SPEAKERS NOTES

Length of presentation:

The Elder Law & Succession Committee ("Committee") suggests the Will Awareness Day talks run for no longer than 25-30 minutes. Speakers might adopt the approach of providing information about wills in the body of the talk, and then address issues of Powers of Attorney, Enduring Guardianship and other estate planning matters as they arise in questions.

Suggested form of introduction:

The Committee suggests starting the talk by introducing yourself, and your practice. Your introduction might also include something to the effect of the following:

Many people think that making a will is a simple exercise and that it is something that you can do for yourself. With the availability of will kits and online wills it would be easy to be lured into thinking that there is nothing much to it. In fact, there are a lot of things that can and do go wrong with homemade wills, and a small saving on the cost of having a will properly drafted by a solicitor can lead to much bigger problems. As lawyers we see how often the result of a homemade will is that there is delay and uncertainty for the person's family as well as unexpected and often substantial legal expenses because the problems cannot be sorted out without Court proceedings.

This presentation deals with wills in general and some of the pitfalls of homemade wills in particular. The information to be covered includes:

1. What is a will and why is it important to have one?
2. Some of the pitfalls of home-made wills
    - problems with signing and witnessing
    - problems with identifying who gets what
    - problems with failing to give away everything
3. Conclusion

I intend to speak for about XX minutes, and leave time at the end for your questions.

Background information for the talk

The information provided below is intended to be basic information, and the Committee leaves it up to you to determine the exact content and style of presentation that will be appropriate for your audience. You may not be able to cover all of the material provided below in a 30-40 minute talk.

1. MAKING A WILL

What is a will?

A valid will is a document that distributes the deceased's property to people or to organisations upon the death of the testator. That document must meet certain formal requirements under the Succession Act 2006 (NSW).

Do I need a will?

A will is required when a person wants his or her property to be dealt with in a particular way upon his or her death. In the event that a person dies without a valid will, his or her property is distributed

according to the legislative rules of intestacy, and the order in which next of kin take may not be the way that person would have liked his or her estate distributed. For example, if a person dies without a will leaving a de facto spouse and children from a previous marriage the rules of intestacy provide for a formula to work out how much goes to the de facto spouse and how much to the children. The formula does not take into account the needs of the different family members or the quality of their relationship with the deceased person.

Dying without a valid will can cause particular problems if the person leaves dependants who are not covered by the intestacy provisions. However, even if family members or dependants, such as a de facto spouse, are not provided for in the deceased's will, they may still have a claim against the estate under the Succession Act or if the rules of intestacy do not adequately make provision.

As well as setting out who is to receive your property after death, your will also nominates your executor – this is the person who will stand in your place after your death and make sure that your will is carried out properly. If you have young children you may also use your will to nominate someone to be their guardian.

Do I have to have a solicitor?

It is possible to make your own will without consulting a solicitor but it is not recommended. As lawyers we see how often homemade wills lead to significant and expensive problems for family members after the will maker has died. Some of the common problems that come up with home-made wills include problems with signing and witnessing, problems with identifying who gets what, and problems with not effectively giving away all of the will maker's assets.

2. WHAT PROBLEMS CAN ARISE WITH HOME-MADE WILLS?

A. Problems with signing and witnessing

Even though will kits usually contain detailed instructions about how a will needs to be executed it is not unusual for these instructions to be overlooked or misinterpreted which can create real difficulties for the family after the person has died.

The formal requirements for executing a valid will are set out in section 6 of the Succession Act 2006. To be formally valid a will has to be in writing and signed by the will maker or (if for some reason the will maker is unable to sign) by someone else at the direction of the will maker. The signature of the will maker must be made or acknowledged in the presence of at least two witnesses who are both present at the same time, and at least two of those witnesses must sign the will in the presence of the will maker.

If the formal requirements have not been met, then the document can only stand as the person's will if the Court is prepared to exercise its power to dispense with the formal requirements. It will usually be up to the executor to bring an application to the Court to seek an order dispensing with the formal requirements, and it will be necessary to serve documents on any people who might have an interest in the estate if the document is or is not the person's will. This may involve checking for earlier wills and tracking down people who would be entitled to inherit if the person died without a will at all. Evidence needs to be put before the Court to show that the document contains the person's testamentary intentions and that the person intended it to form his or her will even though it was not properly executed. Even if there is no-one arguing that the document should not be the person's will the process can be lengthy and expensive compared to a situation where there is a validly executed will. If there is a beneficiary under an earlier will or a family member who wishes to argue that the document should not be the person's will then the expense and delay will be considerably more.

Some examples of situations where problems with signing and witnessing can come up with home-made wills include the following:

1. A will kit form is filled out but not signed or witnessed. This is quite a difficult scenario for the Court to assess, as it might be argued that the document was just a draft that the will maker was considering but that it was not intended to be his or her will until it was actually signed and witnessed. An example is Estate of Smith [2009] NSWSC 907. A stationer's form of will was completed in the hand writing of the deceased. It was not signed or witnessed, and it was only because the deceased made statements that he had made a will that the Court concluded that the document was a intended as the deceased's will. A Court hearing was required even though the Court's conclusion was not opposed by all persons interested in the deceased's estate.
2. The will is signed by the will maker and two witnesses but there are alterations that have been made to the will after it was signed and witnessed. In this instance there might be a valid will but there is a question over whether the alterations are to be treated as effectively changing the terms of the will.

   This problem presented itself in In the estate of O'Dell [2010] NSWSC 678. Between January 2005 and about February 2008 Deborah O'Dell once attempted to make, and twice attempted to change, a home-made will. She died on 28 November 2008. On 25 June 2010 the Supreme Court decided that all her efforts had failed. The problem started when she was given a will form by a funeral director when she made a funeral plan. She filled it in by hand and she didn't sign before two witnesses – she signed before one person and a second person later added her name as a witness. After the birth of her second grandchild, Deborah changed the will, by handwritten additions. Those alterations created these potential problems:

   a. The changes were not signed, initialed or witnessed,

   b. An alteration provided that "money to be given evenly to LJOD, DJOD & invested till age 25". There was no amount specified as "money". LJOD and DJOD were not defined but were presumably her grandchildren.

   c. To a gift "of money: from Life Insurance" was added "$100,000 – put any extra" but nothing indicated the beneficiary of that gift or the meaning of "extra".

   About nine months before her death, Deborah made further changes. These changes contained further problems:

   d. The changes were not signed, initialed or witnessed.

   e. After the reference to the house "NOT TO BE SOLD", Deborah wrote "If sold invest money either of the kids – Mick, Mel can live in". What did this mean?

   f. Deborah added a gift: "Any – Super – other – finance & pay any debts". What did this mean?

   g. She added to the gifts from the life insurance: "DJO $50,000.00 Mick", but there was nothing to indicate its meaning.

   h. In a gift of the remainder of the estate, Deborah made the changes in italics: "As to 1/3rd DOD Mick % to son – MJ O'Dell Decoda Jay O'Dell". There was nothing to indicate the meaning of this change.

The judge in the Supreme Court made these findings:

i. the deceased intended the will form, without alterations, to constitute her will. This allowed for a dispensation from the formal requirement of two witnesses.

ii. the deceased did not intend either of the alterations to constitute her will.

iii. because the alterations showed the deceased's dissatisfaction with the original, unaltered will form, the alterations constituted a full revocation of the will contained in the will form.

iv. Deborah O'Dell died intestate, ie without a valid will.

A similar problem arose in Newman *-v-* Brinkgrieve; the estate of Verzidjen [2013] NSWSC 371, this time with 'alterations' contained in notes that were separate to and made after the will. The deceased made hand written notes whilst in Hospital indicating a wish to change the writer's will. The notes were signed, but contained alterations and crossings-out. The court reflected that "It is always difficult to assess the intentions of a person who has left no specific directions, or indications, relating to his, or her, will. All that the Court can do, in those circumstances, is to look at such facts as are available, in order to determine what was more likely to have been intended by the deceased in respect of the document concerned". Ultimately the court considered that the alterations showed that the writer took care to ensure that the notes correctly reflected her wishes, and that that fact with others were sufficient to constitute the notes an amendment to the writer's earlier (2004) will.

3. The will refers to a list setting out who is to receive what, but the list has been changed since the will was made and the list has not been signed and witnessed. Again there is a problem with determining whether the person intended the latest version of the list to form part of his or her will. In Slack *-v-* Rogan [2013] NSWSC 522 the will-maker signed her solicitor's note saying "I do not want to change my will". After a four day contested hearing the court found that by that note the deceased changed her will by reviving an earlier will which had subsequently been revoked. The position may be different if the note was made before the will and is referred to in the will: NSW Trustee and Guardian *-v-* Hansey; estate of Skala [2012] NSWSC 872.

4. The will is signed by the will maker and two witnesses, but one of the witnesses is a family member who is a beneficiary under the will. In this instance the will is formally valid, but the witness-beneficiary rule operates to make any gift under the will to the person who witnessed it invalid. Unless all the other beneficiaries agree (which may not be possible if any of the beneficiaries is under 18 or suffers from a disability) or an application is made to the Court for an order that the will maker knew and approved and freely gave the gift, then the beneficiary who witnessed the will misses out.

In all of these situations there will be delay and additional expense which will usually come out of the estate of the deceased person, reducing the amount which can be given to the persons intended beneficiaries.

B. Problems with identifying who gets what

A solicitor drafting a will uses language carefully to ensure that the meaning is clear and unambiguous. It should be possible for someone who knows nothing about the will maker's circumstance to understand exactly what is meant.

When someone writes their own will, they may use language which makes sense to them at the time of writing the will but which may be capable of being interpreted in more than one way.

For example, someone drafting their own will may say 'I give XX to my family' thinking that it is obvious exactly which people are meant and the proportions in which the gift should be shared between them. In fact, of course, it is not at all obvious. When the wording in a will is ambiguous, the executor generally has to make an application to the Court to have the Court determine how the will should be interpreted. This is called a construction suit and there are many construction suit cases which concern home-made wills. In a construction suit the Court will require that any people who might be affected by the way that the will is interpreted be served with notice of the Court proceedings and given an opportunity to appear in Court and argue why it should be interpreted one way or another. As well as the legal costs involved this takes time and can cause disharmony among family members.

Sometimes construction suits involve questions over who the beneficiaries are, and sometimes they involve questions over what property the beneficiaries are entitled to.

Some examples of situations where home-made wills have led to construction suits include:

1. A home made will left all the will maker's assets to 'my nieces and nephews'. The will maker was survived by nieces and nephews who were the children of her full brothers and sisters, but she was also survived by children of her half brothers and half sisters, and also by children of the brothers and sisters of her de facto partner. The question was whether all or only some of these people were included in the expression 'my nieces and nephews'.

   In this case (Parry v Haisma [2012] NSWSC 290) after hearing evidence the Court decided that the full and half nieces and nephews were included but not the nieces and nephews of the de facto partner, but it always depends on the circumstances of each will maker and so the same expression might be interpreted differently in a different will.

2. A home made will contained a gift of $10,000 to 'the Blind Dogs'. There were at least two organisations that might have been the intended beneficiary – the Guide Dog Association of New South Wales and ACT and

   Seeing Eye Dogs Australia and an application had to be made to the Court to decide who was entitled to the gift. This particular will also contained a number of other clauses that needed construction by the Court (Kay v South Eastern Sydney Area Health Service [2003] NSWSC 292).

3. A home-made will left the will maker's house to be sold and the proceeds divided between 'Lisette, John, Matthew and my daughter Michelle and her husband John', but the will did not specify the proportions to go to each of the named beneficiaries. If the proceeds were to be divided equally, the question was whether there were to be four equal shares or five, ie. Should Michele and her husband receive one quarter or one fifth each. In this case (Rudge v Link [2008] NSWSC 1104) even though Michelle's husband agreed that he should not receive a separate share it was necessary to go to the Court to have the question determined. Again this home-made will had some other problems, including the fact that it did not include an effective gift of residue.

C. Problems with failing to give away everything

One problem which is quite common with home-made wills is that not all of the will maker's property is effectively dealt with. When this happens, the estate or part of it may be dealt with in accordance with the rules of intestacy, which effectively can mean that the person might as well not have made a will at all.

One example of where an intestacy can arise from a home-made will is where the will maker gives away specific assets, such as a house and a bank account, but does not say who is to receive anything else they may own.

If the person still owns the house and the bank account at the time of death then those gifts will be valid but anything else will pass under the rules of intestacy to next of kin. If the house has been sold at the person's death and the bank account closed, then there may be no effective gifts under the will at all.

Another example of where an intestacy can arise from a home-made will is where the will includes a gift to a person but does not say who is to receive it if the person dies before the will maker. The will might say, for example 'I leave everything to my husband' but if the will does not specify what should happen if the will maker's husband dies first then the rules of intestacy will decide who receives the will maker's assets.

A will prepared by a solicitor will include a residuary clause to ensure that there is no intestacy, and will reflect your instructions about who is to benefit if any of your intended beneficiaries dies before you. A solicitor can also provide you with advice about how to deal with assets that may not pass under your will, such as jointly held property, superannuation and assets that are held by companies or in family trusts. With superannuation, in particular, people who make their own wills often do not realise that their will does not govern what happens to their superannuation after they die.

D. Problems with storage and security

Keeping your original will at home can be risky. As well as the possibility of fire, there is the risk that after your death the will may be disposed of either accidentally or deliberately. One example of a homemade will going missing came up in the estate of celebrated Sydney artist Brett Whiteley. He had made a home-made will that he kept in his studio, but when his daughter went to look for the will it was not there, leading to a lengthy and very public court case to decide whether the will had been destroyed by Brett Whiteley with intention to revoke it, or whether there might be some other reason it could not be found (Whiteley v Clune (No 2) NSWSC Powell J, unreported, BC 9301902). Another advantage of having a will prepared for you by a solicitor is that the solicitor will generally be able to store the original will securely on your behalf while providing you with a copy for your records.

3. CONCLUSION

Just as you can, if you so choose, re-wire your own home, service your own car or pull your own teeth, it is open to you to make your own will. The real difference with making your own will is that if there is a problem it is not likely to be discovered until after your death when it will be too late for you to do anything to fix the problem. The result is likely to involve additional legal expense - often many times more than the cost of making a will with a solicitor in the first place. As well as additional expenses your family is faced with delay and uncertainty as to how your assets will be distributed.

There are a number of good reasons to consult a solicitor for advice when making a will. Your solicitor will be qualified to handle the intricacies involved in making a valid will. It is usually not an expensive service, and will be far less costly than dealing with the problems that often arise with home-made wills. Your solicitor will ensure that your wishes are translated correctly into a valid will that will be accepted by the Court. Your solicitor can also consider and advise you in relation to potential family provision claims and the protection of vulnerable beneficiaries, as well as other planning documents you may wish to put in place, such as an enduring power of attorney and an appointment of enduring guardian.

PRESENTATION SLIDES

THE LAW SOCIETY OF NEW SOUTH WALES

The Law Society of NSW

Will Awareness Events 2013

The real cost of home-made wills

Outline of presentation

- What is a will?
- Why should you make a will?
- Home-made wills
  - Problems with signing and witnessing
  - Problems with identifying who gets what
  - Problems with failing to give away everything
  - Problems with storage and security
- Sorting out problems with home-made wills
  - Cost, delay and uncertainty of outcomes
- Conclusion

What is a will?

- A will is a document which expresses a *competent person's* wishes about the distribution of his/her *testamentary assets* on death.
- It may also:
  - Nominate an executor
  - Appoint a trustee
  - Appoint a testamentary guardian
  - Express wishes for the disposal of his/her remains.

What is a will?

- To be valid, a will has to meet certain formal requirements in the way that it is signed and witnessed
- If a document is not validly signed and witnessed as a will, it can only be a will if the Court makes a determination that it was intended to form the person's will even though it was not validly signed and witnessed

Why make a will?

- If you do not make a will:
  - The laws of intestacy will decide how your property is divided and who will receive it after death
  - Some of the people you would like to provide for may receive nothing or may end up applying to the Court for provision from your estate
  - You will not have a say in who is to be trusted to deal with your assets after death (because the court appoints the administrator) or, if you have children under 18, who should be their guardian

Do I have to have a solicitor?

- It is possible to make your own will but it is not recommended.
- Problems often arise with home-made wills which can lead to delay, uncertainty and legal costs.
- The cost of consulting a solicitor to make your will in the first place is likely to be much less than the cost of dealing with problems which may arise from home-made wills.

Problems with signing and witnessing

- To be formally valid:
  - A will must be in writing
  - A will must be signed by the will maker or by someone else at the will maker's direction
  - The signature of the will maker must be made or acknowledged in the presence of at least two witness who must sign the will in the presence of the will maker
  - The two witnesses must both be present at the same time to witness the will

Problems with signing and witnessing

- With home-made wills the formal requirements may not be strictly complied with.
- If the document is unsigned or not adequately witnessed, or there is a problem with the way the document was signed or witnessed, the Court has to make a determination as to whether the document is the person's will.

Problems with signing and witnessing

- Examples of problems with home-made wills:
  - Will kit form filled out but not signed or witnessed
  - A will has been altered and the alterations have not been signed and witnessed
  - The will refers to a list but the list has been changed since the will was made and the list is not signed or witnessed
  - One of the witnesses is an intended beneficiary under the will

Problems with identifying who gets what

- In a will it is important to use language that is clear and unambiguous.
- It should be capable of being understood by someone who does not know anything about the will maker's circumstances.
- If the wording in a will could have more than one possible meaning an application needs to be made to the Court to decide how the will should be interpreted.

Problems with identifying who gets what

- Examples of problems from home-made wills:
  - Gift to 'my family'. Who is 'my family'? How is it intended to be shared between them?
  - Gift to 'my nieces and nephews'. Does this include children of half brothers and half sisters? Does this include nieces and nephews of a spouse or de facto partner?
  - Gift to 'the Blind Dogs'. There is no organisation of that name.

Problems with failing to give away everything

- Sometimes with home-made wills, the will maker will:
  - Give away the assets owned when the will was made, eg. a house and a bank account, but will not say who is to receive anything else they may own when they die; or
  - Leave everything to one person, eg. their spouse, but fail to say what should happen if that person dies before them.
- Some assets – eg. jointly held property, superannuation – may not pass under the will and legal advice may be needed to ensure they pass as the will maker would want.

Problems with storage and security

- Keeping an original will at home can be risky
- If the will cannot be found after death, it may be assumed that the will maker destroyed it intending that it be revoked. It may be necessary for the issue to be determined by the Court.
- Solicitors will generally store wills securely, or at least keep a file copy of your will if you want to keep the original at home.

Conclusion

- If you make your own will, be aware that if there are any problems with the will:
  - The problem may not be discovered until it is too late for you to fix it
  - It may be necessary to make an application to the Court to resolve the problem
  - There will be delay in relation to sorting out your affairs after death
  - There will be uncertainty about how your estate will be distributed
  - Your estate is likely to have to pay substantial legal costs in order to resolve the problem
- The real cost of a home-made will can be many times more than the cost of consulting a solicitor about a will in the first place