

ATTORNEYS' DUTIES IN WILL PREPARATION

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General position as regards obligations of the attorney to his client

The general legal position as regards attorney client relations is that an attorney has an obligation towards his client in equity (fiduciary obligations) and at law (tort and contract). In equity the attorney should act with strict fairness and openness. At common law the attorney, by his retainer, has a duty to be skilful and careful in the discharge of his services to his client. The attorney also has a duty of care in tort (for negligence) which is not excluded by the relevant contractual regime.

The attorney's obligations to his client have been extended to third parties affected by the negligence of the attorney. This is seen clearly in relation to the preparation of wills.

To whom is the duty of care in will preparation owed?

- To the testator. If the duty of care is breached, then a beneficiary who suffers loss as a result of the breach of duty owed to the testator, can sue on the breach. The scope of the duty of care to the beneficiary will not be wider than that owed to the testator.
- Doubtful whether the duty of care extends to persons (or a class of persons) that the attorney is not told about.

No duty while testator alive and can rectify.

The duty of care is breached in the following circumstances:

- (i) Failure to prepare a will within an acceptable time scale before the death of the testator.
- (ii) Failure to give adequate written directions on how to execute a will.
- (iii) Failure to supervise the execution of the will.
- (iv) Failure to supervise correctly the execution of the will.
- (v) Failure to check the attestation of an executed will.

- (vi) Frustration of the terms of the will by a failure to address the question of devolution of the joint property.
- (vii) Frustration of the terms of the will by a failure to address the question of devolution of the property
- (viii) The terms of the will do not carry out the testator's intention.
- (ix) Failure to explain the terms of an executed will correctly.
- (x) Failure to revoke a will.

Breach of duty may give rise to a successful claim in negligence by a third party

High standard of proof required. Claimant must show convincing evidence that testator's wishes not followed.

Most important cases for consideration:

Ross v Caunters [1980] 1 Ch. 297

White v. Jones [1993] 3 All ER 481; [1995] 3 All ER 691 (HL)