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WILLS & ESTATES

Don't try this at Home

Why a solicitor should prepare and witness your Will

By Lindsay Smith

Completing a DIY project, whether large or small, can provide a great sense of achievement. However, unless you're happy to risk leaving your estate a substantial legal bill there are many good reasons why you should instruct a solicitor to prepare and witness your Will rather than attempting it yourself.

At a minimum, making a mistake in your Will is almost certain to delay the administration of your estate and cause unnecessary legal costs to be incurred. At worst, your Will might be invalid, potentially resulting in your estate being distributed to persons you had not intended to benefit.

Formal requirements

In South Australia, the making, execution, and revocation of a Will is governed by the *Wills Act 1936* ("Wills Act"). In order to be valid, section 8 of the Act requires that a Will:

- be in writing; and
- be signed by the testator, or be signed by some other person in the presence, and at the direction, of the testator; and
- appears, whether on its face or otherwise, that the testator intended to give effect to the Will by signing it; and
- be signed by the testator in the presence of two or more witnesses present at the same time; and
- be signed by witnesses who sign their names as witnesses to the Will in the presence of the testator (but not necessarily in the presence of each other).

Where one or more of these formal requirements are not met, the Supreme Court may nevertheless order that a Will be treated as valid if it is satisfied that the document represents the testamentary intentions of the deceased. Such orders are granted pursuant to section 12(2) of the Wills Act, but an application to the Registrar of Probates must first be made. Ordinarily, the executor's solicitor would engage a barrister to assist in preparing the application and, if a formal hearing in the Supreme Court is required, the barrister would also appear at the hearing(s).

Situations that have been the subject of a successful section 12(2) application include:

- a Will that was signed by the testator but not witnessed and signed by any other person;[1]
- a husband and wife for whom identical Wills had been prepared but who mistakenly signed each other's Will, their error not being discovered until the husband had passed away;[2]
- a deceased who had given instructions to the Public Trustee for the preparation of a new Will, but who committed suicide before the new Will was signed[3] – the Court admitted to probate a draft copy of the new Will on the basis that the deceased had left an unsigned note stating that the new Will was to be valid and, further, that the draft copy of the new Will was consistent with pencilled alterations that the deceased had made to an earlier Will.

Incidentally, no restrictions are imposed under the Wills Act on the material used to write a Will. In a 1988 case,[4] for example, the Supreme Court was required to consider a Will that had been written on a plasterboard wall of the deceased's Semaphore Park home.

[1] *Tsagouris & Anor v Bellairs & Ors* [2010] SASC 147.

[2] *In the Estate of Blakely* (1983) 32 SASR 473; *see also In the Estate of Hendrikus Ignatius Hennekam (Deceased)* [2009] SASC 188.

[3] *In the Estate of Vauk* (1986) 41 SASR 242.

[4] *In the Estate of Slavinskyj* (1988) 53 SASR 221.

Although an executor is ordinarily required to lodge the original Will with the Probate Registry when applying for probate, the Registrar instead directed that the wall be photographed – saving the executor the effort and expense involved in cutting the Will from the remainder of the wall, and saving the Registrar the difficulty of having to store a sheet of plasterboard.

More recently,[5] the Supreme Court has been required to consider a DVD containing a video recording of the deceased in which he had made a statement concerning the distribution of his estate. The DVD was located at the deceased's home, together with a later typed document signed by the deceased but not witnessed. The Court found the DVD to be a document for the purposes of section 12(2), and the DVD and the typed document were both admitted to probate as the Will of the deceased.

Perhaps the most unusual Will ever found to be valid, however, belongs not to a South Australian but to the late Cecil George Harris of Saskaskatchewan, Canada. Mr Harris, a farmer, had the misfortune in 1948 to be pinned under his tractor for approximately 10 hours before being found. He died the following day in hospital. "In case I die in this mess, I leave all to the wife", Mr Harris managed to etch into the tractor's left fender with a pocketknife as he lay trapped, also managing to add his signature. The fender was removed from the tractor and determined by the Saskatchewan Surrogate Court to be a valid "holographic" or hand-written will.[6]

Rectification

Under section 25AA of the Wills Act, the Supreme Court also has power to correct mistakes in a Will. In broad terms, section 25AA enables the Court to rectify a Will whose provisions do not accurately reflect the testamentary intentions of the deceased person. Again, an application to the Registrar of Probates must first be made, with a solicitor ordinarily drafting the application with the assistance of a barrister. The barrister would also appear at any Court hearing that may be required in respect of the application.

Situations that have been the subject of a successful section 25AA application include:

- a deceased with two step-children, but no children of his own, who made a Will in which he bequeathed his estate to "my children"[7] – the Court rectified the Will so that the reference to "my children" was amended to "my step-children";
- a deceased who, whilst terminally ill, made his Will and then married a day later, but whose Will was not expressed to be made in contemplation of marriage and which, in the absence of rectification, would have been revoked by the marriage[8] – the Court rectified the Will to insert the phrase "That this my Will is made in contemplation of my intended marriage to [the deceased's wife]";
- a Will prepared by a solicitor, and a codicil to the Will, prepared by the deceased's son, in which clause 1 of the codicil purported to revoke all earlier Wills[9] – the Court rectified the Will by removing clause 1 of the codicil.

Other considerations

To avoid any problems, it is not sufficient that a Will has been validly executed and that its provisions are clear and unambiguous.

In drafting a Will, some consideration needs to be given to the *Inheritance (Family Provision) Act 1972*. The Act allows certain persons to challenge a Will on the basis that the deceased has not adequately provided for the applicant's maintenance, education or advancement. Where a claim is successful, the Supreme Court then awards the applicant a share, or a greater share, of the deceased's estate. A solicitor is required to take the *Inheritance (Family Provision) Act 1972* into account when preparing your Will and, in doing so, can reduce the likelihood of a claim being brought against your estate.

It should also be remembered that, when probate is granted, the Will becomes a public document – for a small fee, any person can then apply to the Court to obtain a copy of your Will. Accordingly, if a Will contains words that are considered to be of an offensive or libellous nature, the Registrar may require that an application be made for the removal of those words. This would obviously result in additional legal expenses for your estate.

It is also important to ensure that your Will deals with your entire estate. Where a Will distributes only part of the deceased's estate, he or she is said to have died partially intestate, and those assets not disposed of under the Will must then be divided according to the "statutory order" in section 72G of the *Administration and Probate Act 1919*. Similarly, where a person passes away without a valid Will, all his or her assets are divided according to the statutory order.

[5] *In the Estate of Wilden (Deceased)* [2015] SASC 9.
[6] The etched fender remained on the Court's files until 1996 when it was given to the University of Saskatchewan College of Law for the purpose of public display.
[7] *In The Estate of Josef Bernhard Nies (Deceased)* (2014) SASC 93.
[8] *In The Estate of Stephen Mark Dawes (Deceased)* [2011] SASC 236.
[9] *Sykes v Sykes* [2010] SASC 356.

By the same token, it is important to remember that certain assets are not controlled under your Will. If you and your spouse own your house as "joint tenants", for example, the house automatically passes to the surviving joint owner when one of you passes away. A similar situation exists for other jointly-owned assets, such as bank accounts. Any superannuation benefits that you leave behind are also unlikely to become part of your estate. Ordinarily, the trustee of the superannuation fund will distribute those benefits in accordance with any binding death benefit nomination that you have made or, in the absence of a valid binding death benefit nomination, will distribute those benefits directly to one or more dependants chosen by the trustee.

Finally, a solicitor will make appropriate file notes in the course of taking instructions from you, drafting your Will, and witnessing its execution. These notes may prove useful in defending any challenge to your Will if, for example, a family member subsequently alleges the Will to be invalid on the grounds that you did not possess testamentary capacity.[10] If you have memory or other problems associated with your mental health, your solicitor will also consider whether a report from a medical practitioner is required to determine that you possess testamentary capacity.

If you prepare your own Will and, in doing so, you happen to make an error when preparing or signing it, all may not be lost. It's possible that the error can be remedied under the Wills Act, albeit with the involvement of a solicitor and barrister. By instructing a solicitor to prepare and witness your Will, however, you can avoid these and many of the other problems mentioned above – and thus avoid unforeseen delays and legal costs in the administration of your estate.

[10] A person is said to lack testamentary capacity where he or she is not of sound mind, memory and understanding to make a Will.

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