The Regulation of Will-Writing, Probate

and Trust Administration

Consultation submission by Martyn Frost

[1] I do not currently prepare wills. However, I have done so in the past. I have been involved with wills, probate and the administration of estates and trusts for over 40 years. My current interests in this area are that

- I teach the subject for the STEP Advanced Certificate in Will Preparation
- I lecture quite widely on wills, estates and trust issues
- I am an editor of the Wills and Trusts Law Reports
- I am one of the authors of the standard text book on negligence and wills[1]

I make this submission in my personal capacity and not in any way on behalf of STEP, WTLR or my co-authors.

[2] I welcome the recommendation that regulation be extended to the three areas proposed.

[3] I am however, reluctant to endorse the apparently light-touch regulatory structure proposed. The current market is diverse with some very good standards exhibited alongside deplorable standards. There has, until recently, been little in the way of professional qualifications to prepare wills. Across the spectrum of will draftsmen,

- knowledge is very variable

[1] Risk and Negligence in Wills, Estates and Trusts: Frost, Reed QC and Baxter (OUP 2009)

- service to clients is also very variable, as is knowledge of what should be delivered
- current professional regulation of individuals ranges from non-existent to regulated
- financial models of will preparers are diverse

This is not a market that is going to collectively move to towards common standards easily. It is also a market where the level of qualification ranges from next to nothing to the most impressive.

[4] Your consultation document seems to encapsulate its core aim in the comment

"*.....as consumers receive higher quality services at more competitive prices their confidence will increase, resulting in greater numbers of purchases and growth of the market*"[2].

Whilst no doubt this is a laudable aim, there is a substantial issue with "*higher quality services*" and "*more competitive prices*" being linked in this way – and that is the standards of work currently required by the Court.

[5] It is now 17 years since the duty of care in will preparation was established by the House of Lords[3]. I am sure that this decision has resulted raised standards for the conscientious practitioner. However, I would find it hard to accept that there has been any universal improvement since this decision. Indeed there is plenty of evidence that in some will preparers are wholly ignorant of the importance of the duty of care and its risk to them.

Unacceptable standards in will preparation continue to feature in the law reports. These are insufficient in number to draw any statistically safe conclusion, but at the very least they show worrying pockets of underperformance. It is however likely that the matters that

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[2] Para 6 – 1st sentence

[3] *White v Jones* [1995] 2 AC 207

make in through to court are merely the tip of the iceberg. Certainly the reaction from those attending my talks and seminars on wills leads me to suspect much wider problems.

Current areas that cause me concern when dealing with audience questions are

- A widespread failure to understand the relevance of the testator's domicile to his will
- Where the significance of domicile is understood, there is often a lack of knowledge as to the determining factors
- Widespread ignorance of the purpose and effect of administrative provisions in a will that is covered up by simply using the STEP Standard Provisions without any meaningful explanation to the client
- Poor understanding of testamentary capacity and the role the draftsman has to play in this issue
- Lack of appreciation of role of attendance notes and how they should be used to record events properly[4]
- Lack of understanding of the significance of time in the will preparation process[5]
- Limited knowledge of the practical application of the *I(PFD)A 1975* and the part that the draftsman has to play in advising the testator
- Ignorance of the significance of *Carr-Glynn*[6] and the duty that the draftsman has with regard to joint property

These are all issues that arise consistently.

In addition to these particular areas, there is undoubtedly a marked disparity of knowledge across the whole range of those currently drafting wills. While at an individual level this is

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4 Highlighted by the Court in *Key v Key* [2010] WTLR 623; *Martin v Triggs Turner Barton* [2008] WTLR 509; *Sprackling v Sprackling* [2009] WTLR 897; *Burgess v Hawes* [2012] WTLR 423

5 This is really surprising given that this was the issue in *White v Jones*. See Neuberger J (as he was then) in *X v Woolcombe Yonge* [2001] WTLR 301 on the importance of assessment of what is a reasonable time in each individual case

6 [1998] 4 All ER 225

not surprising – there will always be some who are more expert than others. However, the disparity is too great for too many people. This is possibly the most worrying aspect of all in the area of will preparation as it must lead to too much variation in the quality of advice.

[6] The standards in will preparation have been strongly criticised recently by the Singapore Court of Appeal. Their view is one that I am sure would be endorsed by the English Court:-

"*Some final observations*

72 A will is one of the most important legal documents which an individual can execute. Often, it embraces assets which an individual may have taken a lifetime of effort to amass. It may also deal with properties that are not only of immense monetary value, but also (and, perhaps more importantly) incalculable sentimental or emotional attachment for both the testator and the family members or beneficiaries concerned. Almost invariably, a decision by a testator not to distribute his assets equitably among all the family members whom one would expect to be provided for under a will excites dissatisfaction, and is not infrequently a prelude to bitter legal squabbles. The present appeal is, of course, a paradigm example. In our view, there ought to be no room for even the slightest doubt (or the slightest possibility of a mistake) on the part of a solicitor in both understanding the testator's intention and expressing that intention in the will to be drawn up.

73 The preparation of a will involves serious professional responsibilities, which solicitors must uncompromisingly observe and discharge. Regrettably, it seems to us that all too often nowadays, solicitors appear to consider the preparation of a will to be no more than a routine exercise in form filling. This is wrong. Before preparing a will, the solicitor concerned ought to have a thorough discussion with the testator on all the possible legal issues and potential complications that might arise in the implementation of the terms of the will. The solicitor ought to painstakingly and accurately document his discussions with and his instructions from the testator. He should also confirm with the testator, prior to the execution of the will, that the

contents of the will as drafted accurately express that latter's intention. A translation, if required, must be thoroughly and competently done. Half measures or the cutting of corners in the discharge of these serious professional responsibilities will not do.

74 In our view, the solicitor concerned should also conscientiously seek to avoid any situation where a potential conflict of interest may appear to exist. If the solicitor might be perceived as anything less than a completely independent adviser to the testator, he ought not, as a matter of good practice, to be involved in the explanation, the interpretation and the execution of the will. in particular, exceptional restraint and care are called for if the solicitor concerned has a pre-existing relationship and/or past dealings with the sole beneficiary under a will, and all the more so if the will has been prepared urgently and executed in unusual circumstances with the sole beneficiary's active involvement. When such a case occurs, the solicitor must be prepared to have his conduct microscopically scrutinised and, perhaps, even his motives called into question"[7]

This extract is, in my view, an accurate and well expressed view of the responsibility of the will draftsman. Certainly paragraph 73 hits home with the onerous nature of this responsibility and the manner in which it should be discharged. When these views are taken together with some of the recent views of English judges on what is required to take a client's will instructions there is a clearer picture of the

- level of responsibility,
- manner in which it ought to be discharged and
- risks of not discharging it properly.

[7] The opportunity for regulation of will preparation should recognise the standards now required by courts. It should also recognise the increasing complexity of modern

[7] VK Rajah JA in *Low Ah Cheow v Ng Hock Guan* in the Singapore Court of Appeal in July 2008 - (2009] 3 SLR(R)) The extract is obiter comment at the end of a unanimous judgment in a will construction matter. Earlier in the judgment Rajah JA had also observed "*we draw adverse inference against* [the solicitor] *for failing to keep proper attendance notes recording full and accurately the Testator's instructions as to how the will was to be drawn up*"

wills[8]. Both these points produce a strong counter argument to the form-filling approach to will preparation.

The solution must be for consistency of educational standards across all regulators. This is not an argument to reserve the preparation of wills to the legal profession, but it is an argument that regulation must be used to drive up the standards of knowledge in order to drive up the standards of work.

Raising standards of will preparation requires

- raising the overall level of knowledge and qualification to undertake the work
- raising the thoroughness of the process to meet the court's standards

Neither of these, quite proper aims, is realistically obtainable in a market where a significant part of the current work is done below cost or at a cost that cannot support adequately qualified staff.

As I wrote at the outset, I am very much in favour of regulation, but it has to start by setting minimum standards that match the duty of care as currently set by the Court. Allowing any regulator set standards below that would bring the regulatory process into disrepute with both client and draftsman – and, worse, it would be a wasted opportunity.

[8] it is also quite striking that in the consultation is the comment[9] that "*It is unlikely that we will approve arrangements that specify that specialist qualifications will be required to administer most estates or complete probate applications, given that these are activities that thousands of lay people successfully complete on their own every year"*

There is no evidence of successful administration of estates by thousands of lay people every year. They may have reached what they think is the end of the process, but that is no proof of matters being dealt with properly.

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8 Mobility of population, increased wealth, diversity of family units, international assets, taxation.....

9 Para 69 page 58

Further, to use your assumption that the manner in which lay people conclude administrations justifies no qualifications for administering estates carries a direct implication that that standard is sufficient for a remunerated estate administrator. That is directly contrary to

- my personal experience over the past 44 years
- the rationale behind the creation of the Society of Trust and Estate Practitioners

It also carries an implication that all estates are of such a nature that a member of the public could deal with them. Such an assumption is unwarranted. A failure to recognise that specialist skills are required for all but the simplest of estates will result in ineffective regulation of this area.

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