

## Episode 50

### A family affair:

# Conflicts of duties when acting for related parties

#### Intro

This is Risk on Air by Lawcover, and today's episode is a family affair.

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**Julian:** Welcome to Risk on Air. I'm Julian Morrow and today's episode is called A Family Affair: Conflicts of Duties When Acting for Related Parties.

To have this discussion we're joined by Charu Stevenson, partner at Wotton Kearney, and a significant strand of Charu's practice over two decades has been the area of professional indemnity, and she's got lots of experience in helping solicitors defend claims brought against them. Although, Charu, I'm sure you've never acted for two related solicitors with a related claim against them at the same time - surely not?

**Charu:** No, I haven't. No.

**Julian:** Thanks very much for joining us.

**Charu:** Thank you, it's a pleasure to be here.

**Julian:** Could you start off by giving us, I suppose, some examples of the sorts of scenarios that solicitors might find themselves in where a conflict of duties emerges, but even though, every solicitor is aware of the idea of conflict, they might not recognise the conflict in the moment.

**Charu:** Yeah, I mean solicitors in these sort of situations, unlike, say, a conflict of interest, they're just trying to do the best by the people that they're representing and they're often trying to save client's money or they've been asked to act and they think you know, if someone asks you to represent them, you want to help them out. Often this arises in, say, property conveyances, where you think it's a straightforward transaction. Both the parties want you to put it through for them and they're related, so they're family members or they know each other.

**Julian:** So, they're coming in as a united front. They're probably wanting to save money. They can't imagine that there could be a problem with what's going on, and I suppose that's in a way an awkward diplomatic situation for a solicitor to start thinking about all the things that could go wrong.

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- Charu:** That's right. Sometimes, you know, they often see this in regional firms where there aren't that many solicitors around. You know, if you're in a small town, there's only one firm you can see, and both have had them as their family solicitor for a while. They trust them, and they want them to do that transaction for them. And of course, in addition to the common law duty of loyalty to a client, where you might get sued for a breach of fiduciary duty, there's the solicitor rule. So, it's quite clearly stated that a solicitor and the law practice must avoid conflicts between the duties owed to two or more current clients under Solicitor Rule 11. Under that rule there are provisions that allow solicitors to act in these circumstances where both clients are aware of the conflict and give informed consent. But informed consent isn't a silver bullet.
- Julian:** So yeah, when in doubt, go back and have a look at those rules.
- Charu:** Also, I've seen it in the way the PEXA system works. Now, you have to be registered on PEXA in order to put through the transaction. Sometimes one party's represented by the solicitor, but the other party is not registered on PEXA, and so they say, *Hey, can you just put through the transaction for us?* But in order to do that, they need to sign a client authorisation form for the solicitor to be registered for them on PEXA. And I've seen claims where the solicitor's thinking, well, I'm only representing one party. But when it all goes wrong, they say, *Hey, you find this form where it says I'm your client?* And so that's where having a retainer in place that clearly outlines who your client is important.
- Julian:** It's just something that feels like it's purely administrative at the time, but with really significant implications when, all of a sudden, the fact scenario looks very different, and people are looking for someone to blame.
- Charu:** Yeah, and then there are other situations where you see this arise.
- There's been an increase in estates disputes, and I think it's partly driven by the fact that properties are worth more, so there's more to fight about with property prices increasing, and also people are more likely to have second families. They have second marriages, and each spouse has children from a previous marriage, and that often results in disputes when one party passes away.
- There's also, as you'd know, the family provision law in all the states in Australia, including NSW, and so testators may want to favour a particular beneficiary out of good reasons, but they're worried that if they do favour them in their will, ultimately their other dependents will make a family provision claim (and what they want to happen to their estate won't happen). So they try to put through inter vivos transactions, that means transactions when they're still alive, so that then it's no question of it being part of their estate in due course and they can give effect to their testamentary intent, (and in which case the solicitor often thinks, well, they're aligned). It's the parent and their favoured son or daughter, and they both want to put this transaction through, and then they act for both sides of the transaction and when things go wrong later - that causes some issues.
- Julian:** I suppose another scenario where these sorts of issues could arise is if one family member's asked to sort of "help out" with the business of another family member. Does that ring bells for you, Charu?

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**Charu:** Oh, absolutely. I see that all the time and I've had a matter where a solicitor was asked to give, you know, the independent legal advice to guarantors of a loan, but the situation was that the guarantors were a mother and daughter. The daughter was a shareholder of the company that got the loan and a director and so had an interest in the loan. Mum was not, and mum and daughter both owned a property together and when the proceedings were commenced it was because the loan wasn't repaid, and the lender wanted to then seek possession of the property, and the solicitor was dragged into the proceedings. One of the issues that comes up is: Should the solicitor have given advice to both mum and daughter when they had different interests? And again, none of those things were done where the solicitor documented the informed consent, didn't meet with mum and daughter separately, there were issues about whether mum could speak English, and often these circumstances arise. So those are the sorts of situations you need to be aware of.

Often mum or dad will come in and say, *I want to support my child*, but these are clearly situations where they're doing something that's not in their interest. They're getting no benefit out of the transaction. They're putting their property at risk, and that's a red flag for solicitors when they're doing that.

**Julian:** Yes, so many potential scenarios where these sorts of conflicts of duties can come up, but, as you've alluded to, one common one would be when you've got members of the same family, leading to law reports that are full of cases that have the same surname on either side of the V. Why don't we talk about one of those, the case of *Wardle v Wardle*? Could you run us through what the situation in that case was and what I suppose became the problematic situation that the solicitor faced there?

**Charu:** So in *Wardle v Wardle*, a daughter wanted to exercise a power of attorney to sell her mother's property and then buy a property in that daughter's name. Now, this was the usual situation - The Mum had two children, a daughter and a son. The daughter was a good child, good child and looked after Mum, lived with her, took her to medical appointments. Mum trusted her and gave her the power of attorney, and so the daughter thought she's just carrying out her mother's wishes in putting through this transaction. But solicitors need to be careful in situations where there is someone exercising a power of attorney but in their own favour instead of in the best interest of the person for whom they hold the power of attorney.

**Julian:** And, of course, by definition, the power of attorney usually involves a person who, for some reason, the question of what they've consented to, and the quality of that consent is probably not going to be hard to question.

**Charu:** That's right and often, yeah, situations where someone's elderly, lacks capacity. That's when you have powers of attorney, and that's where you need to be very transparent about what you're doing and why you're doing it. In that situation, though, the solicitor recognised the conflict - there is a great email, quoted verbatim in the judgment, where the solicitor says as we've repeatedly advised, you cannot use your mother's funds to acquire a property in your own name. I therefore suggest that we cannot act for you in a purchase using your mother's funds. We're happy to talk with you in relation to any aspect of the sale, however, we cannot discuss your potential purchase any further.

**Julian:** Right

**Charu:** So sometimes the right answer is just to say no and sorry, we can't act for you.

**Julian:** So that sounds like the sort of email that you would want to be hearing or sending in those situations. What went wrong in that case?

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- Charu:** In that case, the mother died, and the estranged son then made a claim against the estate and said that the daughter had misused her power of attorney, and the son should have a right to access that property as part of the estate.
- Julian:** But it also then brought in the conduct of the solicitor. So what did the court say and what did it do in Wardle about the decision of the solicitor to act for both the mother and the daughter?
- Charu:** Oh well, yeah, there was a later solicitor after this one not like the instruction and who did act for both, but that solicitor also, although he acted on both sides, he went and met the mother and he spoke to her and asked her the usual questions that solicitors asked to try and gauge capacity and ultimately determined that the mother did intend to proceed with this transaction. While the court was somewhat critical of the daughter using her power of attorney in this way, did ultimately determine that it was the mother's intention to allow the daughter that benefit.
- Julian:** But the court also did refer the conduct of the latest solicitor for consideration by the disciplinary authorities
- Charu:** That's right, yeah. And that's one of the issues in these sort of matters - it's not just potential litigation, but also later potential disciplinary action, because it's a breach of your fiduciary duty in those circumstances.
- Julian:** There's also an interesting red flag in that case, because I think the judgment notes that there was another solicitor who declined to act for both. Does that sort of situation often happen, where a solicitor is aware of the fact that they're being asked to act for both in circumstances where another solicitor has declined to? I mean, that should be a bit of a red flag, shouldn't it?
- Charu:** It does happen. I've got a matter at the moment where a solicitor declined to act, and the other solicitor just took the instruction. Look, it is certainly a red flag where a solicitor's done that, it's something you should pay attention to and ask more questions in order to satisfy yourself and make sure your gut feels all right about acting in those circumstances.
- To say no is a hard thing to do, but whenever I've had to do it, clients have been very understanding and in fact it's improved my relationship with them because there's like well, I'm glad you're looking out for us in that way. The trick is you have to do it quickly, because they're not going to thank you for leaving them hanging or starting to act on it and then later on feeling bad about it and then knocking the instruction back because it puts them in a difficult position. So you try to make those decisions early.
- Julian:** Yeah, well, it's good to hear that knocking a client back can improve the client relationship.
- So let's talk about, I suppose, some other possible family scenarios. What about if a solicitor's asked to act for a couple who are buying a property together and I think there's a Queensland case 2023, not the same surname on either side in that one because the Legal Services Commissioner was involved, *Legal Services Commissioner v Cass* what was involved in that case?

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**Charu:** So in that case the solicitor acted for a husband and wife on the purchase of a property. There was a disagreement between the husband and wife as to whether it would be purchased as a joint tenancy or a tenancy in common. Basically, the husband didn't like the wife's granddaughter and was annoyed about her living in their house. And the husband said I'm only buying a house with a joint tenancy if the granddaughter moves out. Otherwise, I want it as a tenancy in common. And the wife was concerned that she'd put in her money and that it wouldn't be protected if it was a tenancy in common. And the solicitor was aware that there was this disagreement. The solicitor tried to mediate between them and brought them in to have a meeting and talk about it. And ultimately, during this meeting it was decided that if the wife got her granddaughter to move out, the husband would be happy for it to be a joint tenancy.

Later on, what happens is the husband calls the solicitor and says, oh, she's not done what I've asked her to do and if she's not sorting herself out, then it needs to be a tenancy in common. What the solicitor then did was put through the transfer as a tenancy in common.

**Julian:** So they've been acting for the husband and wife but now what the solicitor remembered was the arrangement between the parties has played out in a particular way and gets instructions now just from the husband.

**Charu:** And then, after he puts it through, obviously the wife sees it and then gets annoyed and she said *Well, that wasn't the agreement. Why did you do that?* What the solicitor said when we came up before the disciplinary tribunal. He said well, you know, the husband had a right under the legislation to sever the joint tenancy anyway so there's really no loss as such, because the wife would have ended up in the same situation. But these are disciplinary proceedings, not a claim for damages, and the tribunal said, in considering the gravity of the misconduct by a solicitor, the fact that a client suffers no losses of little relevance. And the solicitor was found to have engaged in unsatisfactory professional conduct because in principle it's important for solicitors to recognise the need to withdraw when a conflict arises.

**Julian:** Because there was no problem with the situation initially, the acting for both parties was fully above-board, informed consent, but then there was a situation where instructions came from only one of those clients and it was really then that the conflict crystallised and the solicitor hadn't resolved it in the way that he should have.

**Charu:** And then they had a disagreement. Ultimately, the solicitor had to pay a penalty of \$1,000 and then pay the costs. But it's more having a finding of that in your name.

**Julian:** No one wants that.

So that's buying a house together. What about severing a joint tenancy? I mean, the consensual severing of a joint tenancy does seem like the sort of situation where a solicitor could be asked to act for both parties. Is that something you've come across?

**Charu:** Yeah, I've come across a situation where a solicitor, again trying to do the best thing by the parties, acted for a husband and wife for many decades. They had children from different marriages and what happened was the wife had had a long-standing illness over many years. The husband had written his will to say he wanted to grant the wife a right to live in the property, a life tenancy, because they owned that property with a joint tenancy, and then ultimately his share of the property should go to his children.



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If you have a joint tenancy, as many solicitors would know, when you pass away, your share goes to the other joint tenant, and so it doesn't form part of your estate, which means there's nothing to give.

When the husband floated the idea initially with the wife, she was uncomfortable with it and the husband always had in his mind potentially that the wife was more frail and had a pre-existing illness. He believed the wife would pass away ahead of him and therefore he didn't want to create disharmony in the marriage and so agreed that he would write his will as his estate would pass to his wife with an understanding eventually, when she passed, the estate would be divided between the children.

**Julian:** And there was just something about the way you said he believed this that I feel like there's a big but coming.

**Charu:** Well, suddenly the husband gets diagnosed with cancer and he's given a prognosis of two weeks to live, and it's a very stressful situation for everybody. The solicitor who's this longstanding family solicitor is called from the bedside of the husband to write this new will. So, the will that was agreed on was everything would go to the wife and then there was like an agreement, although not a written agreement, but in principle that she would then deal with it appropriately. Now the husband's dying, and his children are coming to the bedside and saying *what's going on?* He wants to change his will to protect his children. And he says to the solicitor I want you to write my will in this way. And the solicitor very properly recognises well, it's owned as a joint tenancy, and you need to sever it in order for this will have effect. Now, in the usual situation you can unilaterally sever a joint tenancy by giving notice to the other joint tenant, but that takes a little while. If the husband only had two weeks left, that wasn't enough time to do that.

**Julian:** This really does sound like one of those sort of law school contrived scenarios, which makes it impossible, but it really happened. So, you've got a short term, you've got a family crisis happening and now there's pressure on the solicitor to act in a certain way.

**Charu:** Yeah. And what the solicitor did was say to the wife, husband wants to do this with his will. And he said to the husband I will only act for you in writing this will if it's fully disclosed to your wife that this is what's happening and what you're intending to do. And the husband said that's fine, I want her to know. And they had family conferences.

But the solicitor says to the wife in order for the husband's will to have effect, you need to sign a statutory declaration saying you agree to the severance of joint tenancy immediately. The wife initially says *Oh, I don't know, I'm uncomfortable about that, I won't do it.* The solicitor doesn't press her about it. But then he goes to her house to visit her to talk to her about her will, because she wants to make changes to her will (because of these changes to his will). And as they're discussing it, the wife says *I don't want a fight in the family, I'll just sign it and give it to me. I'll sign it now.*

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The solicitor says you have the option to get independent legal advice. She said *I don't want it because you're my solicitor. I'm too stressed about everything. I just want it to have harmony in the family. I'll sign it now*, and she signs it, the husband dies and then she regrets it. Proceedings are commenced between the wife, husband's children, the solicitor's dragged in, as they are often in these family disputes where the solicitors acted and we were involved in these very protracted settlement negotiations. In due course there was a settlement. So the solicitor didn't have to go into court to give evidence, but it was a pretty prolonged difficult time for that solicitor where he's taking time out of his practice to give us instructions, do a defence, prepare his evidence, reliving this difficult time for him. And it's often very difficult to resolve these family disputes where people might not be rational, they're being emotional, and the solicitor unfortunately gets dragged along.

**Julian:** And again, it's one of those scenarios where what's been obtained is clearly a consent, but the question is whether it's an informed consent. And when you've got these very highly charged personal situations, in retrospect it can be a lot easier to see difficulties with a consent that might, at the time, have felt like it was all right to proceed on the basis of.

**Charu:** Yeah, and he's trying to do the right thing and he's thinking, well, this will have to happen very quickly, but unfortunately, the right thing to do in those circumstances would have been to say I just cannot do this - she has to get independent legal advice in these circumstances. Because the warning signs are there - she's elderly, she's in a difficult emotional situation, she's signing something that doesn't appear to be in her interests when her husband's clearly dying. If she has a joint tenancy, she's going to get the house. So, all of those are warning signs that ought to flag that you can't act for both parties in those kind of circumstances.

**Julian:** Now we've heard through these cases some of the consequences that can arise when there's a conflict of duties. In one situation there was disciplinary action against the solicitor. The example you just gave us didn't end up with disciplinary action but still took up a lot of time and stress, and that in itself is a really negative consequence for a practitioner. What other sort of consequences are sort of on the horizon if you're in a situation of conflicts of duties?

**Charu:** Well. The other situation is well, you're trying to achieve the right thing for your client and ultimately, it may be the transaction is set aside.

So, in trying to do the right thing you actually don't achieve that for your client. I've had a matter where the solicitor, again, longstanding solicitor for the husband, the husband's dying, decides he wants to write his will. He has a wife, second marriage, has children from the previous marriage. Solicitor starts writing the will for the husband on his deathbed. During the course of writing the will the solicitor realises that the husband, for asset protection reasons, has purchased all these houses in the wife's name, but with his money. So, the solicitor says well, we've got to do something about it. He recognises that the will's not going to have effect if it's not part of the husband's assets. Draws up a deed where the wife agrees to distribute these properties to the children from the first marriage in accordance with the husband's wishes and his will. The solicitor doesn't recognise that he might be acting for the wife because in his mind he's acting for the husband. The wife signs the deed, but she doesn't have separate representation and is clearly signing away properties that are in her name. So, against her interest.

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The court sets aside the deed and there's a judgment by Chief Justice Ward where the court says that the solicitor didn't recognise either that she thought he was her client, or give the wife a warning, saying you need to seek independent legal advice before signing this deed, because the solicitor just didn't recognise in those circumstances, because it's kind of developed along the way as he's writing this will that he starts doing a document that she needs to sign.

**Julian:** So one of the tricky things about this area that we're talking about is that it's really the unfolding of events that makes these conflicts arise or arise in ways that aren't in the consciousness of the practitioner, who ends up being the one whose conduct is questioned. It's very difficult to give sort of practical tips about in terms of how to avoid those unconscious lapses. But give it your best shot, Charu. What would you say to the solicitors about how to better protect yourselves against these sort of tricky situations turning out in the really, really negative ways that we've talked about?

**Charu:** Yeah. Well, firstly, I'd say you need to watch out for these situations, like you need to be conscious that these can arise when you're acting for the two parties in the same transaction - that's a flag where you need to pay extra attention.

With these sort of situations where you're getting someone to sign a document you may not think that they're your client, but they may think that they're your client. If they're signing a document that's giving up some rights, then you are potentially acting for two parties to a transaction.

So you're looking out for situations where one party gains no benefit or suffers a loss from the transaction, particularly if there are some other factors, like they're elderly or under emotional pressure. And if the clients make references to other family members who are estranged and not involved in the transaction - that also can be a red flag, because that's the sort of situation where even if the parties you're acting for are in strong agreement, you're going to have a dispute later on. I had a claim where there was a solicitor acting in a Eastern European community, so the solicitor was part of that community, and so were the mother and then the good son again, and the Mum and the good son come in and Mum says listen, *This son is the only one who's ever taken care of me. I've got these two other children, they're no good, and so what I want to do is...*

**Julian:** What about that red flag..?

**Charu:** Transfer the property to the son, and solicitor's like well, *They're all in agreement, this is all good.*

What happens is, after mom transferred property to son, other kids get upset, go to the Guardianship Tribunal, say Mum has been doing these transactions that are not in her interest. The Guardianship Tribunal is concerned about the situation, therefore appoints a Financial Manager, and that Financial Manager then sues the son and the solicitor to get that transaction set aside. So, even if you think everyone's on the same page, if there are these other angry family members in the wings, that's a flag. And then again you know exercising powers of attorney in a transaction where they're doing it in their favour, that's also a red flag. And then, in terms of then, once you've seen the red flag, what do you do about it?



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Firstly, if you're starting to feel uncomfortable, the first person you consult is yourself. If there's a problem in your gut, do something about it. Do it sooner rather than later, don't just let it fester, and then there might be other people you can consult. Your colleagues, people you respect in the field. All the Law Societies also help, very helpful ethics help lines where you can call and ask for advice - you're not on your own if you're struggling with a situation and how to deal with it.

Secondly, you should really document your retainer. Any dispute involving a solicitor where I've been instructed to act, the first thing I ask for is where's your retainer? It can deal with these situations where you think you're only acting for one party but someone else thinks you're acting for them as well. In these sort of PEXA situations where you may be putting a transaction through and you sign a client authorisation form, make it clear to that person in writing, can be an email saying, I'm only doing this form for you. I'm otherwise not giving you any advice about the transaction. Also, if we don't have retainers which sometimes you don't, which is a problem, I ask for the invoices because that also gives you a sense of who you're acting for and what you're doing. So, make sure, I've had situations where the solicitor thinks they're acting for someone but have been told to send the invoice to another family member. That causes issues as well. So, in your retainer, make clear who your client is and also, send your invoices to that client.

Again, as you mentioned, informed consent it's not a silver bullet can be helpful. When you do get informed consent document that as well. Give that advice, write down the advice and then also get them to sign it, saying they agree. And I know that this all sounds like a lot of admin and it's difficult, for you know you're in commercial practice, a small practice, sole practitioner, you're trying to keep costs low for your client and yet you have to do all this admin. Unfortunately, courts are not that sympathetic to commercial practice, they hold solicitors to a really high standard and if you end up in court it can take away from your time for your practice, it can be a great emotional and financial drain. So a bit of time now can save you a lot of heartache and time and money later. If you can get those precedent documents done, then again it may be that you don't spend that much time on it, those precedent advices about acting, and get them to sign it on the dotted line saying that you're accepting that there's a potential conflict and you're okay with the solicitor acting for both parties.

And when you are acting for both parties, try to as much as you can separate out. Open two files. Again, maybe not possible if you're a sole practitioner, but if you have a few lawyers, try and get different lawyers to meet with the clients or at least meet with them separately.

**Julian:** So build in practices that reinforce the two clients that you're acting for and, I suppose, focus the mind on the need to keep those best interests separated.

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**Charu:** That's right. And finally, the final tip I'd say is do a complete job, because, again, courts hold solicitors to a very high standard and sometimes when solicitors are acting for two parties to transaction they're just like, well, we'll put it through, we won't do the other things that we might do when people are at an arm's length transaction - we won't document various agreements. In the situation where the mother was transferring the property to her son, the solicitor did write a deed, and the deed between the son and his wife, (because the property was being transferred to the son and his wife), they agreed to look after mum for the rest of her life. But the tribunal was a bit concerned, and they said well, what happens if the son and his wife divorce and they have to sell the property? What happens if mum has to go into aged care? How do you deal with those situations? And the solicitor said to me in our community we don't divorce, but you have to actually think about it as an arm's length transaction. What if these people aren't related? What would you do to document that transaction and then you have to do that job because otherwise they don't need a solicitor to document the transaction. The reason they're coming to see you is to document it and document it properly.

**Julian:** Yes, many, many thorny situations, lots of red flags to be looking out for. But, Charu, thank you so much for pointing them out to us and hopefully anyone listening will not have to find themselves trying to explain these situations to a disciplinary tribunal or anything like that.

**Charu:** Yeah, thanks, Julian.

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## Outro

Thanks for listening to Risk on Air by Lawcover and to stay up to date, join us for the next episode on current risks in legal practice.

## Resources:

[Wardle v Wardle \[2021\] NSWSC 1529](#)

[Legal Services Commissioner v Cass \[2023\] QCAT 320](#)