

INFORMAL WILLS: THE DUTY OF A LAWYER TO CONSIDER, DISCUSS AND MAKE AN INFORMAL WILL FOR A CLIENT

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The preparation and drafting of wills is a conventional part of legal practice. The legal issues concerning wills and estates have always engaged elements of formality and technicality.

However, in the 1989 amendments to the *Wills, Probate and Administration Act*, (now adopted in the *Succession Act 2006*), legislative reform took place which, at least in one aspect, allowed for less formality, rather than more.

Before the introduction of this legislation, the execution requirements for a valid will (generally speaking) required that the document be signed by the testator(trix) in front of two witnesses, who also needed to sign the will. Practitioners will be aware that the amending legislation permitted recognition of an "informal will", which did not comply with the otherwise mandated execution requirements.

While these changes were seen as alleviating formal requirements in favour of testators, in one sense they have added additional complications, and burdens, for practitioners. In particular, one of the "risk management" issues for lawyers is the question of when a lawyer is obliged to make an informal will for his or her client.

This issue has been before the New South Wales Supreme Court on a number of occasions – with varying outcomes.

In May, the New South Wales Court of Appeal heard an appeal in the case of *Fischer v Howe* (first instance reference [2013] NSWSC 462). Hopefully, the Court of Appeal will clarify the issue of when a solicitor is obliged to discuss with a client the making of an informal will, and proceed to make such an informal will.

There are two recent Supreme Court first instance decisions on this issue, which appear to be in conflict.

Fischer's case

The basic facts in *Fischer* were:

- Mrs Fischer was the testatrix. She was 94 and physically frail with some mobility problems. She had a home carer but was of relatively good health and had full mental capacity

Snapshot

- Practitioners should be aware of the provisions of the *Succession Act*, which allow a testator(trix) to make an "informal will"
- There is presently a lack of clarity as to the circumstances in which a solicitor has an obligation to advise on, and procure, an informal will from his/her client
- Hopefully, the anticipated judgment of the Court of Appeal in *Fischer v Howe* will bring some clarity to the issue. In the interim, practitioners should err on the side of caution

- The lawyer was contacted by Mrs Fischer's doctor who said that Mrs Fischer "had all her marbles" and was in "relatively good health"
- Mrs Fischer had previously made numerous wills
- The lawyer met Mrs Fischer at her home in late March 2010 (just before Easter)
- She gave instructions to the lawyer (who had considerable experience in wills and estates) about the changes she wanted to make in her will
- The solicitor did not believe there was any urgency in Mrs Fischer arranging a new will. At the end of the conference he told Mrs Fischer he would be away over the Easter break, he would prepare a new will, and would return to see her in the week after Easter. Mrs Fischer agreed and said she wanted her son to be present when the solicitor returned
- On the Tuesday after Easter, Mrs Fischer died without having signed her proposed new will

The testatrix' son – who was to get a substantial and increased benefit under the proposed will – sued the lawyer and succeeded at first instance. The trial judge concluded that, "The solicitor's failure to (procure an informal will) was a breach of his duty to exercise reasonable care.

Although the deceased may not have been at risk of imminent death ... she was, by reason of her age, lack of mobility, need for care and infirmity, susceptible to a not insignificant risk of losing her testamentary capacity in the period of about a fortnight between the initial conference and the proposed conference. There was no reason for her, or her intended beneficiaries, to be subjected to that risk in the light of her settled testamentary intentions ..."

The trial judge also said, "The only thing that would have relieved the (solicitor) of the obligation to procure an informal will would have been the deceased's express instructions that she did not wish to take that course."

The findings in this first instance decision potentially may oblige lawyers to consider (and procure) an informal will in a wide range of circumstances.

This judgment is to be contrasted with the decision of Justice Fullerton in *Maestrale v Aspite* [2012] NSWSC 1420.

Maestrale's case

In *Maestrale's* case, the lawyer was aware, at the time of the initial conference, that his client was in hospital with terminal cancer and that the doctors believed he had "a few months to live".

Fullerton J found that, at the time of the initial conference, the solicitor did not breach his duty of care by failing to immediately procure an informal will.

Summary

These two first instance decisions are not easy to reconcile. The point at which the law will oblige solicitors to consider, and discuss with clients, the making of an informal will is clearly a circumstantial matter. The Court of Appeal's decision in *Fischer* is likely to provide some clarity and greater definition for will-makers. In the interim, it would be sensible for practitioners – to avoid potentially risky territory – to be particularly conscious of the ability of a testator(trix) to make an informal will; and for lawyers to raise this issue with their clients in situations of concern or doubt. **LSJ**