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Accountant drafts will to avoid lawyer fees but triggers material legal costs

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In a post-AI world, generating legal documentation has arguably never been easier. Similarly, however, arguably the risks for advisers have also never been greater.

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In particular, the long-standing issues surrounding advisers without legal qualifications who facilitate the provision of, or indeed self-generate, legal documentation seem likely to come into ever-increasing focus.

Arguably, the leading case in this area is Legal Practice Board v Computer Accounting and Tax Pty Ltd [2007] WASC184.

In this case, an accountant arranged for a trust deed to be purchased for a client online. The base trust instrument had been written by lawyers; however, the accountant then populated the template.

In doing so, the court held that, practically, this meant that the accounting firm was breaching the relevant legislation. In all likelihood, the accountant would also have been in breach of their professional duties, possibly negligent, and almost certainly not covered by their professional indemnity insurance in relation to any issues arising out of the trust instrument.

The decision in Di Trapani & another v Di Trapani & others [2026] QSC 20 provides a further example of the material issues that arise when advisers work outside their specialisation in what was arguably (for any holistic tax and estate planning lawyer) a relatively benign factual matrix (namely a single discretionary trust, with a corporate trustee).

Driven by an apparent desire to avoid unnecessary legal costs as his customers' trusted adviser, the accountant in this case drafted wills to implement his understanding of their estate-planning objectives.

The evidence was somewhat undermined by the accountant not making any material file notes, providing no written advice to the client at any point and providing no affidavit to the court. This said, the court confirmed the accountant was on record at the time of drafting the wills as claiming that he had:

1. Simply 'retyped' the wills from an earlier draft, will – essentially to update it – and suggested that he had 'charged no fee'.

2. No knowledge of the identity or qualifications of the person who prepared the previous draft, and did not retain a copy of the document.

The court found, however, that the accountant did in fact issue an invoice with (presumably a time billing entry) for “matters in relation to provision of assistance for new wills, discuss same and make recommendations and draft same; execution of various documents; matters in relation to company structure, family trust and income.”

A number of key clauses in the will drafted by the accountant misunderstood a foundational, holistic estate-planning principle: that a person's will can only regulate assets owned personally by the willmaker.

Here, the relevant willmaker owned very few assets in their personal name, with most assets owned via a discretionary trust. The willmaker was a shareholder and director of the corporate trustee of the trust and the appointor of the trust, during her lifetime (with that power effectively ceasing under the trust deed on her death).

The will purported (via a series of specific gifts) to transfer ownership of numerous assets owned via the trust to the listed beneficiaries under the will.

There have been isolated cases supporting an argument that “… where a testator conveys to his executor a direction to reduce into possession an asset not owned by the testator and the executor is armed by the testator with the power to get it in, he is bound to do so, and to deal with it by way of disposition in the way that the testator directs” (see Re O’Callaghan [1972] VR 248).

The correctness of the suggestion that assets owned via related entities could be regulated by a will was called into question by the court generally (see also Wheatley v Lakshmanan [2022] NSWSC 583) – and specifically rejected in the factual matrix here, given:

1. The executors had not been given any power to 'get in' assets of the trust to the estate to enable those assets to then be disposed of as directed by the will.

2. Simply gifting shares in a trustee company will not, of itself, give the recipient any control over the company (nor, in turn, the trust).

3. The willmaker had no general power of appointment over the assets of the trust – to the extent there was such a power over the assets of the trust it was exercisable solely by the trustee company (a conclusion contrasted with the decision in Power v Ekstein [2000] NSWSC 905 where it was held that powers under a trust deed can potentially be gifted via a will, if the trust instrument expressly provides for this. Critically, this case, and the strategy generally, ignores the likely materially adverse tax and stamp duty consequences that would be triggered by including such a provision in a trust deed.

4. While the trustee of the trust here did have standard powers to distribute capital, distributions could only be made to the primary beneficiaries – and the estate was not within this class; further reinforcing that there was no ability to argue that under the relevant Succession Act a general power of appointment existed to allow the court to force the trustee to comply with the directions in the will (see Webb v McCracken (1906) 3 CLR 1018).

Finally, a clause in the will that purported to impose an obligation on the executors to seek advice from the accountant who drafted the will was held to be able to be ignored by the executors, for the following reasons (and in the court's view 'likely others'):

(a) The clause, in effect, operated as an ouster of the jurisdiction of the Supreme Court, which was invalid.

(b) The accountant was no longer retained by the estate.

(c) The requirements of the clause were unnecessary or inappropriate.

For ease of reference, an extract of some of the invalid clauses included in the will is set out below:

8.4 I GIVE my Shareholding in Glutolo Pty. Ltd. A.C.N. 010 067 795 to the Trustees of my Will for the purpose of consolidate, disposal, and transfer of my assets in the Mario Di Trapani Discretionary Trust.

8.6 I further instruct my Trustees and Directors and Shareholders in Di Trapani Constructions Pty. Ltd. and Glutolo Pty. Ltd., shall not make any further claims against one another in any intercompany loans and advances as at the date of my death.

10. To the full extent permitted by law, My Executor will allocate the burden of any pay any Commonwealth or State Tax imposed in the future on the capital of My Estate, as though it were a testamentary expense.

11. I wish my Executor to obtain and consider the advice of Mr Tony Lowe of T Lowe & Co. on substantial decisions. Should my Trustees fail to reach a decision on substantial matters Mr Tony Lowe is appointed as arbitrator to the resolution."