

Landmines for lawyers when drafting wills

When it comes to mistakes and claims, the Achilles heel for lawyers in the wills and estates area is drafting wills: Making will-drafting errors – either because of poor communication, inadequate discovery or errors in law – is the single most common issue in claims reported in this area of law. In many cases, the mistake which led to the claim could have been prevented.

Communication

Communication – or lack thereof – remains the number one reason for claims reported in the wills and estates area. Most communication errors arise from a failure to follow a client's instructions, a failure to obtain consent, or a failure to inform the client.

In the area of will-drafting, commonly reported errors which originate from communication or lack thereof can include:

- failure to compare the lawyer's will instruction notes with the will;
- failure to confirm the assets and debts of the testator, and;
- failure to confirm the marital status of the testator.

Many of these errors can be easily avoided: For example, have someone else review the will to avoid a problem arising out of a failure to follow client instructions. Use checklists or reporting letters that confirm drafting instructions to avoid an error arising from a failure to inquire about assets or the marital status of the testator.

A good way to avoid communication errors in will-drafting: Document the will drafting instructions, review and confirm the instructions with the testator when the will is drafted, and do a final review of the instructions when the will drafting is completed.

Inadequate investigation

Inadequate investigation is a broad category; typical errors include those arising from a failure to properly inquire about the testamentary capacity of the testator and the failure to properly inquire as to the personal circumstances of the testator.

It is your responsibility, as the lawyer preparing the will, to ensure that the testator has the requisite testamentary capacity. The solicitor should ask the testator open-ended questions to determine testamentary capacity. As well, inquiries should be made about any medical conditions to assess if there is any mental or physical impairment.

If you are concerned about capacity, consider obtaining an expert opinion from an assessor or, at a minimum, speak to the family doctor and obtain a medical report. Along with preparing the will, prepare a memo on your observations of the physical and mental state of the testator.

As part of your initial will interview, obtain a list of assets and liabilities of the testator. You should also, where possible, verify ownership and registration of assets as well as any

designated beneficiary of those assets. Special attention should be paid to life insurance, pension plans, RRSP and RRIFs.

Finally, the solicitor should inquire and confirm marital status of the testator and any obligations to dependents. If possible, the lawyer should obtain and review a copy of any separation agreement or marriage contract which may give rise to those obligations.

Know the law

Legal errors arising from lack of knowledge of the law are more prevalent in the wills and estates field than in many other areas of the law. Errors range from the mundane (e.g., failure to properly execute a will) to the more complex (e.g., errors in estate planning).

Some of the most expensive claims for LAWPRO in the wills and estates field arise from errors in estate planning. These errors often occur because the lawyer preparing the estate plan does not understand or have the expertise to properly execute it.

Complex estate planning requires a thorough understanding of corporate and tax law. If you don't have the expertise in these areas, please refer the matter to a lawyer who does. If an accountant asks you to draft certain documents and you don't understand the implications of the documents being prepared, send the matter elsewhere. Asserting that you were merely a scribe is no defence to a negligence claim.

When undertaking any type of estate planning it is imperative that the lawyer confirm how assets are held. 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 (see *Willhelm v. Hickson* (1999), 183 D.L.R. (4th) 45 (Sask. C.A.)).

Finally, in light of the decision in *Pecore v. Pecore* (2005), 19 E.T.T. (3d) 162, (Ont.C.A.), [2007] 1 S.C.R. 795, it is crucial that you discuss the implication of joint ownership.

Standard of care

Developments in the current law of solicitor's negligence can be traced to the decision of the House of Lords in *White v. Jones*, [1995] 2 A.C. 207. In *White v. Jones*, the court created a remedy for the benefit of disappointed beneficiaries. The new remedy was necessary because there is no privity of contract between a beneficiary and the lawyer drafting the will who makes an error depriving the beneficiary of his or her inheritance.

In *White v. Jones* the court created a duty of care owed by the solicitor to the disappointed beneficiary to fill a "lacuna in the law." The rationale for the duty of care is that it is reasonably foreseeable to the solicitor that the beneficiaries will suffer a loss if the will is not prepared properly or in a timely manner. The solicitor's liability arises from the solicitor's assumption of responsibility to implement the testator's wishes by preparing the will properly and the absence

of a basis, for the disappointed beneficiary who has suffered the loss, to frame a cause of action unless the court provides a remedy.

Common mistakes in will drafting which can give rise to disappointed beneficiary claims include:

- i) unreasonable delay in preparation of a will;
- ii) preparation of a will for a testator lacking competence; and
- iii) clerical errors in drafting a will.

Unreasonable delay

Unreasonable delay in preparing a will is a question of fact. (*Rosenberg Estate v. Black*, 2001 O.J. No. 5051).

The age and health of the testator are of prime importance. In urgent cases the lawyer should consider preparing a holographic will while the lawyer attends to drafting a more formal will.

LAWPRO was recently called upon to assist an insured in a claim where the disappointed beneficiary alleged that the insured was negligent in not preparing a will in a timely manner.

Justice Mulligan in his decision in *McCullough v. Riffert*, 2010 ONSC 3891, reviewed the standard of care for a solicitor drafting a will. Justice Mulligan referred to Brian Schnurr's text, *Estate Litigation*, 2nd ed. (Carswell; 1994- (looseleaf)) where Mr. Schnurr, when addressing how long is too long, states:

“If the testator is elderly and it is known to the lawyer (or ought to have been apparent to the lawyer) that the testator is in poor health, there is a higher obligation upon the solicitor to take all reasonable steps to give priority to completing the will quickly.”

In these circumstances, Mr. Schnurr suggests that a temporary or holograph will should be prepared immediately while the solicitor attends to the drafting and revision of the formal will. In the case at bar, the judge found that the lawyer met the reasonable standard of care in will preparation. Even though the testator died 10 days after consulting with the lawyer, the judge concluded that the facts did not support a finding that the lawyer should have known that the preparation of the will was necessary immediately, because there was no clear evidence that the testator was in poor health or that his death was imminent.

Incompetent testator

The flipside to the failure to prepare a will are the claims which are reported when the lawyer allegedly prepares a will or a power of attorney for an individual who lacks capacity.

This allegation usually arises in the context of a will challenge. The challenger will allege that the testator lacked mental capacity or was unduly influenced when the will was prepared. The lawyer will usually be added as a party to the proceedings by the challenger who is seeking damages for his lost legacy or costs.

A LAWPRO matter is one of the leading cases in this area. In *Hall v. Estate of Bruce Bennett*, 2003 Can LII 7157 (ON C.A.), the Court of Appeal found that the solicitor properly declined to prepare a will where the testator lacked capacity. The evidence in this case was that the testator did not remember the full extent of his estate and was not alert enough to sign. 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.

However, in cases where a solicitor has improperly refused to prepare a will where there is a retainer, damages have been awarded. In situations involving a potential issue of capacity and a near-death situation, the problem for the lawyer is that he or she is in an impossible situation. If a will is prepared and the testator is found to lack testamentary capacity, the lawyer may be liable for costs to set aside the will. On the other hand, if the lawyer doesn't prepare a will for the testator, there may be liability to disappointed beneficiaries for not completing the retainer.

In these circumstances, where possible, a medical opinion or a capacity assessment should be obtained. Regardless of whether a will is prepared or not in these circumstances, it is imperative to document all advice given to the testator. As well, copious notes should be taken on all aspects of the will preparation, including extensive notes on issues relating to capacity.

In determining capacity, you should ask sufficient relevant questions to satisfy yourself that the testator meets the capacity tests in the legislation. Numerous checklists with lists of relevant questions are available.

Usually where there is a will challenge on the basis of lack of capacity, there is often also an allegation of undue influence.

It is important when drafting a will to ensure that the testator is instructing you and not being directed by an interested party. Be aware of red flags that may suggest undue influence. Examples include a refusal by a "friend" or relative to allow the testator to meet with the lawyer privately or a testator who brings in notes setting forth the terms of the will.

Another red flag would be a radical change in the beneficiaries from a previous will. In these cases, the lawyer should ask the testator the reason for the change and confirm and document the change requested. If you are not satisfied with the answers given for the change, probe further.

Finally, once the will has been drafted, highlight in your reporting letter the changes in the will and the explanation given by the testator for the changes.

Clerical errors

Clerical errors are a continual source of claims at LAWPRO. Common errors include spelling errors in the names of charitable organizations, typographical errors in bequests, errors in the number of parts in the division of a residue and missing dispositive provisions in the document.

Most of these errors can be avoided by reading the will or having someone else proofread the will.

Another “avoidance tip” is to check the math: The division of the residue should total 100 per cent.

Errors in names of charities can result in a charity not receiving its bequest. The solicitor owes a duty to the intended beneficiaries and can be found negligent for misnaming the charity.

When drafting a will with a charitable beneficiary, the lawyer can take steps by reviewing the Canada Donor’s Guide or the Canada Revenue Agency website to confirm the existence of the charity and the proper spelling of its name. It is best practice to include both the name and address of the charity because if there is an error, the court has a better chance of identifying the intended beneficiary.

Recently LAWPRO was successful in a rectification application with respect to a typographical error.

In *Earle Nugent, Estate Trustee under the will of Viola Binkley v Susan Lang et al.*, 2009 CanLII 26604 (ON S.C.), the solicitor had made a typographic error in the preparation of a new will. As a result, the new will left the sum of \$25,000 to each of three beneficiaries rather than the intended \$2,500. The court granted the request for rectification. The beneficiaries sought leave to appeal but it was denied on the basis that there was no good reason to doubt the correctness of the decision. Although this precedent has been extremely helpful in resolving other similar claims, it was an expensive process which could have been avoided by simply proofreading the will.

Failure to include clauses in the will for disposition of assets and the residue often result in an intestacy. If the matter cannot be rectified or resolved, a claim for negligence will be advanced against the drafting solicitor. Even if it is resolved, a claim for costs will be advanced by the various parties against the lawyer, which can be difficult and costly to resolve.

If the testator has life insurance, RRSP or pension plans where there is a separate designation of a beneficiary, this needs to be discussed and considered when drafting the will. Finally, it is imperative that you inquire and confirm a testator’s marital status. Common-law spouses are often referred to as husband or a wife by a testator. If the testator is separated or divorced, the lawyer should review any agreement to determine any support obligations and discuss the implications of the appropriate family law provisions.

Conflict of interest

Another source of claims in the estates field is conflicts of interest. Often conflicts arise where a lawyer accepting a retainer from both husband and wife or common-law partners to prepare mirror or mutual wills.

If you obtain instructions from spouses or common-law partners to prepare wills, treat the matter as one of a joint retainer. The commentary in the Rules of Professional Conduct under Rule 2.04 states:

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992*, S.O. 1992, c.30 to prepare one or more wills for them based on their shared understanding of what is to be in each will, should treat the matter as a joint retainer and comply with subrule (6).

Further, ...if only one of them were to communicate new instructions...

- a) the subsequent communication would be treated as a request for a new retainer and not part of the joint retainer...
- b) in accordance with rule 2.03 the lawyer would be obligated to hold the communication in strict confidence...;
- c) the lawyer would have a duty to decline the new retainer, unless:
 - i) the spouses had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close relationship...;
 - ii) the other spouse or partner had died; or
 - iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

Although the sub-rule does not require it, if there is a power imbalance between the two spouses consider recommending that the “weaker” client obtain independent legal advice to ensure that the client’s consent is informed and not coerced.

Notwithstanding that the rules do allow a lawyer, in certain circumstances, to act on a subsequent retainer, this is an area fraught with danger and a practice that should be avoided. For example, although it appears to be permitted under the Rules, a problem can arise when one of the partners dies and the surviving partner returns to the lawyer seeking to change his or her will.

An example of the type of situation which can arise was discussed in the case of *Hall v. McLaughlin Estate*, 2006 CanLII 23932 (On. S.C.), 2006 O.J. No. 2848.

In the *Hall* case, the couple had made mutual wills. This was a second marriage for both spouses and both spouses had grown children from previous relationships.

The initial wills were mirror wills which provided that on the death of the first spouse the estate would go to the other. On the death of the last spouse, the estate was to be split equally with one half going to the husband’s children and the other half going to the wife’s children.

The wife died first and her estate went to the husband. Contrary to the agreement, the husband changed his will and left the entire estate to his children only. The court imposed a constructive trust on the net value of the husband's estate for the wife's children. The court did so because it found there was a binding agreement that the survivor of them would divide his or her estate into two halves between the two families.

There is no mention in the judgment whether or not the same lawyer prepared the 1992 will and the husband's subsequent will. If it was the same lawyer and the estate had been depleted, it is likely that a claim would have been advanced by the disappointed beneficiaries.

Avoiding negligence claims

1. Promptly report to LAWPRO

Preventing claims is in both your best interests and those of all lawyers insured under the LAWPRO program. Claim prevention helps to reduce the cost of the program and ultimately the cost to the profession for the primary insurance program.

To trigger LAWPRO's involvement, the matter must be reported by the lawyer or the named insured in a timely fashion. Failure to report could result in a denial of coverage if LAWPRO is prejudiced by the late report.

Many claims are reported late because the lawyer does not realize that there is a potential claim. This is particularly true in the wills and estates field. The following events should trigger a report by the insured lawyer to LAWPRO:

1. a request for the will file after the testator's death;
2. a request that the lawyer be examined or provide an affidavit in a will dispute.

If the lawyer reports the matter to LAWPRO as soon as a request is made for his or her file, or the lawyer is asked to provide an affidavit, his or her interests can be best protected. LAWPRO will, in many cases, provide counsel to respond to a request to review a file or to examine the lawyer on a claim prevention basis.

We have in our portfolio numerous claims in which an insured has provided an inaccurate statement or affidavit, and in a subsequent lawsuit this becomes the basis for a negligence claim against the lawyer.

If you are asked for your file after the testator has died, or are asked by a lawyer for a beneficiary or executor to provide a statement, it is possible that a will challenge is being contemplated and the potential exists that you may be sued. As well, in the event of a challenge to the will, the appointment of the executor may also be in doubt and the lawyer may be releasing a file to a party who is not entitled to receive it. The best practice in these circumstances is not to give the file to any party without a court order.

2. Document your file

Once you have reported the claim or potential claim to LAWPRO, defence counsel will request a copy of your file. The contents of the file will often determine the strategy defence counsel will

employ to respond to a claim/potential claim. Well-documented files will often provide a viable defence to the claim. The reverse is true with respect to poorly documented files.

3. Use retainer agreements

Consider using retainer agreements in your practice. Through the use of retainer agreements, you specify the terms and conditions of your employment. If there are conflicts of interest, or any issue of privilege, this can be canvassed in the retainer agreement.

4. Write reporting letters

Where possible, confirm will instructions in writing, document telephone calls and e-mails, and prepare comprehensive reporting letters. Reporting letters are extremely important and can be easily created through the use of templates. In some cases, a reporting letter confirming instructions for a new will and the reason for the drafting instructions may provide a defence to a claim from a disappointed beneficiary.

5. Use checklists

Using a checklist will help prevent many of the clerical errors that are reported. Checklists also help ensure that you've asked about all relevant issues including marital status, family history and testamentary capacity.

6. Develop office routines

All personnel involved in will preparation should be aware of the proper steps to be taken for the execution of wills.

Proofreading wills, comparing the lawyer's notes to the drafted document and checking the math for any fractional legacy should be part of the routine before a will is sent to the testator for review. Consider using a tickler system to follow up and ensure that wills are executed in a timely manner.

Conclusion

In summary, reducing the risk of malpractice claims in the wills and estate field is possible through the use of good practices and procedures. The tools to implement these practices are readily available to the profession. While you cannot totally eliminate the risk of a malpractice claim, you can improve the odds of avoiding a claim by integrating risk management strategies into your practice.

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