

Will Instructions – Potential for Conflict

Occasionally, we are approached by an established client to prepare a will for a third party, where that client is to be the principal or major beneficiary under the proposed will and, in particular, the established client instigates that will.

In *Petrovski v Nasev; the Estate of Janakievska*¹ Hallen AsJ considered our duties when we may face the situation referred to above. His Honour also endorsed the comments of Santow J in *Pates v Craig & Anor; the Estate of Cole*.² The following principles can be taken from the judgment:

1. the essence of our fiduciary duty is to give unfettered service to our client's interest (refer to **Rule 4.1.1 Australian Solicitors Conduct Rules 2012** ('ASCR');
2. this requires that we avoid acting for more than one party to a transaction where there is a likelihood of a real conflict of interest between the parties (refer to **Rule 11 ASCR**);
3. a conflict of interest may arise between the interests of an intended principal beneficiary seeking to prove a will in his or her favour and the interests of the testator;
4. we must seek to assist our client in making a valid will. This means, that the natural object of our client's bounty must be capable of being appreciated by our client, even though our client may choose to exercise that capacity so as to omit such objects or disfavour them;
5. we need to take steps as are reasonably practicable to enable us to give proper consideration to any matter going to the validity of the proposed will. Then, we should advise and act in conformity with that consideration (refer **Rules 7.1 and 8 ASCR**);
6. a conflict can arise where there is reason to be concerned regarding a lack of testamentary capacity by reason of fragility, illness or advanced age. Informed consent will not absolve us of the conflict, particularly where there are doubts as to the client's capacity (refer to **Rules 8 and 11 ASCR**);
7. where our client is obviously enfeebled and the capacity to make a will is potentially in doubt, we need to take particular care to gain reasonable assurance as to the testamentary capacity of the client (see *Legal Services Commissioner v Ford*).³
8. we should attend on our client personally and fully question the client to determine capacity – the questions should be directed to ascertaining whether our client understands that he or she is making a will and its effects, the extent of the property he or she is disposing of and the claims which he or she ought to give effect;

¹ [2011] NSWSC 1275.

² NSWSC, 28 August 1995, unreported.

³ [2008] QLPT 12.

9. have another person present, have regard to their calibre as a potential witness (if possible a medical practitioner should also be considered as witness (preferably the client's treating doctor) – use the Lexon letter to seek advice as to testamentary capacity). Of course, the presence of such persons will require our client's consent (refer to **Rule 9** ASCR);
10. make a detailed written memorandum of your attendance and the results of any medical examination; and
11. be present at the signing of the will and make detailed notes.

Stafford Shepherd

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