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Lindsay practices in a boutique practice in York Street Sydney and was recently engaged by Acorn Lawyers of Wollongong as its estate planning consultant.
Lindsay is a well-respected source of knowledge, expertise and experience in all aspects of estate planning, succession planning, wills and probate.

NEWSAGENTS' WILLS – THE ALARM BELLS GO OFF!

Robert Simon

Your client on review or in passing proudly tells you they have written their own Will with a Will pack and it only cost them $29.95 (and for 2!). Immediately ask them for a copy and also urge her to have it reviewed by an experienced Wills lawyer. You will have already asked if they have enduring powers of attorney but this is a topic for another day.

First 3 reasons for your client to see that lawyer:

1. There is a presumption that a solicitor's Will in valid form is effective on the face of the document when admitting the Will to probate (other extrinsic evidence can upset this presumption).
2. The costs of dying without a Will, which is called intestacy or a partial intestacy depending on the circumstances, will incur additional legal fees in excess of $1,650. Newsagent form Wills are prone to leave out part of the estate not covered by the handwritten Will, causing at least a partial intestacy.
3. The maker of a handwritten Will often lacks knowledge as to what assets are personal and can be the subject of a Will and what passes to another party as a non-Will asset.

Case scenario - One

John & Jane Smith attended Better Lawyers for powers of attorney as they were leaving for overseas. They were teachers by profession with university degrees and so hardly unintelligent. By chance they brought their neatly handwritten Wills. On review they had on the death of the second of them left their superannuation to son Billy, 2, their home to son Charles and 3, the balance to son Evan.

On their understanding each of these primary assets were about equal in value (they had forgotten completely the death benefits in the superannuation.)

But more importantly they failed to realise that superannuation is a non-Will asset.

Billy potentially only had a claim under the Succession Act 2006 – Part 3 – Family Provision. They gave instructions for new Wills

Additional reasons

4. Non-Will assets include assets in a discretionary trust. The Willmaker may have a power of appointment, which may be handed on by Will (if the deed so provides. Sometimes alternative deed provisions are mandated). The maker of a newsagent's Will rarely thinks of this.

5. Other non-Will assets include a jointly owned home, bank accounts in two names, a relocatable home or other assets held by two parties, and superannuation.

Case Scenario – two

Edward and Therese had been married for 23 years. They had no children of the relationship but Edward had 3 of his first relationship and Therese had 4 of her first marriage. Their assets included a jointly owned home valued at $950,000, a SMSF with total benefits of $666,000 and shares and investments held personally of $124,999.

When listening to Radio 976 they realised they had not made a Will together. The ad promised clear instructions[1] and that the Will was easy to fill in. They remembered that their good friends Bob and Margaret in similar familial circumstances to them had a Will, which left a life licence in the home to each other so that the home eventually passed to their respective children in equal shares. This was what they wanted and the ad promised two forms for the price of one if they were quick.

Ted popped down to his newsagent. He did get two for the price of one.

But:

- The handwritten licence clause was not legally of a high quality as it left out some major provisions such as payment of rates and did not give the right of a substituted residence by way of new freehold purchase or rights to go into a retirement village (the house had 24 internal stairs and a steep driveway).
- Ted and Therese failed to recognise the life licence totally failed because the house passed by survivorship and not under the Will.

6. Superannuation is often misunderstood. Many people do not understand it is a non-Will asset and fail to appreciate the full impact of a BDBN and when it should be made in favour of a spouse and the LPR (estate).
7. A hand written Will normally means the Willmaker fails to appreciate the importance of the EPOA and AOEG.
8. Handwritten Wills are often ambiguous and lack clarity.

Further reading

Handwritten Wills are often ambiguous and lack clarity.

No distribution Clause

A recent Will left all the Willmaker's furniture and personal effects to one daughter and the only other distribution was to a large national charity. As a lawyer I actively promote charitable giving. In this case the beneficiary (only one daughter out of 3 survived their mother) and I were pretty confident this was not the Willmaker's intention. There was no Section 100 statement as to Willmaker's intent, which is usual if a professional estate planning lawyer had prepared a Will of this nature.

The only response to this Will is an expensive Succession Act Family Provision claim. It is expensive as charities usually fight these sorts of claims.

9. A handwritten Willmaker will not be fully briefed on:

- Tax implications
- CGT implications
- Proper residuary or 'tragedy' clause, and
- The value of good financial planning advice for a quality retirement and the practicality of a good estate plan with advice from financial planner, lawyer and accountant as appropriate.

Case scenario - Only the lawyers won

Another Newsagent Will case presented itself recently.

Dad was in his 80's. He had a son, a daughter and a lady who was later to marry one of the co-executors as witnesses. Because one of the parties was a former employee our fees were charged out well below cost. But they were still more than $15,000 above probate scale.

If only dad had instructed us for a $330 Will (and as the past employee was next of kin we would probably have discounted that.)

It was a difficult matter factually:

- A handwritten Will
- Executor/beneficiaries as witnesses
- Poorly drafted, and
- A Family Provision claim by the youngest child (aged 50)

The Will defects:

- Handwritten Newsagent's Will
- Two executors who were beneficiaries had witnessed the Will

Neither of these roles are valid witnesses under the Succession Act 2006.

Seven beneficiaries and at least 3 were antagonistic to the Executors.

We mediated a settlement just prior to the 12-month period in which the youngest child could commence proceedings for her claim. This avoided mounting Court costs. The antagonism of beneficiaries incurred further substantial costs, which were only minimised by the executors remaining calm.

We are not into – 'We told you so' or mythological moralism but this one has one:

Our adage: Do not handwrite your Will or
Another: Leave that Will pack on the shelf

Other frequent handwritten Will problems

- No executor appointed
- Failure to appoint alternative executors with prior death of first appointee
- Is the appointment of alternative or substitute executors in the best legal form?
- Is there a good 'tragedy clause' (all beneficiaries named now deceased)?
- Is the residuary clause, if any, clear and unambiguous?
- Does the Will include a proper powers clause especially important for:

- Willmakers with a business
- For Will makers who wish to deal with the digital self (Twitter, Linked in etc).

As bad as it gets?

A bit of a loner who was a down the coast hermit wrote his own Will with the help of the local newsagent's form. It was a complete disaster. The only executor was his much older brother whose affairs were being handled by the Protective Office. In any event he predeceased the deceased by several months. The gifts clauses were ambiguous. The main distribution clause was ambiguous. The Will only had one witness. It could probably not be rectified and the estate appeared to be largely intestate any way. (The deceased died before the current Succession Act 2006 which has better rectification provisions). This was a solicitor's nightmare. To top it off it was a small estate but required a grant.

Case scenario- a recent South Australian case

Fairly recently In the Estate of Albert Firmin Julien Baes (Deceased) [2012] SASC 217, a will dated 7 October 2004 was prepared using a will kit. On the face of it appeared to have been duly executed. However, at the end of the will, there were 10 handwritten lines written by the deceased using a different pen.

An application was made for a grant of probate with the last 10 lines of the will deleted. The court had to consider two issues:

- whether the last 10 lines had been placed on the will after signing; and
- whether the applicant needed to prove the last 10 lines under s 12(2) of the Wills Act 1936 (SA) or whether the will could be admitted to proof without those lines.

The Court found that the last 10 lines were written on the will after its execution. The applicant was required to apply to prove the last 10 lines of the will under s12 (2) of the Wills Act. As he could not do so, the estate was distributed in accordance with the rules of intestacy. This was not what the deceased wanted.

Pointers, Summary and duty of care

1. Wills are never simple.
2. There is some move to legislate against these Will products.
3. Newsagents' Wills are ensuring lawyers expensive and disputed estates for years to come.
4. If your client has one of these Wills even if it looks in order they are best encouraged to see a lawyer for review.
5. These types of matters fall within your duty of care.
6. We suggest you:

- Refer the client to a competent estate planning lawyer
- Remember many firms, not just suburban firms but large CBD firms relegate this work to non-specialist lawyers
- You can more fully carry out that duty by telephoning the referred lawyer in the client's presence, make the appointment and at the same time get the lawyer's email address, and again, with client consent send details of the asset portfolio to the legal firm.

Final warning

Remind your client of the total cost of their car insurance. A good lawyer will help get the right inheritance planning in place. It is not usual for Sydney estates to be in excess of $1,500,000 and often far more. Why incur tens of thousands of dollars in litigated fees and family grief and anguish all for a $29.95 will.

References

1 CHOICE has reviewed these Wills and suggested that of the differing Will offerings the clarity of instruction covers a range of quality.