

**Devon & Somerset Law Society**

NON-CONTENTIOUS BUSINESS SUB-COMMITTEE

**CALL FOR EVIDENCE: INVESTIGATION INTO WILL-WRITING, ESTATE ADMINISTRATION AND PROBATE ACTIVITIES - Submission to the Legal Services Board by the Non-Contentious Business Sub-Committee**

The Legal Services Board (the LSB) has asked for evidence/feedback in relation to the Legal Services Consumer Panel's report of 20 July 2011. The evidence/feedback is to help the Legal Services Board to "determine whether we [the LSB] should make a recommendation to the Lord Chancellor that will-writing be reserved and if so what regulatory protections should be put in place."

The list of the reserved activities (i.e. activities for which a client/consumer is charged a fee) is contained in Schedule 2 Legal Services Act 2007. One such reserved activity, the "Reserved Instrument Activity", relates to the preparation of certain documents. Where such a document is prepared for a fee, the work can only be carried out by a person who is authorised and therefore regulated by one of the approved regulators, the Law Society being one such regulator. To do so otherwise, is a criminal offence, according to the Act.

Will writing for a fee is not a Reserved Instrument Activity at present, even though a Will is an important and often complex legal document to prepare. The Law Society has been campaigning for Will writing to be included within the list of Reserved Activities.

In addition, the LSB has widened their investigations to include estate administration and probate activities as the Panel report highlighted the close association between will-writing and estate administration and examples of consumer detriment. Evidence/feedback in relation to those related areas is also requested by the LSB.

The membership of the Non-Contentious Business Sub-Committee of the Devon and Somerset Law Society ("**the sub-committee**") includes several solicitors specialising in preparing Wills, and administering deceased's estates. The sub-committee thus has an insight into the problems within the industry and is well placed to comment.

**Will-writing**

*Background comments*

Many individuals understand that it is better to make a Will than rely on the rules of intestacy. In many cases, failing to make a valid Will leads to difficulties for their loved ones, after death. Charities derive much of their revenue from legacies under Wills. Charities would not benefit from the estate of a person who dies intestate.

However, contemplating death is a sensitive subject. It is estimated that about half of the adult population have not made a Will. Many are put off by the anticipated cost of a professionally drawn Will, and the belief that it is too complex. Many others simply do not get around to

it, as it may mean taking time off work to visit a Will-writer, and it is not seen as a priority.

For those that do get around to making a Will, preparing a document to cover funeral plans, appointing a guardian for minor children, and preserving capital for loved ones is an extremely personal matter. Because the consumer is contemplating his own death: such a discussion is bound to involve varying degrees of emotion dependent on the consumer. A consumer is more susceptible to being persuaded to agree to unnecessary complexity and/or additional services, and thus increased cost, where matters such as inheritance tax saving, care fees planning (to preserve hard earned assets, such as the home) and related lifetime planning (e.g. powers of attorney and advance decisions - "living wills") are discussed.

Meeting an individual, to discuss such personal and often highly complex legal issues, creates a business relationship of a particular kind. It differs from most other business relationships (for example, buying a car, home improvements, or taking out a mortgage/bank loan) because of the sensitivities involved. Increasingly, such meetings take place in the consumer's own home.

The sub-committee's view is that such a business relationship or transaction should be more closely regulated. The Legal Services Consumer Panel's report illustrates the many issues that this special type of transaction raises, and examples of extensive consumer detriment that can follow.

#### Legal Services Board's questions

*Do you agree with the Panel's assessment of the problems in the Will-writing market and resulting consumer detriment? Are you aware of any key problems and detriments that have not been identified or evidence that any problems and detriments identified are not as significant suggested or are worse?*

Many of the sub-committee members have encountered or have knowledge of the problems that the Panel's report has identified. Sub-committee members agree with the Panel's assessment of the problems and resulting consumer detriment, but highlighted the following issues:

#### Bait tactics

The sub-committee takes the view that the use of advertising low fees to obtain an appointment in a consumer's home, and subsequently "selling" an unnecessarily more complex Will and additional services at a premium is widespread and detrimental to the consumer. Whilst advertising a low price for a basic Will can be a genuine marketing tool, where such advertising is used in a way to "oversell" services, a consumer ends up paying much higher fees than anticipated, and/or buys services that are not required or which are unnecessarily complicated, and thus pays too much. Additional services include storage of legal documents, and storage fees can easily amount to more than the consumer has saved by the initial "low fee" incentive offered.

The sub-committee's view is that regulation is required to ensure the advice given is of good quality, and the services recommended and the

fees charged are proportionate to the consumer's circumstances and needs.

#### "Selling" Executorships Services

Will-writers who require their customers to appoint specific executors (e.g. a probate company or trust corporation) as part of their contract is a widespread activity that is likely to secure the future estate administration work. Many Will-writers do not offer an explanation of consumer choice in this area. Regulation should include a requirement that clear information is supplied, as to the choice to appoint their family/friends or a professional as executors, as well as giving clarity on the professional fees involved.

#### Advanced payment for probate services

The sub-committee notes that some companies offer estate administration services for fees upfront, at the same time as Wills are being prepared. The risk is that the company receiving the payment is no longer in existence when the testator dies, or for some reason cannot carry out the probate work. The sub-committee suggests a company cannot possibly fix a cost of administering an estate prior to the death of a testator due to the uncertainty of its value and complexity. Unless the probate firm has sufficient indemnity insurance, or maintains client payments on account in a client account or the payment is bonded (the equivalent to paying funeral expenses in advance), such practices should not be allowed.

#### Failure to keep records of instructions

The report highlights that in many cases, Will-writers do not keep proper records of the instructions. If a Will requires rectification, or there is a potentially valid claim on the estate, such documents are key to putting right the problems, or confirming the customer's intention. The Solicitors Regulation Authority sets out guidance on storage periods; the professional indemnity insurers require certain standards of record keeping in connection with cover provided.

#### Failure to store original Will

There are instances where firms will charge for the storage of Wills, or will agree to store Wills, but these are subsequently lost, destroyed, or the firm itself simply goes out of business.

#### Payment of referral fees, which are not being disclosed, or which are not transparent

Unregulated Will-writers are not required to disclose referral fees. Referral fees may distort competition, and may be detrimental to the consumer. Thus there should be clear and transparent disclosure.

#### Care-home fees planning

The costs of care, and the need to sell a house to pay for nursing home fees is regularly in the media. The public are acutely aware of the risk to their assets from the need to pay for care, and the risk to their plans to pass on wealth to the next generation.

Many firms, who may make initial contact via "Will-writing" services, offer plans to avoid the need to sell the home, or at least preserve capital from the local authority's means test. Whilst the Law Society has produced a guide to solicitors as to what information should be given to a client who wishes to enter into such arrangements including the pros and cons of various methods, firms selling such schemes very often fail to set out the disadvantages of their schemes (e.g. reducing the consumer's choice of care in the future).

The "care home fees" planning advice is separate from pure "Will-writing". The sub-committee suggests that such advice also needs regulation, and that it should be included with the reserved legal activity definition (see Use of trusts below).

#### Minor children and guardians - incorrect legal advice

Some unscrupulous firms advise parents with minor children that if they have not made a will appointing guardians, then their children will go into care automatically if the surviving parent dies. This is a way of "scaring" young parents into making a Will, but on the basis of misinformation. The sub-committee are aware of examples of such canvassing taking place on the street.

#### Use of trusts

Many Will-writing firms offer additional services. These include schemes to mitigate having to pay for care, and in some cases, to save tax. Mitigating the payment of care fees and paying tax are often dealt with in the preparation of Wills, by incorporating trusts. A Will is currently specifically excluded from the list of Reserved Activities, whereas preparing deeds of trust for a fee falls within the list of Reserved Activities.

The sub-committee's view is that as the law already recognises the need to regulate the preparation of Deeds of Trust for fee, gain or reward, the law should also include the preparation of Wills that include such trusts within the list of Reserved Activities. And given the practical difficulty there would be in monitoring whether a Will did or did not include such a trust, this supports the need to regulate the entire Will-writing industry.

*4.3 Do you agree with the Panel's assessment that Will-writing should be a reserved legal activity? Do you agree with the Panel's assessment that alternatives to statutory regulation - such as consumer information, enforcement of existing legislation and voluntary self-regulation schemes are unlikely to protect against the identified problems and detriments? Do you think that assessed accreditation schemes and quality marks specific to this field would benefit consumers either as a supplement or alternative to statutory regulation?*

The sub-committee agrees that Will-writing should be a Reserved Legal Activity for the reasons already stated.

The sub-committee does not believe that the alternatives to statutory regulation will do much to tackle the problems the Panel has

identified, and those which the sub-committee members are aware of. The law surrounding Wills is a complex area. It is difficult for consumers to be able to assess whether the advice being given is good or not. Existing legislation does not offer satisfactory protection for writing Wills, not least because problems are often discovered much later, and when the consumer is dead. The sub-committee does not believe that voluntary self-regulation schemes are sufficient.

Increasingly, Will writers offer home appointments out of office hours, which consumers often find more convenient.

Consumer regulations do offer consumers a right to a seven day cooling off period, where contracts are entered into other than at a firm's place of business. However, where the consumer does not have any information as to the appropriateness of the advice, such regulation is generally not going to prevent the consumer detriments that have been identified. The consumer can also waive the cooling off period. Consumers will often do so if put under pressure of sales tactics or where they wish the matter to be dealt with quickly.

The sub-committee does not believe that assessed accreditation schemes and quality marks are sufficient protection in place of statutory regulation. The Panel report identifies issues and consumer detriment throughout the industry, in which we already have a mixture of statutory regulations (e.g. the Law Society/SRA); and other accreditation schemes (e.g. Institute of Professional Will Writers) and quality marks. The evidence suggests that despite the framework already in place, the consumer is still at risk of poor advice.

*What do good providers of Will-writing services currently do to protect against problems and ensure that consumers receive a quality service?*

Good providers of Will-writing services offer the consumer:

- A meeting with the person drafting the Will, and not a non-qualified individual;
- clear advice on charges;
- clear advice on a complaints procedure;
- recourse to a regulator in the event of an unresolved complaint;
- paying for the service at conclusion and not upfront;
- sufficient indemnity insurance if loss is suffered.

*If Will-writing was to be a reserved activity what specific activities should be included within the scope of the reservation? The Panel has suggested that the scope of regulation should include the commission, sale and preparation of Will-writing and related services for fee, gain or reward.*

The sub-committee agrees with the Panel that regulation should include "the commission, sale and preparation of will-writing and related services for fee, gain or reward". However, the sub-committee recommends that the words "and related services" are more clearly defined. The sub-committee notes that the Panel report highlights problems in the areas of

- Powers of Attorney;

- Care home fees planning;
- Preparation of Advanced Decisions ("Living Wills")

and recommends that these activities might be included in the list of "and related services".

The sub-committee also recommends that the rules on drafting deeds of trust be clarified. Where a Will includes an ongoing trust, these should be regulated. The sub-committee recommends that all trusts should come within the definition of Reserved Instrument Activities.

*What specific protections are needed for each problem and detriment that has been identified? Do you agree with the "core elements" (as set out above) that the Panel believe are needed? Do you think that any of the "core elements" are not required on a mandatory basis or that there are other protections that are also required?*

The sub-committee agrees that regulation should encompass all the core elements as set out on page 2 of the Call for Evidence document.

The sub-committee also noted the lack of a statutory National Wills Register in the United Kingdom. Other countries have a National Wills Register. Although voluntary registration schemes exist in the UK, such schemes are only useful, if used. The sub-committee are aware of cases where the existence of such a statutory registration scheme may have prevented, for example, the wrong Will being admitted to probate, and the loss of any record of a valid Will. In the absence of a National Wills Register, rules covering the storage of Wills must be introduced and for the regulator to have the power to monitor the storage facilities.

*What impacts do you think regulation might have on consumer protection, competition, and access to services, the cost of services and the administration of justice?*

Consumer protection should be significantly enhanced;  
Competition should be unaffected given that there are plenty of providers of legal services across the country. The recent introduction of Alternative Business Structures is likely to enhance competition;  
The cost of services is likely to remain stable;  
The administration of justice is likely to improve.

## **Probate and Estate Administration**

### *Background comments*

From a financial perspective, an individual's significant lifetime events include obtaining a mortgage, obtaining business finance, getting married/divorced, and investing in stock market related policies. All such activities are regulated by statute.

It is striking that personal representatives (mainly executors appointed under a Will) who deal with a person's entire wealth after

death are not better regulated. The risks of things going wrong and the potential for fraud or negligence is arguably higher in the case of estate administration activities, than any other financial event. Further, the individual who has entrusted the work to his executor is not around to check on what is being done.

*What are the key outcomes for consumers that we should aim to achieve?*

- Prevention of theft of the deceased's assets;
- To ensure that the administration is carried out competently, paying the correct tax due, charging a reasonable fee for the work carried out, dealing with matters to minimise the potential for loss to the estate, and thus to the beneficiaries;
- Ensuring that estate administration is carried out within a reasonable timeframe;
- Reducing incentives to delay distribution of assets (e.g. by requiring payment of interest on client funds).

*What are the existing problems experienced by consumers of probate and estate administration services (testators, executors and beneficiaries)? What are the causes? What are the consequences? What evidence is there of consumer harm?*

- Testators - being persuaded to appoint Executors on the basis of misinformation when drafting their Will;
- Testators - being "sold" additional services such as care home fees planning, and powers of attorney at the same time as making their Will for which they are misadvised and/or overcharged;
- Testators - having appointed attorneys without understanding the implications of the powers given, and who suffers loss as a result of fraud or negligence;
- Executors - appointing unscrupulous probate providers who fail to deal with the estate administration competently, or in the worst case case loss to the estate through fraud, negligence or going out of business;
- Beneficiaries - where executors do not handle an estate administration properly, causing loss to the estate, or delay in distribution of the assets. At worst the probate company goes out of business, and the estate assets have not been kept separately, or the probate company misappropriates funds from the estate, which are hard to trace.

Professional indemnity insurers deal with many cases of loss, including those listed above. There are regular news stories involving estate frauds, and unless such firms are supported by an indemnity fund, the beneficiaries may have little chance of being compensated for their loss.

*To what extent are avoidable problems with the process of probate and dealing with a person's estate after death a consequence of a poorly drafted will or there not being a Will? To what extent are problems a direct result of actions taken while administering the estate?*

Problems arise from both sources.

A Will that does not reflect the testator's wishes, will lead to a loss to the intended beneficiary. A Will that correctly reflects the testator's wishes, but is drafted poorly might mean that the estate is delayed, incurring additional costs, penalties or other losses. A loss of a valid Will is likely to deprive the intended beneficiary of their inheritance.

Losses arising from estate administration issues could be far greater. Some sources of those losses are set out above, including theft of estate assets, bankruptcy of the probate company or delay.

*How and at what stage of the process problems are normally discovered? How and how easily can problems be put right and detriments reversed?*

Problems with the Will drafting (or loss of Will) are rarely discovered until after death. Problems are not easily put right, and in some cases might never be put right. Even where a will can be rectified to correct a testator's wishes, or where court proceedings can compensate the beneficiary, there is likely to be a significant cost to the estate, and thus to the intended beneficiaries. The main issue being one of evidence, as the testator has passed away.

Problems with estate administration may never be discovered, especially where the probate provider misappropriates funds from an estate, where there may be beneficiaries who are not aware of their entitlement. Otherwise problems tend not to manifest themselves until at least six months after the date of death.

*What do good providers of probate and administration services currently do to protect against problems and ensure that consumers receive a quality service?*

Good providers:

- Hold sufficient indemnity insurance;
- Clear route for consumer complaints;
- Hold estate money in a separate client account;
- Pay interest on client accounts;
- Comply with tax legislation;
- Keep interested parties fully informed.

*Are self-regulation and general consumer and criminal law capable of addressing consumer harm? Do you think that assessed accreditation schemes and quality marks specific to this field would benefit consumers either as a supplement or alternative to statutory regulation?*



The sub-committee's view is that the current framework does not provide adequate protection for the consumer, whether testator, executor or beneficiary. Accreditation schemes and quality marks may assist in improving standards to some extent, but it appears to the sub-committee that such schemes contribute more to keeping professional insurance risk down, and therefore indemnity premiums, rather than protection for the consumer.

The sub-committee believes that statutory regulation in this area is required.

*If providers of probate and estate administration services were regulated, what form of regulation should this take, and what are the core elements that should be included within the regulatory system? What specific harm would each core element protect against?*

The sub-committee believes that regulatory framework should mirror the type of regulation applied to the solicitor's profession. The solicitors regulation authority and indemnity fund are available to the client who has suffered loss as a result of the consumer detriments identified above.

*What impacts do you think regulation might have on consumer protection, competition, and access to services, the cost of services and the administration of justice?*

Consumer protection should be significantly enhanced;  
There are plenty of probate providers across the country, and competition should not be adversely affected;  
The cost of services is likely to remain stable. The relative cost of administration services illustrated in the Panel's report support the view that average fees charged by solicitors and non solicitor probate providers do not differ significantly;  
The administration of justice is likely to improve.

*How effective is the regulation of the existing reserved activity of preparing papers on which to found or oppose a grant of probate or letters of administration? How does this regulation work in practice, what benefits does it bring for consumers and how does it impact on the way that providers organise themselves to deliver services?*

The sub-committee has not commented on this final question.

On behalf of the Non-Contentious Business Sub-Committee  
Devon and Somerset Law Society  
4 November 2011