

THE LAW SOCIETY OF NEW SOUTH WALES
THE ELDER LAW AND SUCCESSION COMMITTEE

SEMINAR - MONDAY, 25 MARCH 2013

(A revised version of a paper presented at the Seminar)

**STRATEGIES TO AVOID RISK IN RELATION TO
DEATH-BED WILLS**

By Justice Geoff Lindsay (Equity Division, Supreme Court of NSW)

INTRODUCTION

1. The topic I have been allocated, “Strategies to avoid risk in relation to death-bed wills”, has all the hallmarks of an examination question set by one who knows all the answers for one who plainly does not. I put myself in the latter category.
2. I admire the ease with which Pam Suttor, Chair of the Elder Law and Succession Committee, set this question for me.
3. When I accepted Pam’s challenge to speak I felt uninhibited by my ignorance of the real world of “death-bed wills”. For some reason my imagination leapt immediately to Charles Dickens, a darkened room full of half grieving relatives and a genteel old solicitor, scribbling away with pen and ink, as a 19th century clergyman intones from the scriptures or a prayer book of choice.
4. A long career at the Bar, even with a practice on the equity side of things, conditions a person to critical analysis of historical events, often from the narrow perspective of a particular interest intent upon achieving a litigious outcome, if need be by the creation of doubt in the minds of competing claimants to property. A few months as a judge – still focussing on historical events, but released from the confines of advocacy – does not much alter that perspective.
5. True it may be that the mindset of a litigation lawyer needs to be consulted in the formulation of strategies to avoid “risk” in relation to death-bed wills. However, the topic cannot effectively be addressed from the perspective of a litigation lawyer alone. It matters not whether the litigation lawyer is a judge, a barrister or a solicitor. They all suffer from the same tunnel vision. Litigation lawyers may be able to identify forensic patterns, and pick holes in whatever others have done, but their mindset is constrained by the

nature of the work they do. For them, even forward movement is affected by a focus, first, on the past. Their vision is dominated by the backward glance.

6. Litigation lawyers can generally tell you whether or not a particular set of facts fits an established pattern or whether there is sufficient certainty in an assumed, or disputed, set of facts to warrant (on the balance of probabilities) a grant of curial relief.
7. Towards this end, they may work from a recognised hierarchy of challenges to, or arising out of, a will.
8. The reality is that there is an infinite variety of problems that can arise as death approaches a person of property or a person with parental responsibilities for a child. The idea that any “strategy” can, in this world, “avoid” risk must be brought down to earth. Strategies may operate to “minimise” risk. No strategy can “avoid” risk for any person who by choice or circumstance, enters upon the territory of a “death-bed will”.
9. Unless a textbook is to be expounded in the space occupied by an hour long seminar, the topic explored here needs refinement to a workable focus. That focus of our seminar topic is a factual setting in which a man or woman of property, not concerned with a need to appoint testamentary guardians of children, poses questions about what is to be done with property that cannot be taken on the road to eternity.
10. As the concept of “risk” is relative – one man’s “risk” is another man’s “opportunity” – the perspective adopted in this paper is that of this seminar’s audience: a solicitor called upon to assist a person, in contemplation of impending death, to make a will.
11. As something more than a literary device I will survey “risks”, and strategies for dealing with them, first, from the perspective of a “litigation lawyer” and, then, from the perspective of a “transactional lawyer”. As the story unfolds it will appear, I hope, that the core perspective is that the transactional lawyer charged with responsibility of assisting a prospective will-maker.

IDENTIFICATION OF RISK, COURTESY OF A LITIGATION LAWYER’S PERSPECTIVE

12. Who, as a litigation lawyer, has not gone through a “checklist” of established grounds upon which a will might be challenged? A quick review of them might help to identify a few of the boundless number of risks that may attach to a “death bed will”.

A Probate case

13. The first type of case on the checklist of bases to challenge a will is, as equity practitioners perceptively describe it, a “probate case”. Use of that expression might occasionally refer to an application for family provision relief, these days increasingly brought under Part 3 of the *Succession Act 2006* (NSW). However, equity practitioners generally confine the expression “probate case” to a set of proceedings in which the relief sought is a grant of probate in solemn form or, if a grant in common form has already been made, an order for the revocation of probate: *Tobin v Ezekiel* [2012] NSWCA 285.
14. Identification of the relief sought does not, of itself, identify with precision the nature of the case to be litigated. However this type of case is predicated upon the existence of competing, potential beneficial entitlements to estate property arising from the availability of inconsistent wills, informal wills or rights on intestacy.
15. Upon an assumption that a person who challenges a will has the requisite standing to do so, the focus for a “probate case” is generally upon an allegation that, at the time the deceased made his or her will under challenge, there was a lack of the mental capacity required to make a will: *Re Eger; Heilprine v Eger* (Powell J, 4 February 1985) BC8500997, *Butterworths’ Succession Law and Practice (NSW)* para [13,001]; *Ridge v Rowden; Estate of Dowling* (Santow J, 10 April 1996) BC 9601342, *Butterworths Practice*, para [13,045].
16. Such an allegation might be made, jointly or severally, with an allegation that the will under challenge was procured by an exercise of “undue influence” recognising that “undue influence” in a probate case is a much narrower concept than “undue influence” in an equity case: Young, Croft and Smith *On Equity* (Law Book Co, 2009) para [5.520]. It requires proof of coercive conduct vitiating the free will of the will maker, without the benefit of any form of presumption of undue influence arising from relationships: *Winter v Crichton* (1991) 23 NSWLR 116. Probate lawyers understand the reality that the tender consciences of equity lawyers need to accept that attempts by all and sundry to influence the maker of a will are inevitable; and those attempts might not uncommonly be made on a person in a weakened state of health, without the presence of conduct that would be regarded as unconscionable.

A Family Provision application

17. The second ground of challenge on a checklist of potential challenges to a will is the ubiquitous family provision application. We have come a long way since the enactment, in 1916, of the *Testators Family Maintenance and Guardianship of Infants Act*. That Act gave way to the *Family Provision Act 1982* and it, in its turn, gave way to Part 3 of the *Succession Act 2006*.

18. “Freedom of testamentary disposition” is now no longer, as it was in the 19th century, attributed a status akin to that of a human right. It is now little heard of. Even the “wise and just testator” who came to prominence as the TFM equivalent of the “reasonable man” during the life of the 1916 TFM Act, has been pushed into the background: *Andrew v Andrew* [2012] NSWCA 308. That has been done by increasing appeals to “community standards” guessed at by judges, aided by barristers and solicitors who specialise in Family Provision work, with the benefit of a non-exhaustive list of statutory criteria, grounded on discretionary decisions not necessarily at all connected with the hopes or aspirations of a deceased person.
19. That point is all the stronger for the jurisdiction, now not uncommonly exercised, for property to be designated as “notional estate” for the purposes of the family provision claim. A person who wishes to avoid the reach of the Court’s family provision jurisdiction must, at least, be comfortable with risks associated with divestiture of assets three years or more before death and, if possible, be able to forestall death for three years after a transaction in favour of a person intended to benefit from it: *Succession Act* 2006 (NSW) s 80(2). None of this is easy, particularly as more private wealth is tied up in superannuation policies that become effective only upon death.
20. The risk to all and sundry of a family provision application being made is ever present, but especially so in the context of a death-bed will which, by its very nature, is likely to deal with alienation of property only on death.
21. Who are the “eligible persons” able, by virtue of enumeration in s 57 of the *Succession Act*, to make a claim for family provision relief? How can they be identified without full knowledge of a will-maker’s present personal circumstances, property and relationships, past and present?
22. If any “eligible person” is to be excluded from testamentary benefit, is there utility in the provision by the will maker of reasons for the exclusion or a conferral of benefits less than may have been an eligible person’s expectation? A statement of reasons may cause potential claimants for relief, or the court, to pause; but a statement of reasons might just as easily provide a focus for forensic attack by a claimant who contests the factual accuracy, or substantial fairness, of the statement. A court’s first port of call in deciding whether to make, or to decline to make, a family provision order may be a formal statement of reasons left behind by the deceased. If those reasons are found to be wanting, an order for relief might more readily be made; if not, they may serve as an impediment to the making of an order – though a court can, and must, stay focussed on its time of decision, not the date of a deceased’s will or

the date of death. One hesitates, in the context of discussion about death-bed wills, to invoke the maxim, “damned if you do, damned if you don’t!”

23. A family provision claim is often regarded as the economically, and forensically, more viable alternative to a probate suit when minds turn to challenge of a will. Its prime deficiency is that the outcome of family provision proceedings is, in the real politic of litigation, dependent upon: first, the forensic need for a plaintiff to be able to prove a “need” for relief; and, secondly, submission of a plaintiff’s claim to discretionary judgments of the Court.
24. No amounts of judicial correction, or reminders about statutory formulas, is likely to erase from practitioners’ minds the concept of a need to prove “need”. It may be a label, it may be technically deficient; but the concept of “need” is one that resonates with punters and professionals alike. It lies at the heart of community understanding of the nature and purpose of family provision legislation. Perhaps it is best regarded as something which, by its presence or absence, bears upon the process of persuading a judge to grant, or withhold, relief upon a formal application of statutory criteria.

A “trust” claim

25. The third type of case under consideration as a standard form of challenge to a will is one driven by remedy, not by what a modern lawyer would call (without regard to its common law or equitable origins) “a cause of action”. The remedy of choice, here, is a trust; but anything that might ground an entitlement to an estate or interest in property that might otherwise fall into the deceased’s estate may do the job. A declaration of trust is the most desirable of remedies because it carries with it the notion of (equitable) ownership of property. Nevertheless, an equitable charge on property, securing an obligation to pay compensation, may achieve a similar outcome, in each case subject to a claimant’s risk of being defeated by a legal or equitable entitlement having priority.
26. Whatever the remedy, how does one establish an entitlement to such a remedy? In practice, those in search of a remedy look for the existence of mutual wills (*Birmingham v Renfrew* (1937) 57 CLR 666); a contract to make a will (*Schaefer v Schuhman* [1972] AC572; *Barnes v Barnes* (2003) 214 CLR 169; *Dalton v Ellis* (2005) 65 NSWLR 134); or an agreement to make a will, enforceable in estoppel (*Giumelli v Giumelli* (1999) 196 CLR 101; *DeLaforce v Simpson-Cook* (2010) 78 NSWLR 483).
27. This type of case may be just as difficult, and expensive, to run as a probate case. For that reason, prudent litigants might balk at it; but, not uncommonly, there is sufficient in the facts to tempt a

claimant to assert a trust and to expose a respondent to a commensurate risk of loss of estate property.

Informal Wills

28. In more recent years, a fourth alternative has emerged with the possibility of location of something that might be characterised as an informal will, now eligible for admission to probate in competition with a will formally made and formally executed: now *Succession Act* 2006, s 8.
29. The possibility of an “informal will” being made needs to be borne in mind in the context of a death-bed scenario because its availability increases the range of possibilities for death-bed business. It is not, however, without its risk for everybody. One advantage of formalities is that they are accompanied by ceremonies that underscore the solemnity of decision making and the need for people to make, and accept, decisions as well considered. We do not yet appear to have reached the stage of a proliferation of informal wills being made in a manner similar to the making of a contract by correspondence – with offer, counter-offer and acceptance – in a chain of documents. Perhaps it is only a matter of time.

A Claim in Negligence against a solicitor

30. If all other avenues for challenge to a will are discounted, there remains the possibility of an indirect challenge to testamentary dispositions by means of a direct challenge to the work undertaken by a lawyer (almost always a solicitor) in connection with the making of a will: *Hill v Van Erp* (1997) 188 CLR 159; *Hawkins v Clayton* (1988) 164 CLR 539; *Vagg v McPhee* [2013] NSWCA 29. In rare cases, such a challenge might take the form of a claim for compensation arising out of a disciplinary complaint against a solicitor. More often, it will take the form of a claim for damages for professional negligence, usually made by a disappointed beneficiary, or at least, a person with unrealised expectations of testamentary benefit.
31. The possibility of a negligence action being successful might, and all solicitors no doubt hope will, be diminished by the current availability of powers under the *Succession Act*, not only for a grant of family provision relief but also for the rectification of wills. However, solicitors must be conscious of a risk of exposure to a claim in negligence.

Sundry and Ancillary topics

32. Other types of case involving a challenge to a will might need to be noticed, for completeness sake, as battlefields upon which estate litigation is, or may in the future increasingly be, fought. By their nature, they generally require more time to unfold than can be allowed for in the context of a death-bed will.

33. **Family Law litigation.** In mentioning them, I leave to one side the possibility of “family law” litigation arising out of claims to the property of a marriage or a domestic partnership and disputes concerning the enforceability of property settlements in that arena.
34. **Powers of Attorney disputes.** Increasingly, one suspects, disputes about the succession of property will focus upon disputes about the validity of enduring powers of attorney or the validity of transactions effected by an attorney in reliance upon such a power: *Powers of Attorney Act 2003 (NSW)*; *Szozda v Szozda* [2010] NSWSC 804; *Scott v Scott* [2012] NSWSC 1541
35. As people live longer, and for a longer time unable to manage their own affairs in their declining years, enduring powers of attorney may be utilised (rightly or wrongly, effectively or not) as a means of effecting transfers of property from one generation to another. They may be used in circumstances in which, one suspects, a donor of a power might be surprised to learn that he or she has, possibly long ago, empowered another person to make decisions that once would have been left to the law of succession without any contemplation of the law of agency.
36. Enduring powers of attorney present a special, potential problem for the transactional lawyer because their validity depends upon certification of due execution by a “prescribed witness”, often a solicitor: *Powers of Attorney Act 2003 (NSW)* s 19. A person who provides such a certificate must be able to state that he or she “explained the effect” of the Power of Attorney to the principal before it was signed and that the principal “appeared to understand the effect” of the instrument.
37. This does not impose upon the certifier responsibility for a definitive judgment about the principal’s mental capacity and understanding. However it does require, at least, that a conscientious professional judgment be made about the existence of reasonable grounds for the statements of fact certified. The provision of a s 9 certificate is not a mechanical act. It cannot be approached lightly.
38. **The Protective Jurisdiction.** The protective jurisdiction of the Supreme Court has been supplemented by legislation since the days when, in the 1980s, Justice Phil Powell served as the Court’s Protective Judge, cast his analytical eye over the Court’s inherent jurisdiction and agitated for change: Philip Powell, *The Origins and Development of the Protective Jurisdiction of the Supreme Court of NSW* (Forbes Society, Sydney, 2004). This paper provides no occasion for a close examination of the protective jurisdiction, but it cannot simply be passed over without notice. See generally: Young, Croft and Smith *On Equity* (LBC, 2009) pages 216-228; *Guardianship Act 1987 (NSW)*; *NSW Trustee and Guardian Act*

2009 (NSW), *David v David* (1993) 30 NSWLR 417; *Holt v Protective Commissioner* (1993) 31 NSWLR 277.

39. A person who might conceivably be a candidate for a death-bed will is just as likely to be a person whose welfare might need to be assessed in the context of protective orders, whether designed by the protection or management of property or for protection of the person's person. A lawyer charged with assisting in the making of a death-bed will might be under an obligation to inquire whether steps should be taken for the protection of the prospective will-maker – in person or property – as well as being required to consider the terms of any testamentary disposition.
40. Whatever might be the terms of a solicitor's retainer – normally the point of focus for determining a lawyer's exposure to liability in negligence – public interest considerations might impose upon him or her a greater range of obligations. Can a solicitor acquiesce in a will-making procedure knowing, or suspecting, that a prospective will-maker lacks the capacity to make a will, is being subjected to undue influence or is in need of protection generally? Maybe, if the case is a borderline one, no point will ever be taken. But that is hardly a basis upon which a lawyer can act or take comfort in not acting. A lawyer on notice of an abusive environment might have an obligation, at least, not to participate in, or to assist, abusive conduct and to report problems to a responsible authority.
41. A prudent solicitor would not rush to judgment in perceiving abuse where, on closer examination, no abuse may exist. However, one of the risks that might need to be recognised by a lawyer in developing a strategy to avoid risks associated with death-bed wills might be the risk of criticism arising from a failure to appreciate a prospective will-maker's "whole of life" need. Some familiarity with the protective jurisdiction is required, not merely the law of succession and the law of agency.
42. **Property in Co-ownership.** The ambit of risk widens with an appreciation that our conveyancing legislation (the *Real Property Act* 1900 (NSW), s 97 and the *Conveyancing Act* 1919 (NSW), s 30) includes a mechanism by which a joint tenant can unilaterally sever the joint tenancy in which land is held in co-ownership. A person in need of a death-bed will might also be in need of a *Real Property Act* dealing in registrable form, duly registered before death: *McCoy v Caelli* [2008] NSWSC 986; 13 BPR 25, 515 (Brereton J); [2010] NSWSC 1233 (White J).
43. A failure on the part of a solicitor to attend to this possibility might provide an example of a case in which a disappointed "beneficiary" might make a claim in negligence: cf *Vagg v McPhee* [2013] NSWCA 29. It is not difficult to envisage a case in which a person approaching death raises the expectations of a prospective

beneficiary by making representations about how a residence (for example) might be left to the beneficiary. Neither the representor nor the representee may understand the state of the representor's title (in joint tenancy) or the consequences of survivorship, but might leave everything to the family solicitor in a state of imperfect knowledge.

44. The range of "risks" to which a will maker, his or her property, interested parties or members of the legal profession may be subject is probably infinite in its dimensions. Risk cannot be eliminated from life, or, it seems, from death.

RISK STRATEGIES, FROM THE PERSPECTIVE OF A TRANSACTIONAL LAWYER

45. And with that comforting remark, this paper shifts its focus from the perspective of a litigation lawyer in search of possible rights and remedies, to a transactional lawyer, charged with professional responsibility for giving effect to a transaction (prospectively, a disposition by will) rather than constructing a case for the destruction of that same type of transaction.
46. This change in focus may never involve a boundary line drawn in bright lines because the world is not neatly divided into "litigation lawyers" on the one hand and "transactional lawyers" on the other. Nevertheless, there is some foundation in logic and experience for making the distinction. A transactional lawyer is required to look forward, sometimes almost predictively, rather than to dwell unduly on an historical perspective. A transactional lawyer is required to build where a litigation lawyer may be required to tear down.
47. How then, in a world of risk to lawyer, client and third parties, can a transactional lawyer minimise risk?
48. At the risk of oversimplification, three types of strategy are here proposed, none of them claiming infallibility or a comprehensive reach. All are grounded upon the importance of a commitment to professional integrity, the maintenance of professional standards and a due regard for continuing legal education.
49. The first strategy is to have a plan for dealing with difficulties that might arise, not only in relation to death-bed wills but in relation to taking instructions for the making of wills generally, and for acting upon those instructions in an orderly way.
50. The second strategy is to include, in reckoning about how to deal with a difficult case, means by which risks may be shared. Instructions taken from a vulnerable person might best be taken in the company of a mature, disinterested third party. If there is a question of mental capacity likely to arise, arrangements might be

made for an appropriately qualified medical practitioner to attend upon the prospective will-maker. If it is possible, without exposure to conflicts of interest and duty or similar difficulties, to involve a prospective will-maker's family in the making of family decisions, consider how that might best be done. If an ethical dilemma arises, or might arise, take advice from a senior colleague or nominee of the law society, make full disclosure of the problem and act upon advice responsibly given. If a difficult question of law has arisen, or might arise, in connection with the prospective will-maker's property or affairs consider obtaining a formal opinion from somebody outside your office, traditionally a barrister or a specialist solicitor.

51. The third strategy is to maintain professional indemnity insurance at a level calculated, realistically, to match your exposure to the risk of negligence claims being made against you.

Maintenance of adequate Professional Indemnity Insurance

52. The third strategy provides no opportunity for detailed elaboration in this paper. It is a constant for barristers and solicitors in private practice, whatever their fields of practice.

Costs Agreements and the Scope of a Retainer

53. From time to time one hears of practitioners who endeavour to limit their liability for professional negligence by express terms in a costs agreement, either generally or by means of a clause limiting a claimant's entitlements to whatever might be recoverable from the practitioner's professional indemnity insurer. Whether such provisions are ever likely to be enforceable must, at least, be open to doubt.
54. Local lawyers are officers of the Supreme Court by virtue of s 33 of the *Legal Profession Act* 2004 (NSW), if not the general law. Subject to Divisions 5 and 11 of Part 3.2 of that Act (relating to costs disclosure and assessment), a costs agreement can be enforced in the same way as any other contract: s 326. However, a lawyer is quite unlike any other contracting party. Lawyers are bound by a statutory scheme of regulation that includes a regime of practising certificates and an administrative disciplinary jurisdiction. Moreover, the Court reserves an inherent disciplinary jurisdiction arising from the status of a lawyer as an officer of the Court: eg, *Woolf v Snipe* (1933) 48 CLR 677 at 678-679. One can not easily discount the possibility that, if an overly restrictive costs agreement is brought to attention, the Court will not be able to remain indifferent. On the whole, in such cases it can be expected, in the public interest, to favour the interests of a client: eg, *Coshott v Sakic* (1998) 44 NSWLR 667 at 672.
55. Even if restrictive terms in a costs agreement between lawyer and client favour the lawyer, they are unlikely to be of much assistance *vis á vis* third party claims.

56. The true significance of a costs agreement, or more generally a contract of retainer, upon a consideration of the risks attending a lawyer's preparation of a death-bed will is likely, in most cases, to lie in the definition of the work the lawyer is retained to perform and the possibility that, by implication if not expressly, the lawyer's general duty of care includes a duty to warn the client of risks. Each of those elements of a lawyer's exposure to risk depends on the facts of the particular case.
57. Perhaps the only general observation that can be made is that a lawyer needs: **first**, to have a clear understanding of what can be achieved by him or her in the particular case; **secondly**, to have a clear understanding of limitations on his or her knowledge (eg, about the state of a prospective will-maker's title to property); **thirdly**, to ensure, so far as is possible, that the nature and purpose of the lawyer's work, and the limitations on that work being done effectively, are expressly communicated to the client and, so far as material, other interested parties (so as to minimise misunderstandings); and, **fourthly**, to ensure that, as far as may be practical, everything is documented so as to provide protection for everybody, or at least evidentiary material, in case of future litigation.
58. As in the practice of law generally, a lawyer called upon to assist in the making of a death-bed will needs to be careful to ensure that the task at hand is clearly identified; that boundaries are defined and maintained; and that all work is done, and documented, with professional care.

Sharing the load, sharing risk

59. The need for a common understanding between lawyer, client and interested parties associated with the client leads naturally to the second of the three strategies proposed: minimising risk, by sharing the burden to which risk may attach.
60. Occasionally, it may be possible for a lawyer to identify, without exposure to risks attendant upon acting for more than one party, all parties who, in the present time or prospectively, have an interest in a will-maker's estate.
61. If an opportunity is available for that to be done, consideration should be given by the lawyer to doing it – providing, of course, boundaries about legal representation are clearly marked. The lawyer should be clear in his or her own mind, and should make sure that everyday else is clear as well, that the only person represented by the lawyer is the prospective will-maker. The clarity required in this department probably requires an express statement identifying the lawyer's client as the will-maker, and the will-maker

alone, and advising all others with whom there may be any communication to obtain their own independent legal advice.

62. With that qualification, a will made with the fully informed and free acquiescence of all interested parties is likely, in practice and law, to stand a better chance of effective operation than one made in an environment of conflict, hostility and suspicion.
63. If the making of a death-bed will is accompanied by any controversy about the prospective will-maker's mental health, or free will, a lawyer might protect his or her personal position by sharing the load in one or more of several ways. **First**, steps should be taken to ensure that instructions are taken in the presence of a mature, independent witness, and in the absence of parties who might be thought to have an economic or social interest in the will to be made, or to have dominance over the free will of the will maker. **Secondly**, arrangements should be made for the prospective will-maker to be the subject of a medical examination by a respected, disinterested medical practitioner, whether the will-maker's "family doctor" or not. **Thirdly**, all instructions should be documented and file notes should be kept setting out the course of events and the identity of all participants in the process, commencing with receipt of instructions and progressing through to performance of the lawyer's retainer. **Fourthly**, that documentation should, ideally, include a notation of the identify of disinterested observers (including medical professionals) who may have witnessed, if not participated in, the will making process or ancillary events.
64. If ethical questions arise, in any context, the practical good sense of observations by Hutley JA in *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736 at 756-757 about the true significance of rulings of the Law Society in relation to professional misconduct should be borne in mind. That is so even though there may be legislative constraints on the ability of the Society to make, or purport to make, a formal "ruling". The point for lawyers, by analogy with an application by a trustee for judicial advice, is that if a lawyer makes a full and frank disclose to a senior, responsible lawyer (or a body of such lawyers) of all facts and circumstances material to an ethical problem, and acts in accordance with such guidance as may be given by the responsible lawyer(s), he or she may thereby obtain protection from a finding of professional misconduct or unsatisfactory professional conduct. A load shared is generally lighter to bear.
65. To meet these standards, in attending to the preparation of any will, requires the application of an inquiring mind towards ascertaining a prospective will-maker's personal and business relationships, property, income and debts - and any other ancillary information that might bear upon any of the risks which a litigation lawyer might, at some later time, seek to bring home to the transaction lawyer.

66. That means that it is necessary to consider a will-maker's property interests, legal and beneficial, not only now but over a period commencing not less than the preceding three years (as an aid to identification of transfers of property that might lead to a designation of notional estate in family provision proceedings). It is necessary, also, to identify, and if need be to invite the will-maker to consult, the respective interests of his or her spouse or domestic partner (in connection with existing and any past relationships), children, parents, siblings and creditors generally.
67. In short, an attempt must be made to understand whether there is a reasonable foundation in fact for the will sought to be made, and (if it were to be made) how it would operate in a world in which it might come under challenge from competing interests.
68. In exploring these questions, some allowance needs to be made for the possibility that, even (or, perhaps, especially) in the shadow of death a prospective will-maker might be inclined to have said, and to continue saying, different things to different people. It might make for an easy life, or death, to do so – even if it sows seeds of future conflict. Preparation of a will in these circumstances requires a critical mind coloured by a benign scepticism about facts that cannot be objectively verified, and a reasonable attempt to verify all facts objectively.
69. It is not necessary for a lawyer who assists a person to “make” a will to form a definitive judgment about the mental capacity or understanding of the prospective will maker. Such a judgment can, and should, generally be left to a court to determine.
70. However, a lawyer involved in the process of “will-making” needs to be conscious that he or she may be called up to give evidence about the state of the will-maker's capacity, understanding and health; and about events leading up to and consequent upon the execution of a will.
71. The greater the doubts about validity of a will, the more vigilant an attending lawyer should be in ensuring that the process of will-making is, fairly, open to review by a court and fully documented.

Have “routine procedures” in place

72. The first of the three strategies earlier mentioned falls into the category of “last but not least”. It is a counsel of perfection in the conduct of a solicitor's practice generally. It may not be attainable in all cases, but there should be a constant aspiration to achieve “good practice” in all cases.
73. A solicitor who has, and has a reputation for having, a competent approach to his or her work, and routine systems in place to

address problems that may arise, will find that a deserved reputation for competency, honoured in each case, is the surest strategy for minimising exposure to risk for the solicitor and all parties who deal with the him or her. See, for example, *Zorbas v Sidiopoulous (No 2)* [2009] NSWCA 197 at [89].

74. Conscious adoption of a “system of practice”, and conscientious review of that system from time to time, not only guards against error in fact. It provides protection against faulty memory in the event that a solicitor is called upon to give evidence years after events that become the subject of dispute. Guidelines for practical steps to be taken in the drafting of a will can be found in *Butterworths’ Succession Law and Practice* (NSW), para [10,001] *et seq.* Precedents are published in the same publication at para [11,001] *et seq.*
75. As has been mentioned, there is a need to ensure that a solicitor can, so far as possible, take instructions from a prospective will-maker in circumstances calculated to ensure that they constitute the client’s genuine expression of a competent, free will.
76. It is equally important to ensure that there is a paper trail leading from the time of commencement, to the time of performance, of instructions.
77. There is, equally, need of a system of security for documents which may be required to be consulted only long after the event.
78. Mundane things like an appointments diary, a costs agreement accurately recording the scope of a retainer, an instruction sheet, detailed file notes about attendances, correspondence kept in chronological order, bills of costs and accounting records can assume critical significance in any dispute about a will. In evidentiary terms, persuasive force attaches to records that are demonstrably regular in appearance, contemporaneous and competently maintained.
79. A solicitor who conducts his or her practice in a way that enables this repository of important evidence to be consulted without undue inconvenience will be taken by all participants in the process of litigation – including judges – as a person whose evidence generally can be relied upon. Such a solicitor has little to fear from being called upon to give evidence in hotly contested proceedings. Demonstrable competence engenders respect.
80. In dealing with instructions for the preparation of any will, a range of topics need to be addressed. In a sense, attention needs to be given to risks arising from all the ways in which a litigation lawyer might subsequently challenge whatever transactions the transaction lawyer seeks to put in effect.

81. Whether or not a death-bed will may provide an occasion for elaborate estate planning mechanisms to be put in place must depend on particular circumstances.
82. The starting point for obtaining, and performing, any instructions is probably to attempt to listen for the authentic voice of a client; and to understand, from the client's perspective, what problems are seen by the client as necessary to solve. The autonomous voice of a client cannot be given its due respect if it is not heard. For everybody, there is a trap in giving to people the service we routinely provide rather than the service they may request us to provide. To hear a prospective will-maker effectively, some time at least may be required to be spent in getting to know the person beyond first appearances. It may be necessary to know something about education, employment and cultural experiences even though they may not appear directly relevant to the task at hand.
83. In the making of any will it is necessary, perhaps, to ascertain whether the prospective will-maker has previously made a will, or wills, and (if so) what perceived necessities there may be for a new will.
84. Some exploration of the prospective will-maker's relationships – past and present – is necessary to understand not only particular instructions that might be given about a particular will to be made, but also to understand context.
85. Every so often our understanding of what is required should be refreshed by an examination of some of the leading cases or, at least, commentary on them.
86. In the probate sphere, chief amongst these is *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-565:

“It is essential to the exercise of [a power to make a will] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.”
87. That standard ties in with observations of the High Court in *Gibbons v Wright* (1954) 9 CLR 423 at 437-438 about the mental capacity required to effect an *inter vivos* transaction:

“... [The law] requires, in relation to each matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation

... Ordinarily the nature of the transaction means in this connection the broad operation, the ‘general purport’ of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out...”.

88. An intuitive grasp of each of these cases lies at the heart of what is likely to be required of a solicitor in the preparation of a death-bed will.
89. The rest – including the minimisation of exposure to risk – is an application of general professional standards to a particular factual context.

Justice G.C. Lindsay
28 March 2013