By Tina Cockburn and Barbara Hamilton

ACTING FOR ELDERS in estate-planning and will-making

Civil and professional liability issues

Solicitors must remain ever-mindful of their professional duties to their clients when engaging in will-making and estate-planning work, or face the risk of civil liability and/or disciplinary action.

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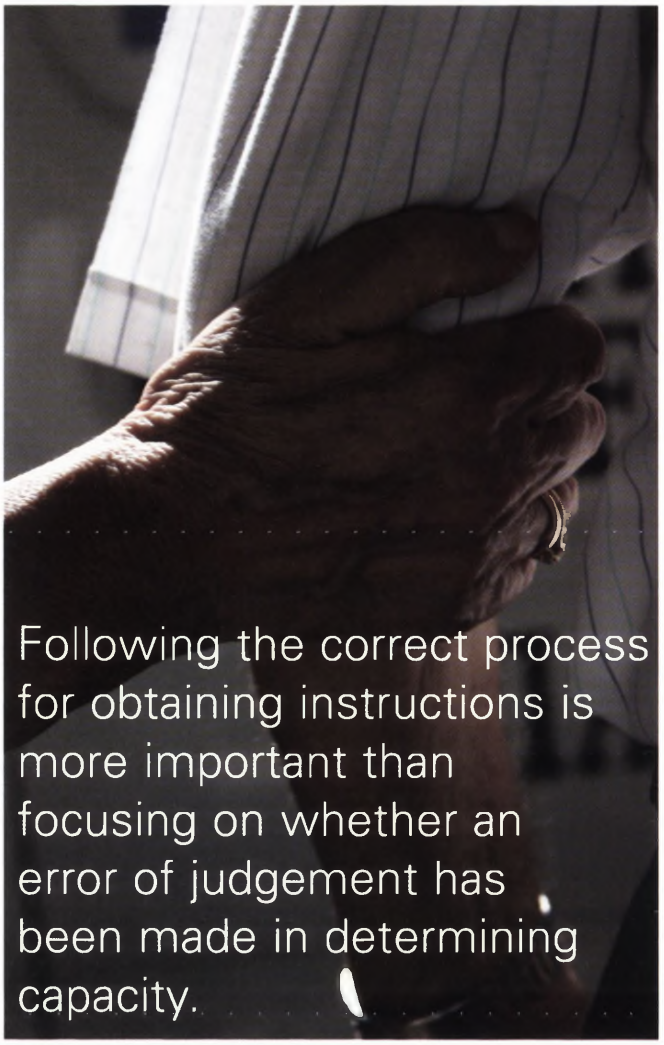
There are various sources of liability: in tort for negligence, in contract for breach of express or implied retainer, and as a result of breach of statutory obligations contained in (state) *Fair Trading Acts* or the *Trade Practices Act (Cth)* 1974. More recently, there have been civil claims against solicitors for equitable compensation for breach of fiduciary duty, particularly in the context of acting for family members with conflicting interests, resulting in a conflict of duty and duty.

A recent example of how such claims are traditionally pleaded is the recent decision of the NSW Court of Appeal in *Hendriks v McGeoch (McGeoch)*.[1] In that case, an elderly widow sought estate-planning advice from the family solicitor, with a view to effecting *intervivos* transfers of her properties to her sons. A family meeting was held in the solicitor's presence and it was decided to transfer one property to each son. The sons were not separately represented and, although the transfer to one son was effected, the transfer to the other son was not, and the subject property passed to others under the widow's will. The disappointed son successfully sued the family solicitor for failing to adequately protect his interests with respect to the property transfer. Liability was founded in tort for negligence, contract for breach of retainer and statute for misleading and deceptive conduct. Although it was not argued as a claim for equitable compensation for breach of fiduciary duty, the conflicting interests of widow and son meant that it could have been.

In addition to civil claims, solicitors need to be mindful of professional ethical duties to act honestly and fairly, with competence and diligence, and with reasonable promptness in the service of the client.[2] In addition, professional rules reinforce the fiduciary nature of the solicitor/client relationship and require solicitors not to engage in conflicts of interest, whether between self and client, or client and client.[3] Client and client conflicts arise not infrequently where a family solicitor is dealing with various family members in the course of estate-planning and will-making advice. To avoid such conflicts, it is important to document the extent of the retainer carefully, identify the solicitor's client clearly, and ensure that all family members understand this as well as the need to access independent advice as necessary. Breach of professional ethical duties may lead to disciplinary proceedings, resulting in penalty, suspension from practice, or even compensation to an aggrieved party.

A recent Queensland disciplinary proceeding, *Legal Services Commissioner v Ford (Ford)*,[4] highlights the importance of following the correct process for obtaining instructions from an older person, especially where there may be questions of lack of capacity. In *Ford*, the solicitor was found to be in breach of his ethical professional duties because he had failed to act competently in assessing whether his client had capacity to make an enduring power of attorney (EPA). A penalty was imposed by way of public reprimand and the practitioner was ordered to pay the costs of the applicant Legal Services Commissioner.

This case provides a timely warning to practitioners engaging in estate-planning and will-making work of the need to be ever-vigilant in ensuring a thorough knowledge and understanding of contemporary best practice, including not only an up-to-date knowledge of the relevant law, but also professional skills, so as to be best-placed to meet the standard of care of professional practice, and thereby minimise the prospect of facing civil claims and/or disciplinary proceedings.



LIABILITY IN NEGLIGENCE ARISING FROM INSTRUCTIONS FROM ELDERS IN ESTATE-PLANNING MATTERS

Solicitors have a duty to take reasonable care when acting for clients in the preparation of wills. For example, they have been held civilly liable to disappointed third-party beneficiaries[5] for failure to prepare a will in a timely fashion;[6] to ensure that the will gives legal effect to the testator's instructions;[7] to ensure that a will is validly executed and attested;[8] or to discharge custodial duties.[9]

Duty to ensure the client has capacity?

A current issue is whether the solicitor has a duty to ensure that the client has capacity to make a will, an enduring

power of attorney (EPA) or other relevant document. Further, does the solicitor have a duty to ensure that a client is not unduly influenced by any beneficiary in the making of a will?

In cases where a solicitor is involved in the preparation of a will, which is subsequently set aside on the basis of lack of testamentary capacity or the probate doctrine of undue influence, the courts have traditionally been reluctant, for policy reasons, to impose a duty of care on the solicitor, other than to the extent of liability to the estate for the costs of the application to set aside the will.[10]

In *Worby v Rosser*,[11] the beneficiaries under an earlier will claimed against a solicitor for failure to take reasonable care to ensure that the testator had capacity to make a will, and was not unduly influenced by a beneficiary under it. They claimed the costs of propounding the earlier will and resisting probate of the later will. It was held that appropriate remedies already existed by way of costs, which could be recovered from the estate. The estate could recover costs paid to the beneficiary from the solicitor at fault, so there was no need for direct action by the beneficiaries against the solicitor, and therefore no reason to impose a duty to a beneficiary under an earlier will, as an alternative remedy was available.[12]

This approach was adopted in *Graham v Bonnycastle*,[13] where the court made clear that imposing such a duty could give rise to conflicts between duties to beneficiaries of different wills.[14] There was a further policy reason for the non-imposition of such duty – the fear of being sued by beneficiaries under prior wills could make solicitors reluctant to act for elderly testators who wished to alter their wills.[15]

This approach accords with the approach taken in the New Zealand case, *Public Trustee v Till*,[16] which suggests that, ordinarily, a solicitor is required to consider and advise on testamentary capacity only where the circumstances are such as to raise doubt in the mind of an ordinarily competent solicitor.[17] Otherwise, the solicitor can take the benefit of the presumption of capacity, sometimes enshrined in legislation.[18] The Queensland disciplinary case, *Ford*, clearly sets out some of the triggers that should raise doubt as to capacity in the mind of a solicitor, such as very old age, residency in a nursing home, advice from carers as to lack of cognitive capacity and difficulty of immediate recall. It was a lack of awareness of these obvious triggers of incapacity and his failure to adopt an appropriate interviewing technique when seeking his client's instructions that led to Ford's disciplinary penalty for breach of professional duty. It seems clear from *Ford* that where lack of capacity should have been evident to the practitioner and an incorrect process for taking instructions has followed, a civil claim in negligence may also succeed, at least for the costs of litigation.

Disciplinary proceedings against practitioner where client lacked capacity to make an EPA

In *Ford*, the legal practitioner was requested to prepare a will and enduring power of attorney (EPA) for an elderly client, who resided in a nursing home. The effect of the will was to disinherit her family (a change from her previous will) and benefit a friend who facilitated the arrangement for the will and EPA in her favour. Shortly beforehand, a nurse had told the practitioner that the client had cognitive impairment and memory loss. A few months previously, the practitioner was asked to register the existing EPA in the client's favour, as she had dementia and was unable to manage her own affairs. When asked to prepare the new will and EPA, the solicitor did not revoke the existing EPA, or give notice to the prior attorney. All of the above factors should have been triggers for lack of capacity.

When the practitioner brought the EPA to the nursing home for signature, the EPA form was left largely incomplete, thus indicating that the practitioner had not gone through the specific matters required by s41(2) *Powers of Attorney Act* 1998 (Qld) (PAA). The witness (usually the practitioner) must certify that principal has capacity to make the EPA.[19] It was in respect of this certification that the practitioner was considered to have failed to meet the appropriate standard of professional conduct. Justice Fryberg found that the solicitor, Mr Ford, had not adequately ensured that his client had capacity by his failure to address the matters set out in s41(2) PAA, which requires that the client understand certain specific matters about an EPA.

The Tribunal noted that the Office of Adult Guardian has prepared guidelines[20] for those who act as witnesses to EPAs, which draw specific attention to the matters noted above. >>

These guidelines refer to relevant triggers indicating a lack of capacity, to the importance of the interview process and, in particular, describe the questioning technique that should be used as a matter of good practice – that is, the use of open questions rather than closed questions.[21](Open-ended questions tend to require the client to explain or affirm his or her choices, while close-ended questions frequently require the client simply to answer yes or no.) In *Ford*, it was found that the practitioner was unaware of the difference between open-ended and close-ended questions and had failed to keep a record of all the steps he had taken in assessing his client's competence, as contemplated by the guidelines. In all the circumstances, the Tribunal found that his 'conduct in relation to execution of the documents fell short of a standard of competence and diligence that a member of the public was entitled to expect of a reasonably competent Australian legal practitioner'.[22]

The *Ford* decision makes it clear that the important and relevant consideration for these purposes is that the practitioner follows the correct process for obtaining instructions, especially where instructions are taken from elderly clients and there is a possibility of incapacity, as opposed to focusing on whether an error of judgement is made in the determination of capacity. A reasonably competent lawyer, who is alert to triggers of possible incapacity (for example, an elderly client in a nursing home; changing a will radically; taking instructions facilitated by a beneficiary; signs of impaired decision-making capacity or dementia), and who acts appropriately where such triggers arise by appropriate questioning and maintaining notes, and/or seeking the advice of the patient's GP in certain cases or specialist advice (particularly in contentious situations where the estate is large) will generally have no reason for concern in respect to breach of professional duty. Where the correct process is followed, there can be no grounds for concern as to disciplinary action or civil liability arising.

A higher standard of care in civil professional liability cases following *Ford*?

The *Ford* disciplinary decision raised the prospects of the imposition of a higher standard of care in civil liability cases founded in negligence. Statements in *Ford* as to what is currently required of a reasonably competent practitioner – particularly the expectation that practitioners will know of, and abide by, published guidelines of authoritative bodies such as the Queensland Law Society – raise the question of whether a practitioner ought to know of the existence of the *Office of Adult Guardian* capacity guidelines,[23] which relate to the witnessing of EPAs and, furthermore, whether a competent practitioner ought to follow these guidelines.

Does the mere failure to follow published guidelines amount to failure to engage in competent practice? What if the published guidelines are not considered to reflect best practice, and are not generally adopted by practitioners as standard practice? For example, a recent memorandum to Queensland solicitors from the practitioners' indemnity insurer suggested that practitioners who hold wills in safe custody must search daily newspapers to check death notices and notify executors that they hold the will (without apparent limitation as to the extent or range of such searches – international, national or local). Anecdotal evidence indicates that most estate practitioners regard this memorandum as imposing too onerous a duty on practitioners, and is not supported by the leading Australian case on holding wills in safe custody.[24]

As regards determining the standard of care in professional negligence cases, this is clearly assessed by reference to established practice at the time of the alleged breach of duty,[25] and not by improvements or changes to best practice that have been subsequently adopted by the profession – in other words, a 'reasonable solicitor' test. This common law approach has been largely affirmed following the enactment of the various civil liability Acts. For example, *Civil Liability Act* 2003 (Qld) s22 and the *Civil Liability Act* 2002 (NSW) s50 set out a standard of care for professionals in essentially the same terms. These sections provide that a professional does not breach a duty in providing a professional service if it is established that s/he acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a number of respected practitioners in the field as competent professional practice.

Ultimately, therefore, the question as to whether a

practitioner will be found liable in negligence for failure to comply with any published guidelines as to will- and estate-planning practice will be determined by assessing, on the available evidence, whether the defence of meeting the standard of 'widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice' is made out.

This 'reasonable solicitor' approach to determining the appropriate standard of care in tort for the purposes of determining civil liability can be contrasted with the 'reasonable consumer' test, which has been applied in assessing the liability of suppliers of goods and focuses on the reasonable expectations of the consumer as the determinant as to whether goods supplied meet an acceptable standard.[26] It would appear that this 'reasonable consumer' test determines the standard under the relevant state legal profession Acts,[27] by asking whether the conduct 'falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner'.[28] It is expected that forthcoming national uniform legislation will continue this approach.

CIVIL LIABILITY ARISING OUT OF BREACH OF EQUITABLE OBLIGATIONS

In addition to the prospect of civil liability arising out of will- and estate-planning advice on the traditional grounds of negligence, contract and statute, recent cases indicate a prospect of liability arising out of breach of equitable obligations, particularly breach of fiduciary duties.

Breaches of fiduciary duty involving conflicts of duty and duty

Acting for several family members in an estate-planning matter

Recent cases[29] indicate that actions against solicitors for breach of fiduciary duty, in addition to suits in negligence or for breach of contractual retainer or statutory obligation, are becoming more common. In the context of will-making and estate-planning advice, those who act as the family solicitor and do not carefully specify and document the extent of the retainer and, in particular, who the client is, are particularly susceptible. For example, in *Hendriks v McGeoch,*[30] the defendant family solicitor gave will- and estate-planning advice. The majority agreed that a contractual relationship existed with the plaintiff (in addition to another client, the plaintiff's mother). The majority also held that a duty of care also arose in tort (in addition to a breach of the contract of retainer). Accordingly, where a solicitor assumes responsibility for advising others, in addition to his or her client, civil liability in negligence may arise if the interests of all are not protected.

Although not argued as the basis of liability in *Hendriks v McGeoch,*[31] given the possibility of a conflict of duty and duty arising in cases where a solicitor acts for several parties in one transaction, the potential for a claim for breach of fiduciary duty arises, giving rise to claims for equitable compensation. Such a claim may have been successful in *McGeoch* had it been raised. On the other hand, breach of fiduciary duty was raised, albeit unsuccessfully on the facts, in litigation arising out of estate-planning advice in the decision of the NSWCA in *Rigg v Sheridan.*[32] However, it is clear from *Rigg v Sheridan* that, in some circumstances, a solicitor acting for more than one party in an estate-planning matter may be found liable to pay equitable compensation for breach of fiduciary duty.

Breaches of fiduciary duty involving conflicts of duty and self-interest

a) Failure to disclose error and advise client to seek independent legal advice

Solicitors have been held liable for breach of fiduciary duty in conflicts involving self and client in a number of recent cases. For example, in *Milatos v Clayton Utz,*[33] the solicitors were held liable in damages for breach of fiduciary duty for intentionally failing to disclose that previous advice given was incorrect, and that the client should seek independent legal advice. When the relevant partner realised that easements affecting the client's property were inconsistent with building on the land, he failed to disclose this and advise the client to seek independent advice. In failing to disclose the firm's negligence, there was a conflict between the solicitor and client's interests. To avoid a breach of >>

fiduciary duty, the onus was on the solicitor to show that there was full and comprehensive disclosure of the conflict of interest, which he failed to satisfy.[34]

a) Drawing a will under which the solicitor receives a substantial benefit

The decision in *Dore (as executor of the will of WH Chenhall dec'd) (Dore)*[35] raises the issue of the application of fiduciary duties to solicitors preparing wills. In that case, a solicitor, Christopher Dore, drew up a will for a client and friend, and took a substantial benefit under it – shares in a company worth approximately $1 million. Dore could have taken $20 million under the will as residuary beneficiary in the event of the widow predeceasing her husband (which was quite likely as the widow herself was very ill), which did not eventuate. The client was not independently advised.

After finding that the bequest in favour of the solicitor should be upheld, Justice McMurdo noted that there was no 'argument that there should be some impact upon the bequest to Mr Dore in consequence of the law relating to fiduciary duties'.[36] The inference was that the court would have liked to hear argument on this point. Given that there was an obvious conflict of personal interest and duty to the client, it would seem that such an argument was not without some merit. The decision led to Queensland's adoption in 2007 of the Law Council of Australia model rule, which prevents a solicitor from drawing up a will under which s/he is to take a substantial benefit (except in certain circumstances).[37]

Avoiding a conflict of interest

To avoid the possibility of liability arising, the solicitor should carefully document the scope of his or her retainer. For example, in *Ibrahim v Pham*[38] the Court of Appeal held that a solicitor was not in breach of any tortious or fiduciary duty for having failed to insist that the client obtain legal and investment advice on a related contract, not the subject of her retainer. The solicitor advised the client to obtain such advice, which proposal was emphatically rejected by the client. In that case, it was found to be material that the solicitor's retainer was only to advise on a loan and mortgage, not the investment contract in question.

Professional ethical duties to avoid conflicts of interest

A solicitor's professional duty to avoid conflicts of interest may also render him or her subject to complaint to a Legal Services Commission, and subject to disciplinary consequences, including a financial penalty, public reprimand, suspension from practice, and payment of compensation to an aggrieved party.

Most Australian jurisdictions have now introduced professional rules worded in substantially the same terms as the Law Council of Australia model rules of professional conduct and practice. These rules reinforce the fiduciary nature of the solicitor/client relationship and work in tandem with the law of fiduciary duties and tort (although breach of professional rules does not give rise to any private cause of action). In particular, professional rules that relate to solicitor/client conflicts may render a solicitor who acts in conflict with the duty to avoid conflicts between self and client,[39] or client and client,[40] liable to disciplinary consequences on complaint to a Legal Services Commission.

A particular instance of the duty to avoid conflicts between the interests of client and self is found in a specific rule in most Australian jurisdictions that prevents a solicitor drawing a will (except in certain circumstances) under which s/he is to take a substantial benefit.[41]

On the *McGeoch* facts, the solicitor who put himself in the position of acting in estate work for a mother and two sons, one of whom ultimately had a conflicting interest to that of his mother, also potentially rendered himself liable to complaint to the relevant state professional disciplinary tribunal for acting for more than one party in the absence of the fully informed consent of each party.

CONCLUSION

Solicitors who engage in estate-planning and will-making work, like all professionals, will be held civilly liable to compensate those who suffer loss due to their action or inaction in cases where they fail to meet the appropriate standard of professional competence in advising their clients. It may be that a higher standard of care will be imposed for the future in relation to the process that a competent solicitor ought to follow in matters where there may be questions as to whether a client has capacity following the findings in the *Ford* disciplinary proceedings. Traditionally, civil liability has been founded in tort, contract and pursuant to legislation such as the *(State) Fair Trading Acts* and the *Trade Practices Act (Cth)*, as was recently illustrated by *Hendriks v McGeoch*.

In appropriate cases, it may also be that civil liability may be found to arise for breach of equitable obligation, such as breach of fiduciary duties to avoid conflicts of duty and duty and conflicts of duty and interest, or as a consequence of breach of other equitable obligations such as the abuse of a special relationship of influence, as was suggested in *Dore* and argued in *Rigg v Sheridan*. Recently, the spectre of breach of professional duty and disciplinary proceedings has arisen, particularly in relation to the duty of due diligence and the duty to avoid conflicts of interest.

While it is acknowledged that solicitors who act in will- and estate-planning matters will often face difficult judgement calls – for example, as to whether a client has capacity and/or whether to act for more than one party in a transaction – provided that they follow the correct process, there will generally be no liability in negligence arising out of an error in judgement, particularly in capacity assessment cases. To avoid civil liability and/or disciplinary proceedings where a solicitor has acted in estate-planning and will-making matters in cases where there are various family members involved, or in circumstances where the solicitor may take a benefit from the will or transaction, prudence dictates that a range of risk-minimisation strategies should be adopted. For example:

- Keep up to date with developments not only in the

relevant law, but also the professional practice and procedures to be followed when acting in particular matters.

- Carefully document the scope and limits of the retainer, taking into account the relevant professional rules relating to acting for more than one party and conflict of duty and interest and carefully considering whether it is appropriate for the client or other family members to be advised to take independent advice.
- Exercise extreme vigilance in taking instructions; ideally, having a face-to-face meeting with the client, preferably on his or her own, or at least providing an opportunity for private instructions.
- Use an open-ended questioning technique; and being particularly diligent in cases where there are triggers of possible incapacity, such as where there is a radical change in instructions (compared to previous wills or EPA), where the client is resident in a nursing home, where carers have pointed out the possibility of impaired decision-making capacity, and where the appointment to receive instructions is facilitated by someone other than the client.
- Carefully document instructions, and in some cases consider having an additional witness to the giving and taking of instructions. Consider the use of checklists for taking instructions but remain open to client's individual facts and circumstances; carefully consider file-retention policies and procedures for will files to ensure that evidence is available if necessary (for example, perhaps put copies of crucial evidence from file in a packet with the will as a safeguard).

Failure to develop and adopt appropriate risk-management strategies, such as those set out above, may mean that wills and estate-planning practitioners face the spectre of civil liability and disciplinary proceedings.

Notes: **1** [2008] NSWCA 53. **2** Most Australian jurisdictions have professional rules binding solicitors modelled on the Law Council of Australia Model Rules of Professional Conduct and Practice: see LCA rules 1 and 2. **3** *Ibid* rules 8, 9 and 10. **4** [2008] Qld LPT, 12. **5** *Hawkins v Clayton* (1987-1988) 164 CLR 539; *Hill v Van Erp* (1995-1997) 188 CLR 159. **6** *White v Jones* [1993] 3 All E R. **7** See *Carr Glynn v Frearsons* [1998] 4 All E R 225. **8** Liability has arisen for failure to observe the interested witness rule: See *Hill v Van Erp* (1997) 188 CLR 159. **9** *Hawkins v Clayton* (1988) 164 CLR 539. **10** *Worby v Rosser* [2000] PNLR 140. **11** [2000] PNLR 140. **12** *Ibid* per Chadwick LJ at [25], per Peter Gibson at [29]. **13** (2004) 243 DLR (4th) 61. **14** *Ibid* at [29] per McFadyen JA. **15** *Ibid* at [30] per McFadyen JA. **16** [2001] 2 NZLR 508. **17** *Public Trustee v Till* [2001] 2 NZLR 508 per Randerson J [25]-[26]. **18** See *Powers of Attorney Act* 1998 (Qld) Sched 1, Part 1 – general principles no 1, states: 'An adult is presumed to have capacity for a matter'. **19** *Ibid*, s44. **20** Office of the Adult Guardian Capacity Guidelines for witnesses of enduring powers of attorney, June 2005, available at <http://www.justice.qld.gov.au/files/Guardianship/capacityguidelines.pdf> viewed 1 September 2009. **21** The OAG guidelines refer to how an interview should be conducted. **22** *Legal Services Commissioner v Ford* [2008] LPT 12, 23[1]. **23** The OAG guidelines can be accessed on the Qld Law Society website: Knowledge Centre>Practising Resources>Guide for EPA witnesses. **24** *Hawkins v Clayton* (1988) 164 CLR 539. **25** *Roe v Minister of Health* [1954] 2 QB 66. **26** See, for example, s7 *Consumer Guarantees Act* 1993 (NZ). **27** See, for example, *Legal Profession Act* 2007 (Qld). **28** *Ibid*, s418. **29** Such as *Milatos v Clayton Utz* [2007] NTSC 44; *Ibrahim v Pham* [2007] NSWCA 215. **30** [2008] NSWCA 53. **31** *Ibid*. **32** [2008] NSWCA 79. **33** *Milatos v Clayton Utz* [2007] NTSC 44. **34** *Ibid*,at [446] **35** *Dore (as executor of the will of WHB Chenhall dec'd)* [2006] QCA 494. **36** *Dore* at [56]. **37** LCA Model Rules of Professional Conduct and Practice, rule 10.2; Legal Profession (Solicitors) Rule 2007 (Qld), rule 10.2:

A practitioner who receives instructions to draw a will under which the practitioner will, or may receive a substantial benefit must:

- Decline to act on those instructions and
- Offer to refer the person to another practitioner who is not an associate of the practitioner.

Unless

- The person instructing the practitioner is a member of the practitioner's immediate family or a practitioner who is a partner, employer, or employee, of the practitioner.
- 'Substantial benefit' means a benefit which has substantial value relative to the financial resources and assets of the person intending to bestow the benefit.

38 *Ibrahim v Pham* [2007] NSWCA 215. **39** LCA model rules of professional conduct and practice rule 9: Avoiding conflict of interest (where practitioner's own interest involved); Legal Profession (Solicitors) Rule 2007 (Qld), rule 9. **40** *Ibid*, rule 8: Acting for more than one party; *ibid*, rule 8. **41** *Ibid*, rule 10: Receiving a benefit under a will or other instrument, see above n37.

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