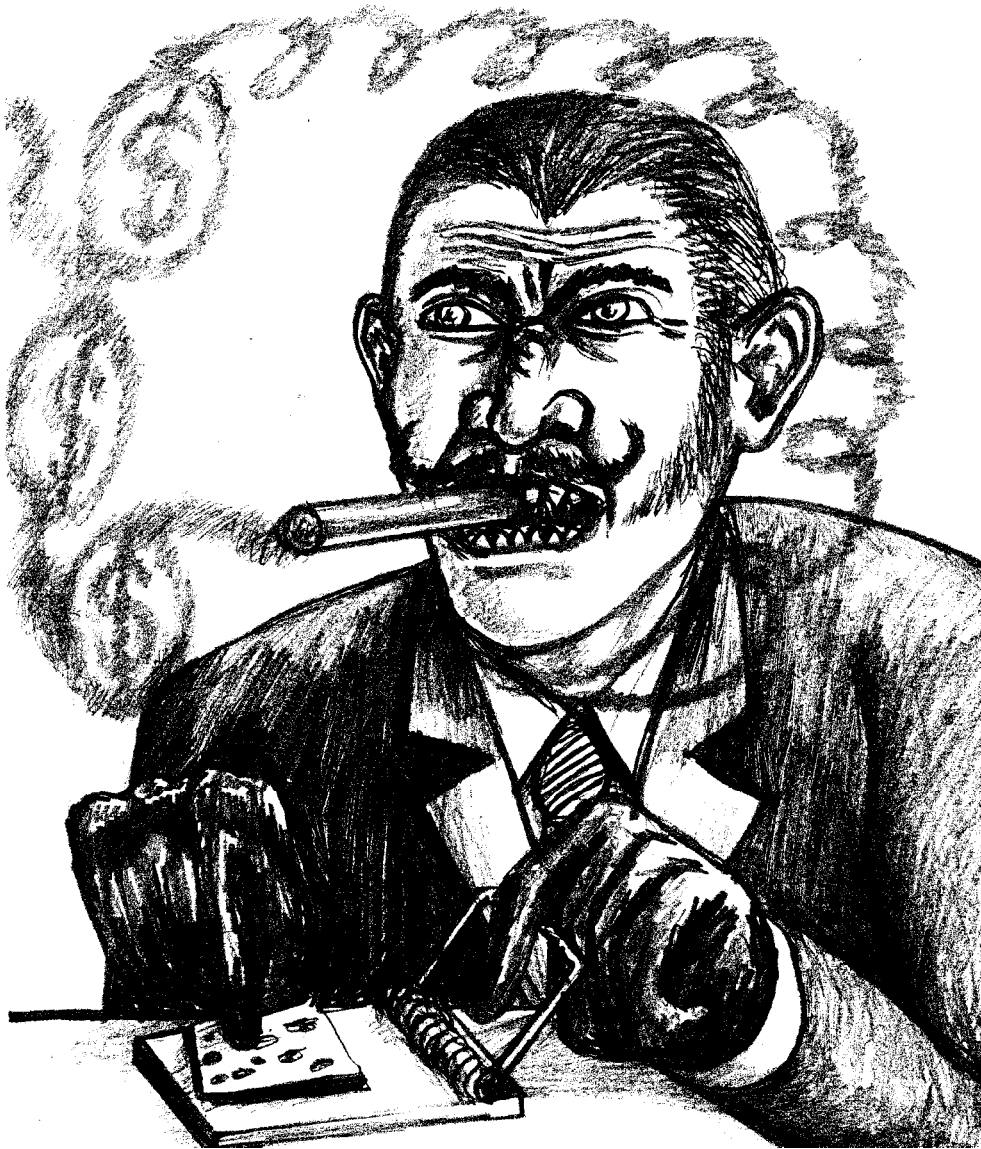


The lawyer sets the trap

## The lawyer sets the trap



## Lawyers or grave robbers?

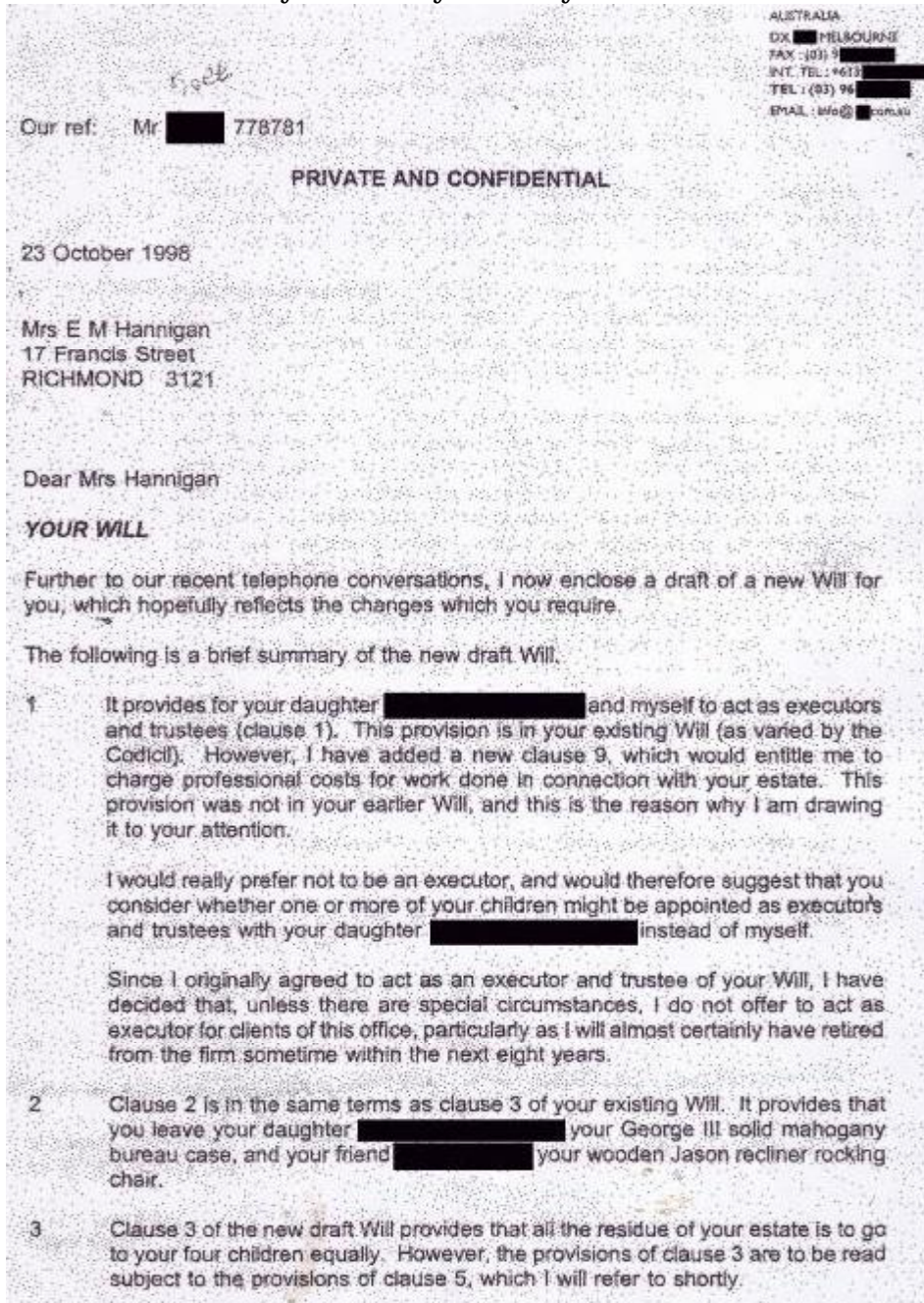
### 1

## The lawyer sets the trap

The story begins with a letter written in 1998 (six years prior to my mother's death) by my late mother's lawyer to her, explaining certain changes that she had enquired about, regarding her last will and testimony. My mother had four children from the same marriage and wished to divide her estate equally between us. My own company became involved in the risky business of export to Japan. The venture resulted in the company experiencing some financial problems. Unbeknown to me, my mother sought legal advice on how to protect my share of the estate if things got out of control.

## The lawyer sets the trap

A letter sent to my mother by her lawyer. 23/10/1998.



## Lawyers or grave robbers?

4 Clause 4 provides that if any of your three children [REDACTED] [REDACTED] or [REDACTED] die before you leaving children who survive you and attain the age of 21 years, then those children are to take their deceased parent's share.

5 Clause 5 provides special provisions with respect to the share of your son Diarmid -

(a) clause 5(a) creates, in effect, a discretionary trust which empowers your trustees to pay or apply to or for his benefit, or the benefit of any of his wife or children, all or any part of the income and all or any part of the capital of his quarter share, in such shares or proportions as your trustees may think fit;

(b) clause 5(b)(i) provides that, not later than two years after your son's death, the balance remaining of his quarter share (if any) is to be distributed equally amongst such of his children who survive him and attain the age of 21 years.

(c) If none of Diarmid's children survive him and survive the age of 21 years, then the balance of his quarter share is to go to such of his brother and sisters as survive him, and if more than one in equal shares. However, if any of them dies before him leaving children who survive him and attain the age of 21 years, then those children will take the share which their, his or her deceased parent would have taken if he or she had so survived Diarmid and attained the age of 21 years (see clause 5(b)(ii)).

[REDACTED]

The provisions of clause 5 are designed to protect the quarter share of Diarmid in case he gets into financial difficulties. If he had a vested interest under your Will, then if he was bankrupt, his share would go to his trustee in bankruptcy and neither he nor his family would receive any benefit from it.

6 Clauses 6 and 7 confer wide powers of investment and management on your trustees.

7 What is clause 8 in the new draft Will appears (in slightly different terms) in clause 9 of your present Will.

8 I have already commented on clause 9.

9 By clause 10 you revoke all prior Wills.

After you have had an opportunity to consider the draft Will could you please ring me and let me know whether the Will meets with your approval, or whether you require any changes. I would also like to discuss with you the possibility of you appointing someone as executor other than myself.

Yours sincerely  
[REDACTED]

### The lawyer sets the trap

There are two points of concern regarding the lawyer's advice in this letter.

The first is found in clause one where the lawyer introduces a new clause which entitles him to charge the estate on a fee-for-hour-basis. He also suggests that she should appoint another family member as co-executor. He fails to discuss with her the importance of ensuring a family ascendancy line in the executor she appoints in her will. In particular the ascendancy of a family member if her daughter is no longer able to carry out the duties of an executor after her death. This omission favours the lawyer in the future.

In 2002 the lawyer again revisits the will and changes his executor ship from himself to his firm.

Clause one of her final will was changed to read.

"I appoint my daughter \*\*\*\*\* and the persons who are at the time of my death the Victorian members of the firm of \*\*\*\*\* , solicitors of (firms address) or any firm carrying on business in succession thereto executors and trustees of my will."

This action by the lawyer provided for the ascendancy of the legal profession in the will. The lawyer fails to mention the imperative of providing for ascendancy within the executor ship of the family-appointed member. This omission by the lawyer is indicative of a legal professional who is acting in a paternalistic manner. It is apparent within the traditional model of our legal system whereby the lawyer begins to take control of the client's affairs. The omission of ascendancy of the family-appointed member can eventually favour the legal professional executor over a family when the family appointed executor is unable to perform their role. It is an indication of poor quality of service by the lawyer to his client in the construction of the will.

Being middle class, English and a migrant to this country my mother, like many other people, felt it important to have a member of the "trusted legal fraternity", in a position to assist her family, after her death. She believed the attendance of a legal professional at this critical time in her family's life would help us and her daughter to carry out her duties as executor, so as to benefit her family after her

## Lawyers or grave robbers?

death. The legal professional was obviously a substitute for an extended family member as would have been the case if she had not migrated to Australia.

The second point relates to the unforeseen circumstances as identified at the end of clause five.

“The provisions of clause five are to protect the quarter share of Diarmid if he gets into financial difficulties. If he had a vested interest under your Will, then if he were to become bankrupt, his share would go to his trustees in bankruptcy and neither he nor his family would receive any benefit of it.”

The “financial difficulties” referred to involved a company that I was and still run which had been involved in export to Japan. As a result of a collapse in its export sales the company was forced into voluntary administration. The company signed a deed of arrangement with its creditors. The company paid off its full commitments under the deed of arrangement to its creditors in September 1998. At no time prior to sending this letter or after it have I ever been in a position where I would have been made a bankrupt. The financial difficulties alluded to in this letter referred to a limited liability company and not to me as an individual.

It appears that my mother’s lawyer has failed to explain to his client the fundamental difference between the two legal entities thereby creating a picture which would be perceived by her to be threatening. I would have assumed that a senior partner in a middle sized legal firm, who advertised its quality service as one of its main attributes, would have clarified my financial position prior to advising my mother on such an important and fundamental change to her will. The lawyer did not do this. By failing to obtain up-to-date information about my financial status he could not be in a position to advise my mother, as he was not in possession of the facts. To give quality advice to my mother he would need to be in possession of this information. By failing to enquire about my financial position he was able to maneuver himself into an advantageous position over my mother’s family. He could see the will was now uneven and would have known

### **The lawyer sets the trap**

that the chances of a dispute occurring in the future had increased: a dispute which inevitably would create more fees from the estate for the lawyer.

“The provisions of clause five are to protect the quarter share of Diarmid if he gets into financial difficulties. “

This statement by my late mother`s lawyer becomes a fundamental and crucial point as time goes by. A statement without foundation.

**Letter from My Mother to her lawyer dated 30/10/98**

This letter is not shown as my late mother`s lawyer has refused to provide a copy of this letter to the executor my sister or to myself. The lawyer uses legal privilege as his justification to my mother`s children, for refusing to supply a copy of this letter to my mother`s children. He states that the contents of this letter justify his actions in going against requests to him by the family-appointed executor (my sister) and all of the united family, who are the beneficiaries of my mother`s estate to treat us equally. His action in doing so has enabled him and his firm to amount \$38,159 in legal fees from the estate and has cost the beneficiaries a further \$60,000 in other legal costs and accumulated interest charges, not to mention the on-going legal charges for administering the trust.

The failure by the lawyer to attach the letter setting out the terms and conditions of the trust has left this matter unresolved and consequently split my mother`s family, created an immense amount of psychological damage and are a direct result of the lack of quality standards in place for lawyer/executors who are managing deceased estates. They are indicative of a flawed system that allows people who are specialists in adversarialism to enter the world of grieving families for their own financial benefit. The failure to resolve this matter has generated an additional \$32,000 in legal fees upon the estate.

The letter which the lawyer/executor maintains sets out the terms and conditions of the trust should have been

## **Lawyers or grave robbers?**

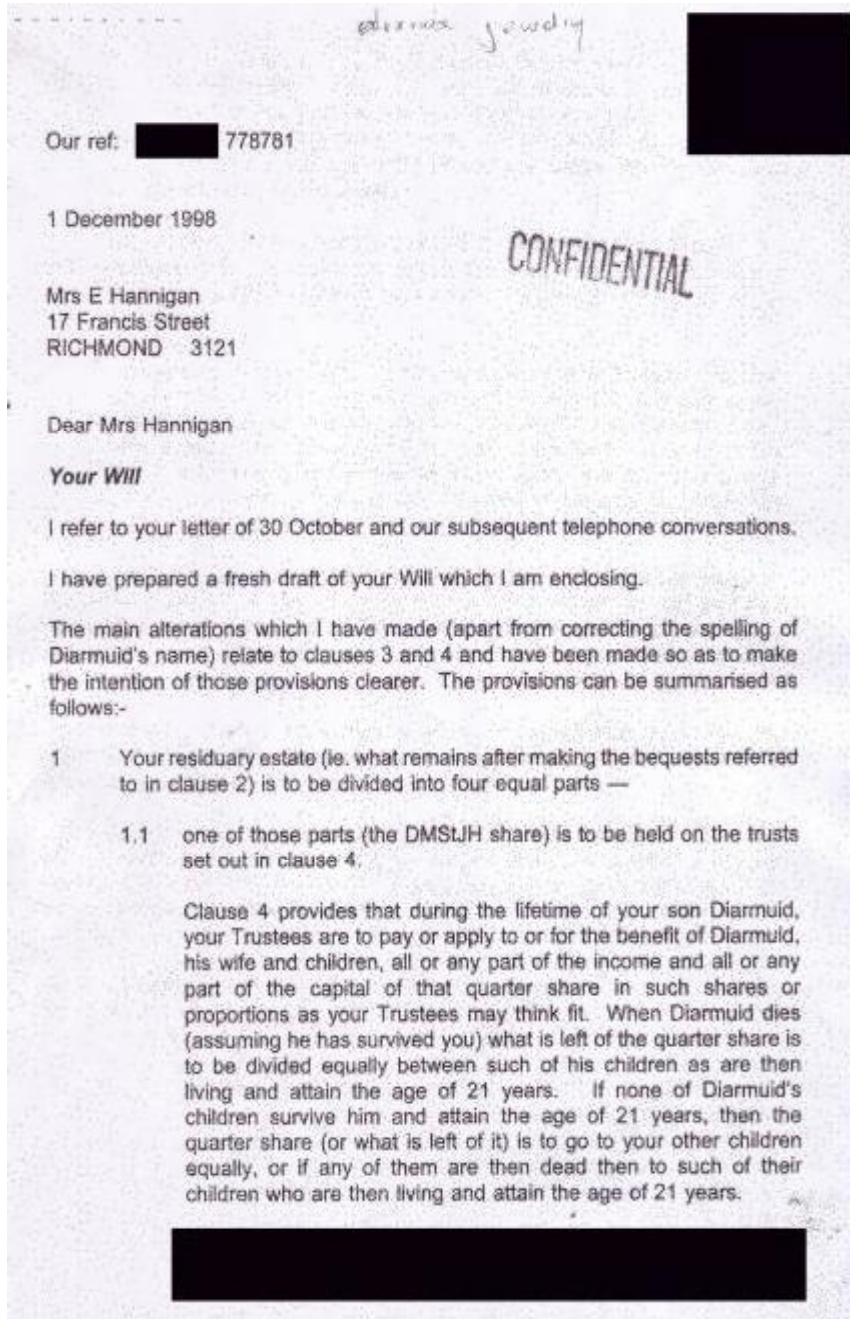
attached to the will. If the law firm were true to its advertised statement of providing a quality service they would not have allowed a single interpretation of this letter by the lawyer/executor to dominate the trajectory of the estate. If the law firm were concerned about providing a quality outcome they would have sought interpretation of this letter by my mother's children who were much closer to their mother than her lawyer. Their interpretation of a letter written six years prior to her death would be different to that of my mother's lawyer.

By denying my mother's children access to this letter the lawyer/executor is ruling over the family. He is following a traditional model of our legal system and is behaving in a paternalistic manner. He is allowing himself to be unaccountable to my mother's family. He ignores the basic principals of quality standards in his modus operandi. Quality standards are built on the basis of a free flow of information in order that people can make informed decisions and get on with life. His actions have assisted him and his firm to generate more income from the estate.



## The lawyer sets the trap

Letter sent to my mother by her lawyer 01 12 98 with a copy of her new will.



## Lawyers or grave robbers?

1.2 As regards the other three quarters of your residuary estate, that is dealt with by clause 3(b) which provides that it is to be held on trust for such of your other 3 children as survive you, in equal shares. If any of those 3 children die before you but leave children who attain the age of 21 years, then those children take their deceased parent's share.

2 In your letter you referred to clause 3 of the Will, which talks of selling and converting your property into money and expressed the wish that your children should be able to choose whatever they wish to keep before that happened.

Although the Will provides for sale of assets in clause 3, clause 5(d) does confer express power on your Trustees to appropriate any part of your estate in or towards the share of any beneficiary in your estate. I have also added to this provision so that it now states "in this regard I declare that it is my wish that my children should each have the opportunity to choose any items of furniture or other items of personal property which they may wish to have".

In your letter you asked me what happens if any of the grandchildren are under 21 and their parent has died. I confirm that their share is kept in trust until such time as they reach the age of 21 years, although under clause 5(c) any part of the income or capital of their share could be applied by your trustees towards their maintenance, education, advancement, benefit or support.

When you have had an opportunity to consider the new draft of the Will and to discuss with me any queries which you may have or any changes which you may wish to make I can then finalise the Will and arrange for you to call at our office for the purpose of signing the original.

Yours sincerely,

**I find it coincidental that there is no further mention of my mother's lawyer wishing to be replaced as executor, since he has inserted clause 8. This clause sets out the payment schedule that he and his firm can charge the estate.**

### **The lawyer sets the trap**

**When one reads the notes that were written by my sister, the executor, on the draft will and her concerns as a lay person, one has to assume that a trained lawyer with over thirty years of experience could foresee the future outcomes, i.e. the chance of Diarmuid contesting the will, a contest that would inevitably cost the estate a large sum of money in legal fees, and was prepared to bide his time.**

**My late mother's lawyer does not mention any concerns he has in relation to the inequality in the will. He does not flag the need to inform the family appointed executor (my sister) of the terms and conditions of the trust as is set out in the letter to him. When asked to provide a copy of the letter he refuses. Since he maintains the contents of the letter as far as his interpretation is concerned, disallow him to treat me as an equal. I would have thought it important for him to obtain an interpretation from the members of my mother's family, her own children who knew her better than anyone else so as to obtain a quality interpretation of my mother's wishes.**

**I would have thought that at this point in time if her lawyer had any concerns regarding the smooth transition of her estate and the future wellbeing of her childrens' relationships after her death, he would have flagged it in this letter to my mother. He did not and therefore I assume his interpretation is one of shameless mendacity.**

## Lawyers or grave robbers?

*if occurred after 1987 has to pay my capital gains tax top of tax dollar on 50% of the gain*

**DRAFT**

**THIS IS THE LAST WILL AND TESTAMENT** of me **ELIZABETH MOIRA HANNIGAN** of 17 Francis Street, Richmond, Victoria, 3121, Gentlewoman.

1. I **APPOINT** my daughter [REDACTED] and my solicitor [REDACTED] of Level [REDACTED] Street, Melbourne in the said State executors and trustees of this my Will and I **DIRECT** that the expression "my Trustees" where hereinafter used shall where the context permits include, in addition to the executors who prove my Will, the trustees or trustee for the time being of this my Will whether original additional or substituted.

*Could we leave out (CGT)*

2. I **GIVE AND BEQUEATH** free of all duties:-

(a) to my daughter the said [REDACTED] my George Ill solid wood mahogany bureau bookcase;

(b) to my friend [REDACTED] my wooden Jason reclining rocking chair.

*Case children get making stuff before 87 50% of gain*

3. I **GIVE DEVISE AND BEQUEATH** all my real and the residue of my personal estate of whatsoever nature and wheresoever situate to my Trustees **UPON TRUST** that they shall sell call in and convert the same into money with power to postpone such sale calling in and conversion for so long as they may think fit and out of the proceeds of such sale calling in and conversion and of any ready moneys of which I may be possessed at my death to pay my just debts funeral and testamentary expenses, probate and death duties, capital gains tax and other like duties and taxes (if any) payable on or in respect of my estate (to the intent that all such debts expenses duties and taxes shall be charged upon or paid out of my residuary estate and shall not be charged upon or against any specific devise or bequest) and the costs of and incidental to the execution of the trusts of this my Will and **SUBJECT THERETO** to hold my residuary estate **UPON TRUST** to divide the same into four (4) equal parts and to hold:-

(a) one (1) of such parts ("the DMStJH Share") **UPON THE**

*CGT*

*Do you want to include that*

*Personal + stuff as per 1.1.18 taken out*

## The lawyer sets the trap

TRUSTS set out in clause 4;

(b) three (3) of such parts UPON TRUST for such of my children  
[REDACTED] HANNIGAN, [REDACTED]  
HANNIGAN and the said [REDACTED] as  
survive me in equal shares PROVIDED HOWEVER that if any  
of the said [REDACTED] HANNIGAN, [REDACTED]  
[REDACTED] HANNIGAN and [REDACTED] dies  
before me leaving children who survive me and attain the age of  
twenty-one (21) years those children shall take, and if more than  
one equally between them, the share which their his or her  
deceased parent would have taken under this my Will if he or  
she had survived me.

4. MY TRUSTEES shall hold the DMStJH Share upon the following trusts:-

(a) during the lifetime of my son DIARMUID MAURICE ST JOHN  
HANNIGAN to pay to, or apply for the benefit of, him, his wife  
and children, all or any part of the income and all or any part  
of the capital of the DMStJH Share in such shares and amounts  
and at such times as my Trustees from time to time in their  
discretion think fit without obligation to benefit all of them or to  
treat equally those to whom payments are made;

(b) upon the death of the survivor of my said son DIARMUID  
MAURICE ST JOHN HANNIGAN and myself ("the vesting date"),  
to divide the DMStJH Share, or the balance of it (if any) which  
then remains, equally between such of his children as are living  
at the vesting date and attain the age of twenty-one (21) years  
without regard to any payments previously made to them;

(c) any part of the DMStJH share which is not effectively disposed  
of under paragraphs (a) or (b) of this clause 4 shall be held  
UPON TRUST for such of [REDACTED] HANNIGAN

*I have to decide what they all get*

*asked do you want me to do with that money for Diarmuid this is complex Solicitor's guess may argue needs to get a particularly meeting*

*completion might not get benefit*

## Lawyers or grave robbers?

██████████ HANNIGAN and ██████████  
██████████ as are living at the vesting date, and, if more than one,  
in equal shares, but, if any of them dies before the vesting date  
leaving children living at the vesting date who attain the age of  
twenty-one (21) years, then those children shall take and, if  
more than one, equally, the share which their his or her  
deceased parent would have taken under this paragraph if he or  
she had been living at the vesting date;

(d) ██████████

5. I DIRECT that my Trustees shall have the following powers:-

- (a) to retain as an authorised investment of my estate such part or parts thereof as my Trustees may think proper.
- (b) To invest trust moneys for the time being in their hands and available for investment under the terms of this my Will in any investment in which by the law of the State of Victoria trustees are authorised to invest.

- (c) Prior to the vesting of the interest of any beneficiary under this my Will to apply the income and such part or parts of the corpus of his or her vested contingent or expectant share under this my Will as my Trustees may think fit towards his or her maintenance education advancement benefit or support with power to pay the same to the parent or to the guardian of such beneficiary without seeing to the application thereof.

## The lawyer sets the trap

(d) To appropriate any part or parts of my estate in or towards the satisfaction of any share or interest and for such purpose to determine the value or values of any part or parts so appropriated. In this regard I DECLARE that it is my wish that my children should each have the opportunity to choose any items of furniture or other items of personal property which they may wish to have.

There are no items of furniture CGT Tax Capital Gains Tax

6. MY Trustees shall have the following additional powers in relation to the DMStJH Share:-

(a) to accumulate income;

(b) to establish and record a category or categories of income or capital, having distinctive characteristics, and to deal separately with the whole or part of the income or capital of any such category so that it may be paid to, or used for the benefit of, any one or more beneficiaries to the exclusion of the other or others;

(c) to determine in their absolute discretion, in the event of a disposal or deemed disposal of an asset, what part or parts of capital or income will be resorted to in payment of any tax liability flowing from the disposal or deemed disposal.

7. I DECLARE that all dividends rent interest and other periodical payments in the nature of income received after my death in respect of a period wholly or partly prior to my death shall not be apportioned pursuant to the provisions of the Supreme Court Act 1986 or any like rule or law for the time being in force but shall be treated as though the same had been paid in respect of a period immediately subsequent to my death.

8. ANY one or more of my Trustees being engaged in any profession or in business may act in a professional or business capacity in the administration of my estate or in connection with the trusts of this my Will and shall be entitled to charge and be paid all professional and other charges for any act so done or services so rendered by him or her or them or any firm with which he or she is or they are associated including acts done and services rendered by a trustee personally and not requiring the services of a person engaged in a profession or in business for the doing or rendering thereof in the same manner in all respects as if he or she or they were not a Trustee.

9. I REVOKE all prior Wills.

IN WITNESS whereof I have hereunto set my hand this \_\_\_\_\_ day of \_\_\_\_\_ 1998.

SIGNED by the said ELIZABETH MOIRA HANNIGAN the Testatrix as and for her last Will and Testament in the presence of us both being present at the same time who at her request in her presence and in the presence of each other have hereunto subscribed our names as attesting witnesses: )

DRAFT

is shown right to charge for being a trustee and may suit change anything

## Lawyers or grave robbers?

The notes were written on the draft will by my sister the executor raising her concerns as to the equality of the will. My sister does not work in the legal industry and it is obvious that she had concerns of a dispute occurring and had raised them. The letter dated 30/10/98 written by my mother to the lawyer is not attached to the draft will and is no mention is made of it in his correspondence, despite it supposedly setting out the terms and conditions of the trust.

The notes state her concerns as follows.

1. What happens if she disagrees with the co-executor in regards to the distribution of my share of the estate?
2. She states things could get messy.
3. She raises her concerns in regard to clause eight of her will in so far as the costs charged by the lawyer when acting as trustee are open ended.

When my sister raised her concerns with my mother she was given the short shrift and was told not to be silly, that she trusted the lawyer that he was a good man and he knew what he was doing. This is the typical attitude of people of my late mother's status and upbringing. They had ultimate faith in the institutions and the frameworks that run our society, in particular the judiciary. She was of course upper-middle-class English in background.

Her lawyer had two more opportunities to revisit her will and to discuss with the executor, (his client), any concerns he had regarding my mother's will prior to her death. One was in 2002 when a change was made to the will regarding the fees he and his firm could charge the estate. In her final will which was signed in November 2002 two changes were made. The first was to ensure ascendancy of the legal profession.

Refer to clause one of her final will.

I appoint my daughter \*\*\*\*\* and the persons who are at the time of my death the Victorian members of the



### The lawyer sets the trap

firm \*\*\*\* \*\* of \*\*\*\* \*\*\*\*\* \*\* Melbourne or any firm carrying on business in succession thereto executors and trustees of my Will”

The omission to clearly provide for ascendancy of a family member as executor is a glaring example of how a lawyer can obtain an advantage over the sick and the aged.

It is particularly repulsive when one considers:

- The hourly charge-out rate for the legal work.
- The assumption by the consumer, in this case my sick and dying mother that she is being provided with the best quality service available.
- That because as a lawyer and a member of the legal profession it is automatically assumed that they can be trusted not to take advantage of the estate and her children after she dies.

Refer to clause eight of her final will.

If any members of the firm \*\*\*\*\* act as an executor or trustee of my estate he or she shall be entitled to charge for all work done and services provided by him or her or the said firm in connection with my estate (whether of a legal nature or not) at the respective hourly rate from time-to-time charged by that firm for the provision of legal services by him or her and by any other partner or employee of the firm engaged on work relating to my estate or trust, together with all expenses, whether administrative or otherwise, but shall not be entitled to any executor’s or trustee’s commission.

Clause eight was changed because my mother and her daughter were concerned that the lawyer as executor could charge a commission for handling the estate and therefore my mother changed her will in order that the charges by the lawyer would be specified and would be less burdensome on the estate.

## **Lawyers or grave robbers?**

**Another change to the will and another opportunity for the lawyer to revise it, was when a condicil was attached to the will regarding the executor's share of the estate in October of 2003.**

**On both occasions my mother was not informed of the need to investigate any changes which may have occurred to the financial circumstances of the beneficiaries of her estate. There was no provision made for ascendancy of another family member to the position of executor in the event of my sister being unable to perform her role. He failed to raise any of his concerns regarding the confidential letter he held in his possession since 30/10/98.**

**My mother passed away on 21/06/2004 two weeks prior to her 75th birthday.**

**About a month after her death our family gathered together to read her will. This was the first time I had read her will or was aware of any of its contents. Like many of my generation death and dying are subjects we avoid and we hope against all odds that we will never have to face it. Unfortunately death is a reality of life and in hindsight I should have been more aware.**

**Upon reading the will it was agreed by all of her children that they would go to her lawyer and ensure that we would all be treated equally and all receive our share of the estate in the same way.**

**I did not attend this meeting. At this meeting my late mother's lawyer initially stated that he hoped that things would not get complicated as it would be very expensive for the estate. This statement was taken as a threat by my brothers and sisters. He stated he had to refer to his notes and felt that my share of the estate would have to be held in trust. He stated that the will was equal. He refused to provide my brother or sisters including the executor with any evidence of his assumptions.**

### **The lawyer sets the trap**

**He was informed by the Executor and my brother and sister that my mother would have wished that her children be treated equally in matters regarding the estate. He was informed of the damage that would occur to my mother's family if we were not treated equally by all parties at the meeting. Hence the saga of the grave robbing of my late mother's estate began.**

**After this meeting and the intransigence of my late mother's lawyer I engaged my own lawyer and a series of letters were written.**

**The cost of this first meeting with the lawyer/executor including phone calls was at least \$1000.**

**Note: My mother's lawyer attended the meeting accompanied by his legal representative who also works for his firm. His charge rate was \$425 per hour plus 10% GST. His legal representative was \$375 per hour plus 10% GST.**

## **Lawyers or grave robbers?**