

# Current Issues From the LPCC

## TAKING WILL INSTRUCTIONS THROUGH INTERMEDIARIES

It is not uncommon for a legal practitioner to receive a referral from an accountant, financial planner or other intermediary in respect of a will.

The referring professional may be assisting a mutual client with estate planning and the referral may go so far as to forward the client's instructions as to the actual content of the will.

The Legal Profession Complaints Committee (LPCC) has recently considered the appropriateness of a practitioner preparing wills based solely on the instructions of an intermediary, the clients' accountant.

The practitioner was the subject of a complaint from one of the children that the wills did not reflect the parents' wishes. The wills were fairly complex and the parents resided at a nursing home.

The practitioner argued that his conduct, in failing to meet or speak with the clients before preparing the wills, did not amount to unsatisfactory professional conduct. He submitted it was sufficient for him to rely on the accountant, as a fellow professional, to take the clients' instructions and discuss the draft wills with them. The Committee rejected that submission.

In preparing a will a legal practitioner has an obligation to satisfy themselves that the will is drafted in accordance with the client's voluntarily given instructions, that it accurately reflects the client's testamentary intention, that the client understands the terms of the will as drafted and that the client has the requisite testamentary capacity. This would ordinarily involve personally meeting the client and discussing those matters. The Committee's view was that the practitioner's duties could not be displaced by reliance on the judgment of an intermediary, notwithstanding that that person may be a trusted and competent fellow professional.

An intermediary removes the opportunity for interaction with the client and for the client to demonstrate an understanding of the instructions.

The Committee considered that, by failing to meet or speak with the clients at any time between receipt of the instructions and preparing the wills, the practitioner engaged in conduct which fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent and diligent legal practitioner.

The Committee's view is consistent with what has long been considered good professional practice.

*It is imperative that solicitors see the client at least once when preparing the will: see In the Estate of Tucker [1962] SASR 99. Usually there is an initial interview where the client gives instructions; further conferences with the client may be necessary to ascertain certain aspects of the will and its potential effect. Finally, it is always best if the will is signed in front of the solicitor." Wills Probate and Administration Service (WA) [40,005]*

*[T]he court always looks with great suspicion at a will that is prepared by a solicitor without direct contact with the testator ... It should be the practice of all solicitors to make sure that they see the testator themselves and make sure that what is in the will is understood by the testator and that he freely accedes to it. Woodley-Page v Simmons (unreported, SC (NSW), 23 September 1987, BC8701133 at per Young J at [21] & [22].*

Practitioners should be aware that preparing a will without meeting or speaking with the testator client may amount to unsatisfactory professional conduct.

## TRUST RECORDS — SOME PRACTICAL TIPS FROM THE LPCC'S SENIOR TRUST ACCOUNT INSPECTOR

If you maintain a trust account you need to be familiar with the records you are required to keep. The *Legal Profession Regulations 2009 (LPR)* Part 7 r33 to r68 provides assistance in this regard.

During inspections, it is noted that some legal practices do not establish trust account cash books, or if they do the records lack the detail required by r46 to 48 LPR. The trust account cash books should comprise trust account receipts and trust account payments which record all the transactions a practice has undertaken with respect to its trust bank account.

Reconciling the trust bank reconciliation with the trust ledger listing is an important process which should be undertaken each month. It is important to review these reports and look for any of the following issues:

- Stale cheques still appearing in the bank reconciliations.
- Outstanding deposits which have not cleared after two days.
- Adjustments being made to the bank account but not clearing.
- Trust ledger listing having funds for clients which are no longer current or for small amounts.
- Trust ledger listing having funds for the practice or for administration accounts.
- Whether the reconciliation was completed within 15 days of month end.

Trust records can be kept manually or be computerised. If you are a sole practitioner and have minimal transactions through your trust bank account then a manual system may meet your needs. However, a larger practice should consider investing in an approved software package.

If you have queries concerning your trust account obligations, please contact Anna Young or any of the Legal Practice Board's Trust Account Inspectors for clarification.