SMSFAdviser

Where there's a will, there is not always a way

By Keeli Cambourne, Deputy Editor SMSF Adviser and Matthew Burgess, Director, View Legal

A recent court case has demonstrated that self-made wills can be challenged if the wording is not abundantly clear, a legal specialist has warned.

Matthew Burgess, director of View Legal, said it could be argued that the secret of the legal profession, at least for estate planning lawyers working in the estate litigation space, is that avoiding specialist legal advice in the will creation process virtually guarantees exponential legal costs when troubles arise post-death. "Also, it can be said that nothing in the ever-rapid rise of AI seems to undermine the accuracy of this principle," he said.

"There are an array of court decisions reinforcing the point; and an overwhelming number of other examples that never get through the entire court process, yet still create massive financial, emotional and energy diversion costs."

One example, he said, is the case of Rogers v Rogers Young [2016] WASC 208 in which homemade wills, using a will kit, were found to be inadequate and resulted in the parties having to go to court to seek directions.

Burgess said this case is an example of the benefits of having a will professionally drafted by a competent legal practitioner to avoid this and other problems which can come at great expense.
A more recent reminder is the decision in the Estate of the late John Currie Docherty Hamilton [2025] NSWSC 932.

The facts presented to the case stated the deceased prepared his will using what was described as a "plain English Will kit".

The court noted that these kinds of kits are designed with the "laudable" intention of permitting a will maker to inexpensively prepare a document to effectively dispose of their estate, but indicated it comes with risks.

"In this case, the relevant will kit made what the court noted was a bold claim that it was 'The gold standard in will kits'. The estate of the deceased was valued at around $2.5 million and at least two court proceedings arose in relation to it, as well as a further related proceeding concerning the estate of the deceased's brother," Burgess said.

"The decision in this case was focused on whether an attempted specific gift of a property to a beneficiary under the self-made will was effective or whether it failed with a completely different beneficiary entitled to the asset pursuant to an intestacy."

He continued that the court confirmed that its role in cases involving the interpretation of a will is to determine the one true construction, and give effect to what the will maker intended by the words used, having regard to admissible extrinsic evidence (see De Lorenzo v De Lorenzo (2020) 104 NSWLR 155).

“Ultimately, the court confirmed each case of will construction is different. While there are various principles that provide general guidance, depending on the particular case these principles may have greater or lesser or no application,” he said.

“As part of a detailed analysis of the rules and case law concerning self-written wills, the court confirmed that while the authorities acknowledge that the misuse of language should not too readily defeat the deceased’s otherwise clear intentions, the fundamental problem in this case was that the deceased’s intentions were not clear because a key sentence was incomplete.”

The key sentence, Burgess said, was one which in the will kit set out on separate lines and states:
· All monies from the sale after mortgage Is paid to be used
· to buy a property (house/apartment) cannot be given to any
· partner of friend or used for any other purpose ie business

“Ultimately, the court held that there was sufficient intent with the drafting to allow the above wording to make a specific gift of a property acquired after the date of the will to a particular beneficiary, thereby avoiding the application of the intestacy rules in relation to that asset,” he said.