

Dilemmas of the family solicitor

By PETER MORAN

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Often a solicitor has acted for different members of a family in different situations and has earned the position of the family solicitor (especially in rural areas). However, this position carries with it certain risks that need to be considered each time you are acting for a family member, particularly when more than one member is involved in a matter. The solicitor must stop and think about who is the client and whether one of the parties should receive independent advice.

When acting for solicitors in family negligence claims brought against them, it is often instructive to look at what the solicitor could have done differently which might have avoided the claim being made in the first place.

Below are three LawCover matters I've been involved with that particularly concern family issues, either through having more than one member of the family attend conferences, or where a solicitor acts for more than one family member with conflicting interests.

Estate planning

An elderly lady proposes to leave a farming property to one son and a coastal holiday property to another. She is unsure whether she wants to gift the properties before she dies or leave them in her will. She has a meeting with the sons. The solicitor also attends. He acts for the mother only. There is no clarification at the commencement of the meeting that the solicitor only acts for the mother. An arrangement is entered into

but the mother subsequently changes her mind and decides to leave the holiday property to other relatives.

The disappointed son who misses out makes a claim against the solicitor, contending that the solicitor was also representing his interests.

The claim could have been avoided with a more careful opening statement at the meeting about who the solicitor represents, strengthened by confirming letters to the two sons prior to the meeting taking place.

Security for daughter's loan

A solicitor acts for the borrower in obtaining funding for a business. He also acts for the borrower's father, who offers his property by way of security for the daughter's loan. The lender has its own solicitors acting. There is default and the lender seeks possession of the father's property. The father raises the 'I didn't understand' defence.

The lender then joins the borrower's solicitor, asserting it relied upon the solicitor's representation to the lender that the mortgagor understood the loan transaction.

To avoid such claims, look carefully at the nature of declarations provided to lenders when acting for borrowers. Make sure they can't be construed by a lender as, in effect, a representation to the lender of a borrower's understanding of the loan transaction.

Family asset transfer

A solicitor acts for a widow on the transfer of her assets to a son and a nephew (in return for the son and the nephew paying out debts of the widow). The solicitor prepares a deed of family arrangement. He sees his client, as well as the son

and nephew, in conference.

The widow subsequently challenges the validity of the deed and brings an action against both the solicitor (failure to advise) and the nephew (undue influence).

The nephew also brings his own action against the solicitor, alleging the solicitor was representing his interests as well.

The claim could have been avoided with clear advice (evidenced in writing by a contemporaneous file note or letter) that he was only acting for the widow and not for the son or the nephew. Additionally, the son and the nephew should not have been permitted to participate in the conference when they had a material interest in the outcome.

Risk management lessons

- Establish from the start of the retainer who is and, when necessary for the sake of clarity, who is not your client.
- Confer with the client alone, free from family influences.
- Be aware of conflicts. Do not advise a family member (especially parent) of a client borrower when the security is being provided not by the client but by that relative.
- Avoid situations where someone other than the client can assert reliance on your advice. Do not confer with the client with other family members present. If this is unavoidable, clarify who you are acting for and that only that person can rely on your advice.
- Keep evidence on file in the form of file notes or, better still, letters or emails confirming who you are acting for, the instructions that were received and the advice given.

- Ensure your client understands what you are investigating or advising about. Clarify in writing both what you are and what you are not doing.

- If instructions come from a third party (such as child, relative of client, accountant), check with the client the accuracy of what is supplied and the authority of the third party to give instructions or receive advice.

- Confirm with the client who you can discuss a particular matter with so that confidentiality is not inadvertently breached.