Retirement & Estate Planning
Bulletin

Informal wills and solicitors' duties

***Christopher Birch SC** NEW SOUTH WALES BAR*

Two recent decisions of the Supreme Court of New South Wales deal with the duties of a solicitor taking instructions for a will where there may be delay in providing a formal document prepared at the solicitor's office for execution by the testator. The cases find that in appropriate circumstances, a solicitor's duty may extend to recommending to the testator, and procuring from him or her, an informal will as a stop-gap measure.

The background to the two decisions, which were both actions against solicitors for professional negligence, involved the now well-recognised duty of a solicitor preparing a will owed to potential beneficiaries who may fail to receive a gift if the solicitor is negligent. This duty is additional to that owed to the testator.

This cause of action was first clearly established following the decision of the House of Lords in *White v Jones*.[1] That decision involved what was found to be unreasonable delay by a solicitor in acting on the instructions and producing a will. The testator died before the will had been prepared. Two years later, the principle was declared to be part of the law of Australia by the High Court in *Hill (t/as RF Hill & Associates) v Van Erp*.[2] In *Hill*, there was negligence by the solicitor in permitting a spouse of a beneficiary to witness the will, which rendered null and void the gift in favour of that beneficiary.

Since *White v Jones* and *Hill v Van Erp*, there has been a steady stream of decisions in which solicitors have been found liable where their failure to act in accordance with the standard of a reasonably competent practitioner has defeated the intentions of testators, and caused loss to intended beneficiaries. Apart from delay in providing a will for execution, there have been matters involving a failure to advise and arrange severance of a joint tenancy,[3] and failing to advise a severely disabled testator that the solicitor could execute the will on his behalf and to proceed to do so.[4]

Simultaneously with the development of the cause of action against solicitors by disappointed beneficiaries, there has developed a body of law surrounding the power conferred upon the courts to dispense with the formal requirements in regard to a will, and permit the admission to probate of a so-called "informal will". Informal wills provision was originally adopted in New South Wales as s 18A of the Wills, Probate and Administration Act 1989 (NSW), and now appears as s 8 of the Succession Act 2006 (NSW). Other jurisdictions in Australia have similar legislation.

The case law on informal wills makes clear that it is crucial to demonstrate a dispositive intention in regard to any relevant document. A draft will, or notes for a will, where the testator has not yet determined whether they reflect his or her testamentary intentions, will not be capable of admission to probate as an informal will. On the other hand, even a document addressed to family, found on the deceased's computer, which may never have been printed, was capable of constituting a will where the evidence revealed the requisite dispositive intention.[5]

The statutory informal will provisions in Australian legislation are ostensibly worded so as to confer upon the court a power to dispense with formal requirements in regard to a will. They thus appear, at first blush, intended to protect the testator who, through ignorance or oversight, fails to comply with the formal requirements. Nevertheless, there is no legal reason for treating them as having only that limited purpose. The informal will provisions may, just as easily, operate as a facultative provision. This would be particularly so in any circumstance where a testator, for timing or logistical reasons, is unable to prepare and execute a will complying with all formal requirements, and deliberately executes a will with the intention of availing himself or herself of the dispensary provisions for informal wills. What is critical in such an instance is that the testator makes clear that the document is intended to be a dispositive document. This can be easily and simply done by including in the document words to the effect that it is intended to be an informal will.

Fischer v Howe

In *Fischer v Howe*,[6] the most recent of the NSW decisions regarding a solicitor's duty when preparing a will, Adamson J found against a solicitor who had failed to procure an informal will in circumstances where there was going to be a 12-day delay after taking instructions

before he could return with the fully engrossed formal will for execution (of which the testator was made aware at the initial meeting and to which she agreed).

The testator was 94 years of age, frail and with mobility problems. The solicitor attended the testator in her home unit, which she shared with a housekeeper and carer. The conference between the solicitor and testator lasted an hour and a half, with the testator giving clear instructions for a new will. She did not have available a copy of her current will and the solicitor did not ascertain its terms. The changes she was making were, in fact, substantial. While the testator did not settle on the identity of an executor during the conference, she otherwise provided complete instructions and appeared to have a settled dispositive attitude.

Her Honour found that the testator did not appear to the solicitor to be suffering from ill-health during the conference. The testator did not expressly disclose her age, but had referred, during the meeting, to a son and daughter who were 72 and 73 years old respectively.

Justice Adamson found that, in all the circumstances, the testator was, clearly, at greater risk than a younger person of sudden mortality or loss of capacity during the anticipated 12-day delay until her formal will was ready for execution. In fact, she died during the 12-day hiatus.

It was a significant factor in the *Fischer* decision that there would have been little time or effort needed to seek an informal will from the testator. The proposed dispositions were brief and could have been quickly written by hand on the solicitor's pad, and then signed by the client. The client could have simply signed the solicitor's notes of the instructions with an annotation that they were intended to constitute an informal will, but it would have been preferable for a manuscript will to be made.

Both parties in the litigation called expert evidence. Both experts accepted that there were circumstances in which it would be incumbent upon a competent practitioner to give consideration to procuring an informal will from the client. Both experts agreed that this was a situational duty dependent upon the circumstances of the client, but where there was a significantly greater than average risk that delay in procuring a formal will could result in frustration of the testator's intentions, a competent solicitor should advise the client as to the advisability of making an informal will if he or she had otherwise determined how to dispose of the estate.

Finally, her Honour noted that the informal will, with its potential shortcomings, would not entirely replace a formal will. A formal will could, in due course, be executed and would then supersede the informal will. Informal wills in such situations are essentially stop-gap wills.

Maestrale v Aspite

Maestrale v Aspite[7] was decided by Fullerton J in the NSW Supreme Court in late 2012. The testator, who was 62 years old, gave instructions at a café after temporary release from a hospital. Her Honour found that the solicitor was not aware at the time of taking instructions that there was a risk of his client dying before a formal will was prepared.

Some days later, the client's health deteriorated and his son sought to contact the solicitor to procure the will. The solicitor was found to be dilatory in responding to those calls. The solicitor ultimately prepared the will and attended at the hospital, but the client had died 10 minutes before the solicitor's arrival.

Justice Fullerton concluded that by accepting the instructions, and in pursuance of carrying them out, the solicitor had assumed a duty to the intended beneficiary to ensure, in the event of any change in the testator's health or capacity, that he would make prompt arrangements to attend with a formal will. Her Honour went on to further decide that, had there been any obstacle to the solicitor promptly attending with a formal will for execution, then his obligation would have been to attend with file notes so that they might be signed and a formal will created.

Conclusion

An appeal in *Maestrale* has been filed but not yet heard or determined. An appeal in the *Fischer* decision is also possible. These decisions may, thus, not yet be the last word on the issues, or indeed even on their particular facts.

Subject to whatever the Court of Appeal may ultimately say, these two decisions give strong and clear guidance to solicitors in regard to important aspects of their duties when instructed to prepare wills. They are a reminder of the importance of acting without delay. They affirm that unreasonable delay will depend upon the circumstances of the client, but where there is serious ill health, or clients are elderly or frail, a delay of even a few days may be unreasonable. Of course, in circumstances where a solicitor is called to a hospital bedside, he or she needs to be aware of all the possible legal steps required to give immediate effect to a testator's clearly expressed wishes.

The decision in *Fischer* raises directly the obligation of a solicitor to give consideration to procuring a stop-gap informal will where there may be delay in having a formal will executed. *Fischer* approached the matter on the basis that it was a situational duty. In *Fischer*, the solicitor was aware that the testator was in her 90s, had limited mobility, and was living with a

carer. The decision in *Fischer* does not stand for the principle that a solicitor should give consideration to a stop-gap will in all circumstances.

Where a testator's intentions are settled and are not overly complex so as to involve the resolution of difficult drafting issues, the creation of an informal will usually will be a task that would take a competent solicitor barely more than a few additional minutes at the end of a conference. The question arises as to whether competent professional practice may ultimately be found to embrace the consideration of a stop-gap will in any circumstance where there will be any delay in procuring a formal will. There can be little countervailing risk in a solicitor considering a stop-gap will in virtually all such instances where his or her client has made up their mind as to how they wish to leave their estate, and where there may be delay in processing a formal will.

Christopher Birch SC
Barrister
New South Wales Bar
cbirch@chambers.net.au

About the author

Christopher Birch SC is a Barrister in practice at the Sydney Bar and a Senior Counsel. He practises in the areas of commercial law, equity, probate, property, administrative law and human rights law. He has been a lecturer in the postgraduate program at Sydney University since 1994, teaching courses in legal philosophy, and also teaches an introductory course in jurisprudence for the Law Extension Committee. He was Chairman of the NSW Council of Law Reporting from 2002 – 2006.

Footnotes

1. *White v Jones* [1995] 2 AC 207; [1996] ANZ ConvR 132; [1995] 1 All ER 691; [1995] 2 WLR 187.
2. *Hill (t/as RF Hill & Associates) v Van Erp* (1997) 188 CLR 159; 142 ALR 687; 71 ALJR 487; BC9700701.
3. *Carr-Glynn v Frearsons (a firm)* [1999] Ch 326; [1998] 4 All ER 225; [1999] 2 WLR 1046.
4. *Summerville v Walsh* [1998] NSWCA 222; BC9800342.
5. *Yazbek v Yazbek* [2012] NSWSC 594; BC201203869 per Slattery J.
6. *Fischer v Howe* [2013] NSWSC 462; BC201302228.
7. *Maestrale v Aspite* [2012] NSWSC 1420; BC201209622.