

DO I SUGGEST AN INFORMAL WILL?

THE *HOWE v FISCHER* APPEAL

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By Ray Ward and Peter Moran

All solicitors who accept instructions to draft wills should be familiar with the decision of the Court of Appeal in *Howe v Fischer* [2014] NSWCA 286 (26 August 2014).

In these proceedings, the testator's son brought an action against the testator's solicitor, seeking damages for a breach of duty of care owed to him as a disappointed beneficiary under a proposed new will. The son alleged that the solicitor was negligent in failing to procure the signing of an informal will at the time of taking instructions. The elderly testator, who was otherwise in good health, died before a new will was prepared.

The Court of Appeal decision reversed the first instance decision of the Supreme Court in which Adamson J found that the solicitor's retainer was to give legal effect to the testator's intentions and not merely to prepare a formal will and arrange for its execution. Her Honour found that due performance of the retainer required the solicitor to procure the immediate execution of an informal will.

The Court of Appeal decision was the subject of an application to the High Court for Special Leave to Appeal. That application was dismissed by the High Court on 8 April 2015.

Dismissal of the application confirmed that a solicitor's duty to a testator was as outlined in the Court of Appeal judgment. The Court of Appeal found that the duty, pursuant to the solicitor's retainer, is 'to bring to bear the reasonable care and skill of the ordinary practitioner exercising and professing to have the special skill relevant to the field of professional practice' (at [71]). More specifically, the court found that a solicitor's duty is to take reasonable steps to achieve:

- fulfilment of the testator's objective of making a formal will according to the agreed timetable; and
- the avoidance of any reasonably foreseeable frustration of that objective.

Snapshot

- Claims against solicitors by disappointed beneficiaries on the basis of delay in will preparation are on the increase.
- Following the first instance decision in *Howe v Fischer* there has been concern and uncertainty as to the extent of a solicitor's duty to procure and/or execute an informal will at the time of taking instructions.
- The Court of Appeal decision has now clarified the uncertainty.
- The application to the High Court for Special Leave to Appeal from the decision of the Court of Appeal was dismissed on 8 April 2015.
- Solicitors should consider potential risks to the testator such as imminent death or loss of capacity when taking instructions to draft a will.

A breach of the solicitor's duty to the testator would also be a breach of the solicitor's duty to an intended beneficiary, if the intended beneficiary suffered a foreseeable loss as a result of that breach.

Following this decision, solicitors taking instructions for a will should consider:

- any risk of the imminent death of the testator;
- any risk of the imminent loss of capacity of the testator;
- whether the testator is subject to intensive medical care;
- whether the testator is in hospital and the reason why the testator is in hospital; and
- whether the testator is about to embark on a potentially risky trip (eg a soldier urgently called to a war zone).

As, on the evidence, none of the above factors were present in *Howe v Fischer*, the Court of Appeal held that there could not have been a duty owed by the solicitor to

procure an immediate informal will by the testator.

At its highest, the duty was one to call to attention the possibility of making an informal will, but only if the solicitor was aware that some factor, as a matter of reasonable foresight, might frustrate the testator's objective of making effective testamentary dispositions by means of a formal will.

Lawcover recommends that when taking will instructions, solicitors should:

- consider if any of the above risk factors are present in relation to the testator (a checklist could be added to the solicitor's standard will instruction form);
- advise the testator of the possibility of making an immediate informal will if any of the factors are present; and
- make a contemporaneous file note of any advice provided to the testator and the instructions provided by the testator.

The High Court's rejection of the Special Leave Application is a pleasing outcome for solicitors involved in wills and probate practice. While the obligation to understand and apply *Succession Act 2006* (NSW) s 8 remains, it is not something that needs to be called into play on each occasion. However solicitors need to exercise the usual standard of care and foresight to ensure that the testator's objective of making effective testamentary dispositions is achieved. **LSJ**

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