



The Law Society

Regulation of will writing

protecting
the consumer

Introduction



A will empowers a person to provide for those people and causes they care about through the distribution of their estate after death, and may also help to provide closure for their family and friends.

But the drafting of a will and administering the estate through probate can engage complex legal and financial areas, often involving technical issues of tax, trusts, and property rights.

It is therefore unsurprising that problems in the drafting of a will have the potential to cause the most profound repercussions for the bereaved, who may be left with significant costs to resolve problems, be prevented from benefiting from the wishes of the person they have lost, and be faced with an uncertain and difficult process to seek redress at a time of great emotional difficulty.

So there is a clear need for effective regulatory provisions to be put in place to ensure that where there is a problem, those affected can be recompensed, and the reasons for the mistake can be addressed and prevented from reoccurring.

Regrettably, not all consumers who purchase wills receive this protection, or are aware of its absence. Many of those who draft wills are entirely unregulated; they are not subject to any regulation and are free, if they choose, to prepare wills without any training or insurance protection. As a result some will writers may not have the means to recompense an injured party to the full extent of their loss, which would severely undermine the efficiency of seeking redress.

Many people are unaware that anyone can operate as a will writer and draft wills, and that will writers are not required to adhere to guidelines or provide consumer protections such as insurance. Our consumer research conducted in 2010 indicates that consumers are unable to distinguish between regulated and unregulated providers. Despite this confusion, there is a clear demand for regulatory elements to be in place despite the added cost that it might entail. The vast majority (82%) of respondents to our recent survey agreed that they 'would pay more to have a will drafted by a regulated provider with a formal complaints procedure and compensation scheme'.

The fact that most problems are detected after the individual has died is a strong argument for establishing a robust regulatory framework. Five years since the government called for voluntary regulation the problems with will writers have not subsidised, and in this time we have been presented with more and more examples of consumer detriment as a result of unregulated will writers. It is now time for action to be taken to protect consumers.

The Law Society therefore calls for will writing to become a reserved activity, placing it within the regulatory net of the Legal Services Board.

Our work

The Law Society has received reports for many years from solicitors highlighting problems clients have had with unregulated will writers. In a recent call for evidence we received over 120 responses and we outline some of the key examples sent to us in this document.

As part of our work in this area we also commissioned ICM Research to conduct a survey on behalf of the Law Society using a random sample of 1001 adults aged over 18 in the UK (excluding Northern Ireland). The fieldwork was carried out from 15 - 17 October 2010 and this data therefore captures a very recent snapshot of the views of the public in general. Statistics used throughout this document are based on the results of this survey.

The problem at present is that any person can provide unreserved services without any form of regulation (other than the general law) and this is where most damage occurs

Government White Paper, The Future of Legal Services: Putting Consumers First, October 2005

What is a reserved activity?

The Legal Services Act 2007 (LSA) sets out six 'reserved legal activities', for which a person must be authorised and regulated to do under the LSA framework. Currently, the six reserved activities are:

- the exercise of rights of audience;
- the conduct of litigation;
- reserved instrument activities such as the transfer of property;
- probate activities;
- notarial activities, for example under the Public Notaries Act;
- the administration of oaths.

What is will writing?

In this document we use the phrase 'will writing' to describe the activity that we would like to see regulated. By will writing we are referring to will drafting, estate administration, any probate or related work that falls outside what is currently defined as a reserved activity. We believe that to avoid confusion all reasonable activities that would be carried out by a person providing will drafting, probate activities or related services should become a reserved activity.

In most situations, will writers do not just offer to draft wills, but usually offer a variety of services including drafting a Lasting Power of Attorney and providing advice about care fees.

Unregulated will writers - the problems

I perceive a serious breach of both the public and consumer interest in any area of activity that looks or “smells” like a reserved activity but is allowed to go unregulated. Most of our fellow citizens would surely be taken aback to learn that anyone can currently set himself or herself up as a will-writer and also that some aspects of probate activity can take place outside the regulatory “net”. The consumer detriment inherent in that seems to me self-evident

Lord Hunt, Hunt Review of the Regulation of Legal Services, October 2009

The public places great value on regulatory protection, with the overwhelming majority (93%) of respondents to our survey agreeing that ‘it is important for anyone running a business making wills to be properly regulated’ - yet a significant number of people do not understand that will writing is not a reserved activity. It is important that consumer choice is not championed at the expense of consumer protection.

Many individuals believe that since will writing is a legal activity that only trained and qualified individuals would be able to undertake this work; more than one-half (61%) of respondents to the Law Society survey agreed incorrectly to the statement that ‘will drafting is always subject to regulation’, with less than a quarter disagreeing. This result is concerning and highlights the difficulty that members of the public have with recognising the true regulatory status of will writing.

The term regulation is often confusing, as there are a number of different schemes in place. Solicitors are subject to compulsory regulation in any work they undertake, including activities which are not reserved legal activities, while some will writing companies require their members to meet certain set requirements to belong to their organisations or associations. The great number of different structures, requirements and standards used by individual will writers makes it difficult for consumers to properly understand the level of protection they are entitled to for the services they are receiving.

Poor practices

Drafting a will is a complex activity and should not be undertaken by someone without training and knowledge in this field. What may seem like a straightforward will may turn out to be much more complex once the correct questions are asked of the consumer. There may be children from a previous marriage, complicated family relationships, diverse investments and tax implications that may mean that detailed advice and planning are required. Professional skill is always required when drafting a will and undertaking related services.

Will writing is unlike other legal activities in that most mistakes or defects are often not found until after the client has died, which makes rectification more difficult if not impossible in some cases. A significant number of individuals make a will long before their death, this could be 20 years or more, and by this time if any problems are found there will not usually be any redress available from an unregulated will writer who may no longer even be operating as a business.

Listed below is evidence provided to the Law Society by members of the legal profession of common problems their clients have experienced when using an unregulated will writer. Some of these examples include poor quality drafting, dishonesty, fraud, and significant costs incurred due to the complex unregulated nature in which some inexperienced and unprotected will writers are working. It is clear from these examples that some unregulated will writers can and do cause considerable detriment to members of the public, and this harm should not be ignored.

Further examples are available in the Law Society’s response to the Legal Services Board Call for Evidence, at <http://www.lawsociety.org.uk/willwriters>.

Poor quality drafted wills - were commonly cited as problems resulting from wills being drafted by will writers who had no training or understanding of the complexity of this area of law. We received a significant number of examples of wills that were not valid, or did not reflect the client’s wishes. In many of these cases the client had no readily available redress, and even where legal recourse for their complaint was available recovery was not feasible due to expense or being unable to locate the will writer.

“We had a case where a will was made by an unqualified will writer where the will was so badly drafted that it was not possible to say whether the widow had an absolute entitlement to a house or only a life interest. A bitter dispute arose in the family as a direct result of the bad will. Separate solicitors and barristers became involved.

There was great delay in winding up the estate. The family dispute caused a permanent estrangement between family members, the direct cost in legal fees was incredible and when we attempted to submit a negligence claim we found that the will draftsman was not insured and had left the country to reside somewhere in Spain.”

Will writing is not a straightforward contract. Simple mistakes can lead to unjust outcomes and these outcomes will often occur a long time after the will has been written

Lord Hunt, Hunt Review of the Regulation of Legal Services, October 2009

Storage problems - The Law Society received many examples of clients being unable to locate a will, wills being unprotected and/or kept in inappropriate places, significant and/or ongoing charges for storage of the will being charged.

“I recently prepared new wills for a local couple. The husband provided me with a photocopy of their previous wills which were produced by a will writing company. He says a few months ago he received a telephone call from ‘another firm’ saying his original wills had been found dumped in a field. He now has no idea where the original wills are or how to get hold of them. I have looked up the will writing company and immediately came across an article which seems to verify this story.”

“A client was charged about £150 to make a will but then a standing order of £149 per year was set up for storage fees”.

Executorships - Examples included charging consumers a significant upfront fee to guarantee a discounted executor fee, will writers naming themselves as executor without explaining this to the consumer, and problems arising out of an unregulated will writer being named as an executor.

“A couple made wills with the same will writer and appointed him sole executor. This is despite the fact that they have three adult children. The husband in the couple was seriously ill at the time and died shortly afterwards. His widow does not recall appointing the will writer or discussing this with him and says she has no information from him with regard to his fees or terms of business.”

“A client instructed a will writer who had advertised his services at £49 plus VAT. The client ended up issuing a cheque for £3,000 to the will writing company as they had taken an advance on their probate fees.”

When the clients pointed out the drafts were unacceptable, they were sent another bill for £300 before changes were made. They never received a completed will

Dishonest practices - This can include wills advertised as 'cheap' ending up significantly more than the advertised price, inappropriate selling techniques such as attending a consumer's home without invitation, or being invited to attend a consumer's home but refusing to leave until a contract is signed or a fee is paid for the visit, or other pressure-selling techniques have been used.

"An elderly lady thought she was rewriting her will at a cost of £29.00. Subsequently she received a bill in excess of £1,000 which included a 'lifetime storage' charge of over £600. The company was also in the process of preparing a Deed of Gift for her to sign, which would have transferred her property to the beneficiary of her will during her lifetime, which the client did not want to do."

"The will that we have been dealing with left the residue of a widow's estate upon discretionary trusts. The will writer argued that as executor, the law allowed him to invest estate monies as he saw fit - including investing in his children's school fees, foreign property and cars. He had argued that he was intending to pay a share of the profits to the estate. The jury was not convinced and he was convicted of theft from the estate we are dealing with and several others."

What is more shocking is that his wife is carrying on the business. We spoke to the probate registry and there is no power for them to block applications for probate by her, nor is there any method of us being put on notice when she applies for a grant. The Law Society of course does not have power to intervene, even though the firm holds a large wills bank. It is interesting to compare this with the position had a solicitor been convicted in similar circumstances".

Costs - Excessive or unreasonable costs were one of the most commonly cited occurrences, as well as costs associated with the problems caused by an unregulated will writer - for example the costs of intervention, fixing up mistakes, and trying to recover the will or fees paid.

"The clients paid £62.50 for 36 months, a registration fee of £150 plus a further fee of £59 which amounts to over £2,500 for copy wills and a small amount of correspondence, without any tax planning advice, or a copy of the signed will."

"My clients were initially told a will would be £49.99 plus VAT. At the end of the home visit they were advised that the charge would be more like £1000. Their instructions were a simple all to each other and then to kids. When the clients pointed out the drafts were unacceptable, they were sent another bill for £300 before changes were made. They never received a completed will."

"Will writers informed the executors that all the shares in the estate had to be sold, however the share price had fallen greatly and if the family had known they could retain the shares instead of them being sold in a bad market they would have done that. The family therefore lost money by not retaining the shares until the market picked up."

Just 3% of respondents cited cost as their reason for not having a will

Law Society Survey Executive Summary, October 2010

Encouraging will making

There is an argument sometimes made that it is better for a poorly drafted will to be made than no will at all. There is concern that if will writing is regulated the cost of making a will, whether by a solicitor or a will writer, will increase and as a result deter consumers from making a will at all.

In the Law Society's experience this is not the case; our evidence suggests that consumers are not deterred from making a will by the potential cost, and that the real costs of using unregulated will writers and remedying problems with poorly drafted wills can leave consumers considerably more out of pocket than a regulated alternative.

The potential for regulation to increase the cost of making a will is therefore not a significant consideration for consumers.

The effect of cost on consumers

Consumers appear undeterred by the cost of drafting a will, with other factors playing a far more significant role in both their choice to draft a will, and their selection of service provider.

The two key reasons for not having a will given by respondents to our survey were they 'haven't got around it' and there was 'no need' (40% and 39% respectively). Just 3% of respondents cited cost as their main reason for not having a will, the least out of all the options, with this figure never rising above 10% across different age groups.

A similar result was received when respondents were asked which of the following qualities of a will writer they considered to be the most important - low cost services, maintenance of high professional standards or being a regulated provider - more than one-half (55%) of respondents thought that the most important quality of a will writer was the fact that they were regulated, a further 30% named maintenance of high professional standards. In contrast, low cost was only named as the most important quality by 11% of respondents, showing that ultimately most consumers prioritise protection above price.

Given the significant consequences if a will is not drafted correctly, it was not surprising that the vast majority (82%) of respondents agreed that they 'would pay more to have a will drafted by a regulated provider with a formal complaints procedure and compensation scheme'. Based on these results it is reasonable to assume that consumers would prefer to be charged a slightly higher price to ensure there are safeguards in place to prevent mistakes, and where mistakes occur to have remedies available.

The cost of not regulating

As detailed in the earlier section on poor practices, the consequences of a poorly drafted will can be significant - for example, an estate may be passed to the wrong person or the will may be declared void.

Consumers often turn to solicitors to provide them with assistance and rectify the problems left by will writers. However, in many cases there may not be a viable remedy if the will writer has disappeared or the expense of taking action against the will writer outweighs the costs that have already been expended. In most cases a new will is drafted, or action is taken in an attempt to rectify the problems found in the will, usually through the courts at additional expense.

Regulatory standards - protecting the consumer

When considering whether regulation is the most appropriate response to protect consumers the focus should not be whether a will drafted by a solicitor is better than one by a non-solicitor. We do not advocate that solicitors never make mistakes - the key point is not who can draft a better will, but what safeguards are in place to promote high standards and provide protection when something goes wrong. Where a non-regulated will writer makes a mistake there is no guarantee that there will be any accessible remedies available. Consumers who use a solicitor will never be left unprotected - this protection should apply universally to all consumers.

Arguments have been made that regulation may restrict competition. Many will writing organisations have openly supported the move to regulation and we believe that these organisations will continue to stay in the market even if will writing is regulated. At present solicitors are already working to meet high regulatory standards, and yet solicitors continue to have the largest portion of the market share in this area. This shows that having to meet high standards and compulsory requirements will not prevent organisations or individuals from competing in the market.

Given the considerable evidence of widespread problems within this unregulated market, as seen by the Law Society and acknowledged by Lord Hunt, it is difficult to argue against providing consumers with protection by imposing standards on will writers.

The right kind of regulation

The Law Society believes that regulation is the only true form of consumer protection in this area of law. However, the Law Society does not support any form of regulation for will writers that would create a two tier system of regulation with will writers having different core standards than those required of solicitors.

If regulation is to be effective, all providers of will writing must be subject to the same standards within the regulated area. The Law Society is not suggesting that all will writers should have the same legal qualification as solicitors; but will writers need to meet the competence and ethical standards necessary to undertake will writing work in the consumer and public interest.

In 2005 the government called for voluntary regulation for will writing - yet it was not until June 2010 that a code of practice drawn up by the Institute of Professional Will Writers (IPW) was approved by the Office of Fair Trading under its Consumer Codes Approval Scheme. This is first and only recognised voluntary code of conduct for will writers. It is believed that IPW has approximately 190 members, which is only a small portion of the number of will writers we understand to be practising in this area.

While the Law Society welcomes the attempt to safeguard the public and improve standards, the lack of enforceability and serious sanctions within this code of conduct is concerning. If a will writer practises outside the voluntary code of conduct they may be expelled from the organisation they are a member of, however there is nothing to stop that will writer from continuing to practise outside this organisation.

As found in our recent survey results a clear majority of individuals believe that will writing is already subject to regulation. Most individuals do not understand the regulatory difference between a solicitor and a will writing, and it is unlikely that a clear distinction could be drawn between a will writer subscribed to voluntary regulation and a will writer not subject to any requirements.

Vulnerable people

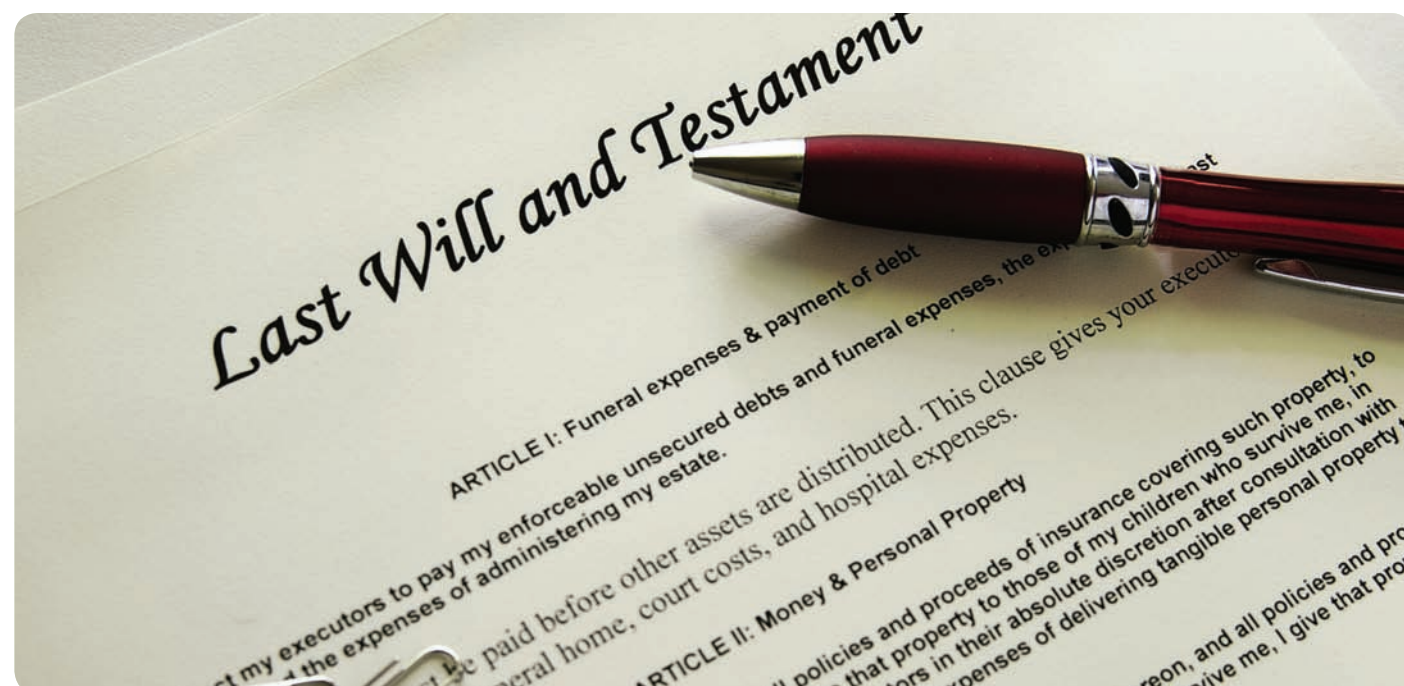
Will writers who choose not to undertake professional training or to protect themselves and their clients by obtaining adequate insurance place the general public at risk and in particular the elderly and vulnerable. The argument that consumers should be free to make choices about the level of regulation and protection that they wish to engage, with the proviso that they are sufficiently well informed to do so, sidesteps the issue of vulnerable members of society, such as those who are recently bereaved or experiencing difficult emotional circumstances, who may not be in a position to make an informed choice.

The final costs

A large proportion of the examples we received from the profession related to disparity between the price of drafting a will as advertised by unregulated will writers, and the final costs associated with the making of the will in question.

Often, the cheap price advertised covers only the most basic of wills, with additional clauses, executorships and related legal documents increasing the cost sharply. Charging clients for storage of wills on an ongoing basis is also particularly common (which the vast majority of solicitors do free of charge), leaving the final cost of making a will with an unregulated will writer potentially far higher than the alternatives.

The final cost of making a will with an unregulated will writer is potentially far higher than the alternatives



Voluntary regulation

While voluntary regulation schemes may be appropriate in other areas, the Law Society is firmly of the belief that it is not worth the risk in hoping that a will writer will abide by any voluntary requirements they sign up to. The fact that most problems are detected after the individual has passed away is a strong argument for establishing a robust regulatory framework. Anything short of regulation is not providing the most appropriate safeguards for the consumer.

Solicitors - a model for consumer protection

Solicitors operate within a thorough and tough regulatory system that includes a number of protective elements. Together, these help identify problems in the provision of legal services, prevent them from recurring, and act as a vital safety net for consumers when something goes wrong.

While solicitors have long been subject to these forms of regulation, they are now the standards set by the Legal Services Board, under the Legal Services Act 2007. Making will writing a reserved activity would be the first step in bringing these protections to everyone making a will.

An enforceable code of conduct

The Solicitors' Code of Conduct, as enforced by the Solicitors Regulation Authority (SRA), ensures a quality service is provided and that solicitors must behave in the client's best interest at all times. This means a solicitor found guilty of wrongdoing can be prevented from practising again and that the client who suffers can be compensated. The Code also ensures if a firm becomes insolvent then the wills of their clients are appropriately transferred to another practitioner or firm, and their secure storage maintained.

Training

Solicitors must complete compulsory training in wills and probate as part of qualifying to become a lawyer. The wider legal training and expertise of solicitors brings this additional benefit to a client, which is further bolstered by compulsory professional development training for all solicitors. In addition, a well trained solicitor can make clients aware of the myriad of interconnected issues raised by their will, such as tax, trusts and tenancies. This can be an invaluable additional benefit for a client, who may not raise these other related issues.

The Legal Ombudsman

If a client is unable to resolve a complaint about the level of service they have received with the solicitor in question, they may refer their complaint free of charge to the Legal Ombudsman, who holds formal powers to resolve it. The Ombudsman is independent from both the legal profession and the Law Society.

Compensation fund

Where a client suffers loss and hardship due to a solicitor's dishonesty or failure to pay the client money that they have received, they are able to apply to the SRA for compensation. This compensation can reach up to £2 million, and can cover a diverse range of losses, including conveyancing costs such as taxes and mortgages, estate or trust funds and more general issues involving loss of client money or non-payment of professional fees.

Professional indemnity insurance

Solicitors must obtain professional indemnity insurance under compulsory Indemnity Insurance Rules. This provides the solicitor with cover for claims brought against them due to professional negligence in administering their practice.

Regulatory framework - the minimum standards

Until will writing becomes a regulated activity, the same standards cannot be guaranteed by all will writers, to the detriment of consumers. The Law Society calls for will writing to be made a reserved activity, and for any regulatory scheme to impose as a minimum the following criteria:

- Training requirements;
- Compulsory professional indemnity insurance cover;
- A compulsory compensation fund;
- A code of conduct;
- A complaints management system; and
- A disciplinary mechanism.

Regulatory framework - good practice

Further to these requirements, will writing bodies should also prove that they have the following in place, as solicitors do, before they are approved as a regulatory body:

- An equality and diversity code;
- An advertising code to ensure clear and accurate advertising that is not misleading;
- A regulatory system on costs to ensure that costs are transparent;
- Financial rules to ensure adequate protection is in place for client money;
- Monitoring of training providers to standards;
- A system to transfer work should a will writer no longer be able to continue their business.

Contacts

If you are interested in supporting the Law Society's campaign for regulation and want to find out more, please visit the Law Society website:

www.lawsociety.org.uk/willwriters

If you have any queries or comments please write to WillWriters@lawsociety.org.uk, or contact Catherine Reed, Press Office on **020 7320 5764**.

To get this document in alternative formats please e-mail accessibility@lawsociety.org.uk or phone **020 7320 5893**.



The Law Society

113 Chancery Lane
London
WC2A 1PL