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Roger Kerridge's Response to the Legal Services Board's Call for Evidence: Investigation into Will-Writing, Estate Administration and Probate Activities

I am a (non-practising) solicitor, and a legal academic, whose main teaching and research interests are in the Law of Succession. I am (inter alia) the editor of *Parry and Kerridge on the Law of Succession*, I have written the last three editions.

My main interest in relation to this topic concerns Will Writing (as opposed to Estate Administration and Probate Activities).

It seems to me that the rules which apply to will writing in England and Wales at the present time are in urgent need of reform. I agree with the suggestion that will writing should be made a reserved legal activity, but I think that we need to go (much) further than that. I would not permit solicitors who have no specialist knowledge of the Law of Succession to draft wills.

It seems to me that the legal profession as a whole (this includes both solicitors and barristers) has, in the past, behaved very badly indeed in relation to the preparation and execution of wills. Until the case of *Wintle v Nye* ([1959] 1 WLR 284) solicitors regularly drafted wills in their own favour. The public outcry over that case caused the Law Society to change the rules and to pretend that the (new) rules had always been in force. This was not true (and this is easy to prove). At the end of case Nye (the solicitor) was struck off. But this was nonsense! He should have been struck off at the beginning! Why on earth wait until after Colonel Wintle had fought and won. There were no facts which were known at the end of the case which were not known at the beginning. I have discussed the details of this case in an article in the Cambridge Law Journal (59 CLJ (2000) 310), and in a chapter in a book,

(Chapter 7 from *Modern Studies in Property Law* Vol 5 (2009)) and I can send you either or both of these if you want.

But, even now there is a huge problem which is hardly addressed in the Investigation, which is that many solicitors, and other professional will writers, regularly permit beneficiaries to take part in the will-making process. Take two recent cases (and I can provide you with the names of many more cases, if you want them). There was *Re Loxston* ([2006] WTLR 1567) and then there was *Key v Key* ([2010] EWHC 408 (Ch)). *Loxston* was a case where the will was prepared by a retired solicitor, who was acting as a professional will draftsman, and *Key* was a case where the will was prepared by a solicitor. In my view, it should have been evident to the draftsmen in each of these two cases that the testatrix/testator was incapable of making a will, *and* that she/he was subject to improper pressure from a potential beneficiary. Neither draftsman should have touched either will, but they did, they went ahead, and, in each case, the "will" was set aside (at, of course, enormous expense).

To prevent this kind of thing, we need to have rules which *penalise* those professionals (whether they are, or are not, solicitors) who in any way permit beneficiaries to take part in the will-making process. The present lax rules are (I believe) a left-over from the days when solicitors were allowed to make wills in their own favour; and so the Law Society now appears to be embarrassed about introducing rules which are too draconian. We need new rules.

I believe that there is much to be said for a rule that *all wills*, not simply wills which have been prepared for profit, should be prepared by properly trained professionals.

Those who prepare wills do not need to be solicitors but *they need training in the Law of Succession, the Law of Trusts, Tax Law and Land Law.* And it follows from this that not all solicitors should be regarded as qualified to prepare wills. The idea that any qualified solicitor, including someone who normally practises in Criminal Law or whatever, is fit to draft wills, is nonsense.

That leads on to two further questions. The call for evidence suggests that we need to be careful

about what draftsmen charge for preparing wills. I am not sure that I agree. And, at this point, we need to consider the relationship between the preparation of wills, their storage, and the obtaining of probate.

Many, if not most, solicitors who prepare wills, do so as a loss-leading service. They then retain the wills and recoup their losses when they obtain probate. I do not think that this, in the long run, is good practice. People who do jobs as loss leaders tend, on the whole, to do them badly. Again and again, when one reads the reports of contested probate cases (and I write the All England Annual Review on Succession, so I tend to trawl through almost all the reported Succession cases every year), one sees references to the low rates being charged by professional will draftsmen. *Loxston* (above) is a classic example. There is, of course, a link here. The courts have tended to feel sympathy for those who draft wills cheaply, and may well have been inclined to treat them generously when it has been suggested that they have been negligent. I don't think that this is going to last. If people take on the job of preparing wills, they should charge the proper price, and do the job properly. Charging low rates and doing a shoddy job is not the way ahead.

A particular problem here relates again to the question of vulnerable testators and beneficiary involvement, but there are other aspects too. Clearly, someone who prepares a will for a low fee is less likely to waste time (as he or she sees it) attempting to ensure that the testator (or testatrix) is not subjected to undue influence etc. etc. than he or she would be if he or she were paid a proper rate for the job.

So this then leads on to the question of storage of wills. If you want to separate the preparation of wills from probate (which I think you should) then the practice of storing wills by those who have prepared them should stop. And, again, there is much to be said for having some kind of central register of wills. Even home-made wills (if one permits them to be made) could easily be registered, and/or stored, centrally.

It may be going over the top to suggest that *all* wills must be prepared by those who are professionally

qualified, but *if* people chose to draft their own wills, there should be clear rules in place to protect them too against beneficiary interference. This can be arranged via presumptions which would apply at the time when such wills are challenged (after death). See the article in the CLJ referred to above.

Anyway, what I am saying is that I am in favour of restricting to properly qualified persons the right to charge for the drafting of wills. I believe that not all solicitors should be permitted to draft wills. I believe that those who do charge for the drafting of wills should charge properly for the service and should not be linked with those who obtain probate (cross-subsidies are a bad thing, they lead to inefficiencies, or worse). I believe that there should be some kind of central register of all wills (whether professionally prepared or not), preferably there should be some form of central storage too. It would have a number of advantages, including safeguarding against forgery. At the moment, the whole situation is shambolic and it is (historically), the fault of the legal profession. They (members of the profession) have mucked about for far too long, and are now going to find it difficult to put their house in order. That is not an excuse for not trying.

Roger Kerridge