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# Court decision another warning of risks of online wills

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**Even if a will is drafted by a legal professional, if they do not engage with the willmaker it can be at a high risk of dispute much the same as an online will, as a recent NSW court case highlighted, Matthew Burgess, director of View Legal, said.**

Burgess said the decision in The Estate of the late Wilma Annette Pusterla [2026] NSWSC 951, that dealt with an estate of around $3 million in dispute, emphasises the importance of not just legal involvement in drafting of a will, but also some personal involvement of the professional with the willmaker.

“The number of pathways for self-creating estate planning documents seems to be ever expanding. The initial iteration of avoiding lawyer involvement via a Post Office will kit is arguably now a minority approach, with web-based (or online will) offerings ubiquitous,” Burgess said.

“However, avoiding specialist legal advice in the creation process virtually guarantees exponential legal costs when (almost inevitably) troubles arise post death. 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.”

He said the Pusterla case demonstrates that there is a prospect if a legal professional does not “engage” with the willmaker that the will may be at as high a risk of being held to be invalid as an online will that has no lawyer involved.

The facts of the case as presented to the Court were that the willmaker, Wilma Annette Pusterla, 92, was confined to a nursing home, weighed around 36kg and required significant round-the-clock assistance and supervision, including help with mobility and taking medication.

She was also legally blind, suffering from memory loss, socially isolated from surviving friends, entirely dependent upon the plaintiff, as her newly appointed attorney and guardian, for decision making and her health care needs and more importantly, vulnerable to exploitation.

“The new will radically changed the charitable gifting under previous wills to instead provide for the son of the willmaker’s late partner,” Burgess said.

“While accepting the willmaker had testamentary capacity and was not subject to undue influence, the will was still held to be invalid due to the principle that the willmaker did not have the requisite knowledge and approval of the terms of the document signed.

“The failure of the lawyer who drafted the will to engage directly with the willmaker to ensure this principle was satisfied was a critical factor in the will being held to be invalid.”

In its decision to Court confirmed that where testamentary capacity is established and the will has been duly executed, the testator’s knowledge and approval of the contents of the will at the time of its execution is presumed in the absence of evidence of “any circumstance which creates a well-grounded suspicion or doubt as to whether the will expresses the mind of the testator” (see Tobin v Ezekiel (2012) 83 NSWLR 757).

“The types of situations capable of raising such a suspicion are circumstances relating to the preparation or execution of the will, or its intrinsic terms,” Burgess said.

"They may include 'the mental acuity and sophistication of the testator, the complexity of the will and the estate being disposed of, the exclusion or non-exclusion of persons naturally having a claim upon the testator, and whether there has been an opportunity in the preparation and execution of the will for reflection and independent advice. Particular vigilance is required where a person who played a part in the preparation of the will takes a substantial benefit under it' (see Re Fenwick [1972] VR 646)."

The Court continued that if suspicion is raised, it displaces the presumption or assumption as to the willmaker's knowledge and approval of the contents of the will at the time of its execution.

"The onus is then cast on the proponent of the will to remove the suspicion by affirmatively proving that the testator knew and approved of the contents of the will and appreciated the gravamen of the document so that it can be said that 'the will contains the real intention and reflects the true will of the testator'," Burgess said.

"What is required to remove the suspicion will vary according to the degree of suspicion that is aroused by the particular circumstances. Evidence that the willmaker gave instructions for the will, or that it was read over by or to the willmaker prior to execution, will often suffice to dispel the suspicion, but that is not invariably so (see Battenberg v Phillips [2020] NSWCA 249)."

Burgess continued that in this case, while the will was read aloud to the deceased before she signed it, this was insufficient given firstly, that the reading occurred in circumstances where the new beneficiary brought two strangers to her room while she was eating dinner and watching television, and was left alone with the strangers after a brief introduction.

"Additionally, the solicitor who prepared the will had not contacted the willmaker or taken any instructions from her in relation to the will, and the willmaker did not know that the will had been drafted in terms that were contrary to her intention," he said.

"Furthermore, the willmaker gave no indication when the will was read aloud to her that she noticed this discrepancy and the whole of the encounter in which the will was read aloud to her and then signed was very short, the will was not left with the deceased afterwards, and at no time did the willmaker express an understanding of the way the will had been drafted."