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Estate planning in family law: risk management

Nabil Wahhab recently acted in a family law matter in which a party died before the property settlement was completed. This case highlights the importance of ensuring clients are aware of the need to change their will after separation. Failing to do so can have serious consequences, not only for beneficiaries, but for the deceased's lawyers and financial advisers as well.

There are significant estate planning issues that clients should address once they separate. Lawyers as well as financial planners could be at risk of negligence claims, not only from their clients, but from intended beneficiaries if the client dies while the family law matter remains unresolved.

Consider the scenario that the writer had recently. The husband and wife separated in November 2002. The parties had not applied for divorce, so under the law they were still married, albeit separated. At the date of separation, the family home was owned in joint names. Both the husband and the wife had wills drawn up in 1989 giving their respective estate to the other spouse and the husband had provided death nominations to his superannuation trustees in favour of the wife. While the family law proceedings were still continuing, the husband died. It was discovered after his death that, notwithstanding the parties had been separated since November 2002, the husband had not changed his 1989 will, nor had he given any thought to severance of the joint tenancy of the family home. As a result the existing family law proceedings became irrelavant and were discontinued as the wife was entitled to all of the assets in which the husband had an interest either through his will, because of survivorship or because she is still his spouse. The jointly held family home would be transferred to the wife as the surviving spouse; the balance of the husband's estate will be given to the wife as per the husband's will; and the death benefit from the husband's superannuation fund would also go to the wife.

Did the deceased husband intend this? Presumably not. The reason that the husband and the wife were involved in family law proceedings is because each of them wanted a financial separation. They were each seeking the division and settlement of the assets they accumulated together. Both the husband and the wife wanted to forge their own financial future without being involved in the affairs of the other party. Does the lawyer for the husband in the above case, or for that matter the financial planner, have any duty to their client to advise him about changing his will, severing the joint tenancy or changing his death nomination?

Duty of lawyers

The matter of *Hill & Associates v Van Erp* [1997] HCA 9, a decision of the Full Court of the High Court, sheds some light on the extent of the duty of the lawyer to their clients. In that case Mrs Olive Eileen Currie wished to change her will. On or about 3 December 1990, Mrs Currie gave instructions to Mrs Hill (the lawyer) instructions for a new will in which Mrs Currie bequethed 50% of her home, as well as a number of other chattels, to her neighbour Lorna Van Ern. On 7 December 1990, the lawyer brought the draft will to Mrs Currie's house. The lawyer read the draft will to Mrs Currie and she signed the will as testator. The lawyer signed as one attesting witness. Mrs Hill asked Mr Van Erp, the benefactor's husband and the only other person present, to sign as a second

attesting witness. Mrs Currie knew at the time of the signing of the will that Mr Van Erp was the husband of Mrs Lorna Van Erp.

After Mrs Currie died, it became apparent that because Mr Van Erp signed as an attesting witness, sec 15(1) of the *Succession Act 1981* (Qld) meant that the testamentary disposition made by Mrs Currie in her will in favour of Mrs Van Erp failed. Mrs Van Erp's intended gift fell into residue and presumably was taken by the residual beneficiary. Mrs Van Erp then successfully sued the lawyer for negligence and damages and in the first instance received a judgment in the District Court for $163,471.50, plus interest. The lawyer's appeal to the Court of Appeal failed and she then appealed to the High Court. The issue before the High Court was whether the lawyer was liable in negligence for procuring Mr Van Erp to be an attesting witness whereby Mrs Van Erp failed to acquire the property which Mrs Currie intended to devise to her.

A majority of the High Court (5 to 1) found the lawyer negligent and confirmed that Mrs Van Erp should be compensated for the economic loss which she suffered as an intended but disappointed beneficiary. Brennan CJ (as he then was) adopted with approval what Lord Goff of Chieveley espoused in *White v Jones* [1995] 1 All ER 601, a decision of the House of Lords in the United Kingdom, where Lord Goff regarded it of "cardinal importance" that "if the law did not recognise a duty owed to a disappointed beneficiary, there would be a lacuna in the law which, for reasons of practical justice, ought to be filled. Unless such a duty is recognised 'the only persons who might have a valid claim (ie the testator and his estate) have suffered no loss, and the only person who has suffered the loss (ie the disappointed beneficiary) has no claim'."

Brennan CJ also quoted with approval a decision of Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74, where in relation to an architect Windeyer J said: "Whatever might have been thought to have been the position before the broad principles of the law of negligence were stated in modern form in *Donoghue v Stevenson* [1932] AC 562, it is now beyond doubt that, for the reasonably foreseeable consequences of careless or unskilful conduct, an architect is liable to anyone whom it could reasonably have been expected might be injured as a result of his negligence. To such a person he owes a duty of care quite independently of his contract of employment."

While generally speaking a solicitor's duty is owed solely to the client subject to the rules and standards of the profession, Brennan CJ said "the interests of a client who retains a solicitor to carry out the client's testamentary instructions and the interests of an intended beneficiary are coincident". His Honour went on to say:

> "... the claim can be made only by an intended but disappointed beneficiary in respect of an intended testamentary gift and the duty of care owed by the solicitor to the intended but disappointed beneficiary is in the performance of the work in which it owes a corresponding duty - albeit contractually - to the testator. It is immaterial of course, that the negligent act or omission which causes the loss occurs during the lifetime of the testator and the plaintiff's loss is suffered on or after the testator's death."

In his judgment, Dawson J referred to the decision of *Caltex Oil (Australia) Pty Limited v the dredge "Willemstad"* [1976] HCA 65 where the High Court held that: "Although as a general rule damages are not recoverable for pure economic loss even where it is foreseeable, damages are recoverable where the defendant has the knowledge or means of knowledge that a particular person, not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence ... there was a need for 'some control mechanism based upon notions of proximity between tortious acts and resultant detriment'."

Lawyers and financial planners who provide full service to their clients could be at risk of negligence claims for economic loss from "intended but disappointed beneficiaries" in respect of a spouse who dies during the course of family law proceedings where that spouse had not been advised that he or she should change his or her will, of the consequences of not severing joint tenancy, or to amend his or her death nomination. A client who approaches a family law lawyer expects that lawyer to provide him or her with complete and comprehensive advice about the consequences of separation and the impact that if the client dies leaving behind a jointly held asset, then that asset will be retained by the other spouse based on survivorship. The lawyer must be able to reasonably foresee

that a client (and in particular a client who is advanced in years) may die during the course of the proceedings or the negotiations and that the jointly held asset will go to the other surviving spouse.

Duty of financial planners

Financial planners who provide full service to their clients and who become aware of clients separating from their spouses also owe a duty to inform them about the matters raised above. Financial planners who fail to advise their client to consider changing their wills are certain to be caught out by the test in *Hill v Van Erp* of foreseeability and proximity. The same applies in relation to a client who separates from their spouse and the financial planner is aware of the asset holdings and therefore knows that a particular asset is owned jointly. That financial planner has a duty to inform the clients of the risks of not severing the joint tenancy.

In some cases, clients do not approach lawyers for family law advice immediately on separation. They generally approach their financial planner or accountant and negotiations may ensue for weeks if not months before the client approaches a lawyer. In those cases the risk that a financial planner or an accountant carries is even more significant than if the client has already approached a lawyer. In those types of cases, the liability cannot be shifted onto or shared with another professional (ie a lawyer).

In the case of the family law client who died during the course of the proceedings, the intended but disappointed beneficiaries were his adult children. While the children may be entitled to make an application pursuant to the Family Provision Act in their state, the entitlement is not be as significant as it would if their father had changed his will, his death nomination and severed the joint tenancy. In that case, the economic loss suffered by the adult children could be upwards of $500,000, which is a potential claim that the children have against the husband's lawyer. This is a significant amount that will impact on on the Professional Indemnity Insurance of lawyers and financial planners.

Financial planners and advisers, along with lawyers, should be mindful of the traps and the opportunities for their clients on separation, and the potential risks of being held liable for negilgence. In addition, if your (now) deceased client's estate is preserved rather than taken by your client's former spouse, you may remain as the adviser for the beneficiaries or some of them and continue to generate fees in respect of the assets retained by the beneficiaries or some of them.

Whoever thought asset protection and estate planning in family law were not significant to their practice ought to reconsider. It is important for clients that their intentions are correctly represented in law and vital that legal practitioners and financial planners protect themselves from damages claims.

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