

The risks of DIY Will kits

Author: Kerry-Ann Smith
Email: kerryann@smithfamilylaw.com.au
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Smith Family Law can assist you to obtain a Grant of Probate in the event you may have been appointed executor of a DIY Will.

What is a DIY Will?

A DIY Will can refer to any Will that is not prepared in the formal way by a lawyer. These ‘homemade’ Wills can be handwritten or typed up by the Will maker or, can be made by the Will maker using a DIY Will kit purchased at a post office or through another organisation.

In Victoria, for a Will to be valid, including a homemade Will, it must be executed in accordance with the formal requirements under the *Wills Act* 1997.

Even if a DIY Will has been executed properly, it is still likely to be scrutinised by the court when the time comes for your executor to apply for a Grant of Probate. This is because it is more likely the homemade Will could be made by a Will maker under duress, without testamentary capacity or having not had proper knowledge of, or approved of, its contents.

Common claims involving DIY Wills

The following are examples of common claims and issues encountered with homemade Wills:

1. Assets not appropriately dealt with in the Will

Where a Will maker intends a specific asset to be distributed to a specific beneficiary, such as real property (eg, a house), a DIY Will may not deal with the property or gift effectively, with the result that it will not ultimately be distributed to the intended beneficiary.

2. Mistakes in the wording of the Will

Many Wills which are not prepared by experts are poorly drafted to a point that some or all of the Will is rendered invalid.

A Will needs to be carefully drafted so the language, wording and construction of the Will gives effect to the Will-maker's intentions. Contradictory or uncertain provisions or ill-conceived wording may mean that a Will-maker's estate is not distributed to their intended beneficiaries.

Where a Will or a specific gift in a Will is rendered invalid, the 'intestacy rules' may apply to the Will or gift. This means a specific formula in the *Administration and Probate Act* 1958 will determine how the assets are distributed. Importantly, the distribution of the estate under the 'intestacy rules' may not be the same as the Will-maker's wishes.

3. Witnesses signing with different pens

For a Will to be valid, the Will-maker must sign his or her Will in the presence of two adult witnesses.

Where different coloured pens are used by the Will-maker and witnesses in the signing of the Will, the court is likely to question whether the Will-maker and witnesses were all present at the same time when the Will was signed.

4. The DIY Will cannot be located

Wills prepared by lawyers can be held in their deed safe for safekeeping at no additional cost. Wills prepared and stored at home by the Will-maker, have a higher propensity to be difficult to locate.

If the Will cannot be found and can be last traced into the hands of the Will-maker, the court will presume that the Will-maker, unless it can be proved otherwise, destroyed the Will and did not intend the Will to apply.

5. Questions as to testamentary capacity to make the Will

When taking instructions from a client wanting to make a Will, a specialist Wills and Estate lawyer will ensure that the Will-maker has testamentary capacity to make the Will.

If the Will-maker is elderly or there is any question in relation to their capacity, without a preliminary assessment of capacity by an experienced lawyer and possibly a capacity assessment by a doctor, a DIY Will is at greater risk of being challenged.

Capacity claims against an estate, which could lead to the deceased's Will being held invalid, can be stressful, expensive and time consuming for your family members and loved ones.

The cost of having a lawyer prepare a Will can vary and, in some cases where the Will is complex, be relatively expensive. However, there is no doubt that the cost of preparing the Will could be far outweighed by the cost to a Will-maker's estate and to their family members to rectify the situation later on.

Grant of Probate involving DIY Wills

After a Will-maker dies, the executor appointed will need to obtain a Grant of Probate of the Will from the Supreme Court. A Grant of Probate is official confirmation from the Supreme Court that the Will is the last Will of the deceased and confirms the executor is legally entitled to administer the estate.

Where a Grant of Probate of a DIY Will needs to be applied for, the process is not always straightforward, and the Registrar of Probates may require additional documentation to prove the Will-maker intended the homemade Will to be their last Will.

Further, if the DIY Will has also not been executed in accordance with the formal requirements set out in the *Wills Act* 1997, it is likely further questions will be raised by the Registrar of Probates and additional proof will need to be provided to convince the court to uphold the Will.

How to avoid a claim involving a DIY Will

The best way to avoid claims involving DIY Wills is to engage a lawyer to provide advice on the proper drafting and preparation of your Will.

Whilst there is little or no cost associated with making a DIY Will, engaging a specialist Wills and Estates lawyer to draft your Will and advise you about validly signing the Will, is money well spent and could prevent substantial cost and distress to your family or loved ones after your death.

Having your lawyer retain safe custody of your Will can also prevent your Will from becoming lost or damaged, thereby ensuring your estate is distributed to your intended beneficiaries in a timely manner and that your wishes are fulfilled after your death.

How a Wills and Estates lawyer can help

Smith Family Law can provide you with expert knowledge and advice in the proper preparation and signing of your Will. We can guide you to make sure your wishes are carried out after your death and ensure that your Will is witnessed and signed in accordance with the legal requirements.

We can store your original Will free of charge, giving you peace of mind that your Will is kept safe until the time it is needed.

Smith Family Law can also assist you to obtain a Grant of Probate in the event you may have been appointed executor of a DIY Will.

Contacting Smith Family Law

03 8625 8957

info@smithfamilylaw.com.au

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