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

By Keeli Cambourne, Deputy Editor SMSF Adviser and Matthew Burgess, View Legal

A recent case in Western Australia has highlighted the issues surrounding advisers without legal qualifications facilitating the provision of legal documentation.

Matthew Burgess, director of View Legal, said the leading case in the area is Legal Practice Board v Computer Accounting and Tax Pty Ltd [2007] WASC184, which concerned an accountant who arranged for a trust deed to be bought for a client over the internet. 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 be covered by their professional indemnity insurance in relation to any issues that arose out of the trust instrument,” Burgess said.

“The most recent 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).”

Burgess said in the Di Trapani case, the accountant drafted wills to implement his understanding of the client’s 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,” he said.

“The court confirmed the accountant was on record at the time of drafting the wills as claiming that he had simply ‘retyped’ the wills from an earlier draft will – essentially to update it – and suggested that he had ‘charged no fee’. It also confirmed that he had no knowledge of the identity or qualifications of the person who prepared the previous draft – and did not retain a copy of the document.”

However, Burgess noted that the court found 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 is the fact that a person’s will can only regulate assets owned personally by the willmaker,” he added.

"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)."

Furthermore, Burgess said, the court heard that the will purported (via a series of specific gifts) to transfer ownership of numerous assets owned via the trust to 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)," he said.

"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."

The reasons for this, Burgess said, was 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 and that simply gifting shares in a trustee company will not of itself give the recipient any control over the company (nor in turn the trust).

Moreover, he continued, the court stated that 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.

"In this case 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)," he said.

"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)."

Additionally, the court heard that 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.

"This was because in the court's view that firstly, the clause, in effect, operated as an ouster of the jurisdiction of the Supreme Court which was invalid, secondly that the accountant was no longer retained by the estate; and finally, the requirements of the clause were unnecessary or inappropriate," Burgess said.