification of testator;

5. authority to contact, receive and exchange information with other advisors (eg: accountants and financial planners);

6. observations of the capacity, understanding, health and dress of your client;

7. the recording of answers as to the existence of family members for whom no provision and their reasons for no provision is being made under the Will;

8. question your client as to their personal affairs, their children and record their responses whilst advising why that enquiry is being made;

9. advice about the possibility and the impact of a family provision claim being made upon the testator's wishes;

10. advice on the steps that could be taken with assets presently held that assist or enable the avoidance of the impact of a claim, or as to a better way to fulfil the testator's intention. (It is noted that the obligation is not extended to ensuring that the advice is accepted and acted on, it is simply giving the advice and recording the fact of giving it);

11. advise of possible alternate options the testator has to fulfil the testamentary wishes other than through the Will – this is particularly so with superannuation and entitlements under trusts;

12. your observations of your client and their level of understanding;

13. the possibility of blended family into the future – this is particularly so with naïve legal consumers;

14. noting what further instructions the testator is to give before a Will can be prepared;

15. details as to assets, liabilities and verifying how they are held – many clients do not understand how assets are owned and frequently are in error –a title search or access to the deed is important;

16. recording the advice given of how to protect and the instructions received as a result of that advice. This may include obtaining signed instructions where you are instructed not to investigate or to do further work.

17. recording what action was not taken or was to be taken, depending on the individual circumstances.

The list is not exhaustive. You may be able to add to it. It should be taken as indicative only of the comprehensive nature of what needs to be enquired into and recorded.

Where you do not have an ongoing relationship with your client and are not familiar with how the wealth and assets are held, greater care and time needs to be spent in ensuring you are adequately instructed.