

DUTY OF CARE TO PROSPECTIVE BENEFICIARY UNDER A WILL ?

BADENACH v CALVERT



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By Abbey Burke

Since the High Court's 1997 decision in *Hill v Van Erp* (1997) 188 CLR 159, solicitors practising in wills and estates have had to live with the uncomfortable possibility that when approached to draft a will they may have professional duties not only to the client sitting in their office, but to a third party – the future beneficiary under the will.

In *Hill v Van Erp*, a solicitor had followed her client's instructions to prepare a will that gave part of the client's property to a friend, Mrs Van Erp. When the will came to be signed and witnessed, the solicitor asked Mrs Van Erp's husband to be the attesting witness, with the result that the disposition of property to Mrs Van Erp was void. Mrs Van Erp successfully argued that the solicitor had breached a duty of care owed to her as the intended beneficiary.

The disappointed beneficiary in *Badenach v Calvert* [2016] HCA 18 similarly sought to establish a case for negligence against the testator's solicitor. However, the High Court overturned a decision of the Full Court of the Tasmanian Supreme Court to find that in the circumstances of the case, the solicitor did not owe the prospective beneficiary a duty of care to advise the testator of the options available to him to avoid exposing his estate to a family provision claim. In doing so, the High Court has clarified the limits of a solicitor's duty of care to an intended beneficiary under a will. This article considers the reasoning of the courts at first instance and on appeal.

Facts

A solicitor, Mr Badenach, received instructions from his client to prepare a will that passed the whole of his estate to Mr Calvert, who was the son of the client's long-term de facto partner, and whom he treated as a son.

Snapshot

- A solicitor approached to draft a will does not always owe a duty of care to a prospective beneficiary.
- Such a duty will only arise where the interests of the client and the interests of the prospective beneficiary are aligned.
- An important factor in determining whether there is such a concurrence of interests is whether the testator's testamentary intentions have been finalised after the client has received all necessary advice from their solicitor.

The property to be transferred to Mr Calvert consisted of the client's share in two properties he owned as a tenant in common with Mr Calvert. The client executed his will, and died later the same year.

However, the client's intentions could not be carried into effect because, after the client's death, an estranged daughter from a previous marriage made a successful family provision claim under the Tasmanian *Testator's Family Maintenance Act 1912 (TFM Act)*. As a result, the estate intended to be passed to Mr Calvert was substantially depleted.

Mr Calvert brought proceedings against the solicitor and his firm. He claimed the solicitor had been negligent in failing to advise the client of (a) the possibility that his daughter might make a claim under the *TFM Act* and (b) the options available to reduce or extinguish his estate in order to avoid such a claim, such as by converting his and Mr Calvert's interest in the two properties to joint tenancies (so the properties would pass to Mr Calvert by survivorship), or by making

inter vivos gifts to Mr Calvert. Relying on *Hill v Van Erp*, Mr Calvert alleged that these acts were breaches of a duty of care that the solicitor and his firm owed to Mr Calvert as the intended beneficiary of the client's estate.

First instance decision

At first instance, Blow CJ of the Tasmanian Supreme Court accepted expert evidence of an experienced solicitor to find that the solicitor owed the client a duty of care (in contract and in tort) to ask whether the client had family, and upon learning that the client had a daughter, to warn that the daughter might make a family provision claim against his estate. However, his Honour was not satisfied, on the balance of probabilities, that a conversation about a possible family provision claim by the client's daughter would have triggered an enquiry by the client about ways of protecting Mr Calvert's position. In these circumstances, his Honour was not satisfied that the solicitor owed the client, let alone Mr Calvert, a duty to volunteer advice about options available to the client to avoid the daughter making a claim against his estate under the *TFM Act*.

Decision of the Full Court

Mr Calvert appealed, and the Full Court (Tennent, Porter and Estcourt JJ) held that the solicitor breached his duty of care to the client, not only by failing to warn the client of the risk that his daughter might make a family provision claim, but also by failing to volunteer advice to the client regarding steps the client could take to avoid exposing his estate to such a claim.

Those omissions, the Full Court held, also breached a consistent and coextensive duty of care that the solicitor owed to Mr Calvert.

High Court decision

By grant of special leave, the solicitor and his firm appealed to the High Court. The appellants did not dispute that the solicitor owed a duty of care to the client to enquire about his family and, when informed of the existence of the daughter, to advise that she may make a family provision claim against the estate. What was at issue was whether more was required, namely whether the duty extended to volunteering advice about how to avoid a family provision claim.

The High Court unanimously allowed the appeal from the Full Court's decision, and in three separate but concurring judgments, found that the solicitor did not owe the alleged duty to Mr Calvert.

The majority (French CJ, Kiefel and Keane JJ) distinguished *Hill v Van Erp* on the basis that in that case, the interests of the client and the intended beneficiary were aligned, whereas in the present case they were not. In *Hill v Van Erp*, both the testatrix and the intended beneficiary had the same interest in the testatrix's testamentary intentions (which were finalised) being carried

into effect. Therefore recognising a duty to the intended beneficiary would not involve any conflict with the duties owed by the solicitor to her client.

In the present case, however, the solicitor's duty to the client was limited to enquiring about the client's family and advising of the possibility of a family provision claim against the estate. The duty to the client did not extend to volunteering advice about how to avoid a family provision claim, because there is no way of knowing what the client's instructions would have been once informed of the possibility of a claim. The client could have instructed the solicitor to take every step to avoid a claim, but equally, he could have maintained his original instructions and allowed events to take their course, or made provision for his daughter in his will. The client's testamentary intentions were not 'final' in the way that they were in *Hill v Van Erp*. In these circumstances, their Honours considered that the interests of the client and the intended beneficiary were not aligned. Therefore the contended duty of care of the solicitor to Mr Calvert did not arise.

Their Honours also found that Mr Calvert had not established that the alleged breach of duty caused the relevant loss.

Risk management and claims prevention – take away points

Solicitors practising in wills and estates may take away two key points from this litigation:

- The solicitor in this case who was approached to draft a will had a duty to his client to enquire about his family, and when he learned about the estranged daughter, to advise that she might make a family provision claim against the estate.
- There are clear limits to a solicitor's duty to third parties when approached to draft a will. A solicitor will only have a duty to a prospective beneficiary under a will where the interests of the client and the interests of the prospective beneficiary are aligned. However, care should always be taken in making appropriate enquiries into, and giving effect to, the testator's intentions. **LSJ**

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