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Using kit to write will can be risky

Litigation lawyers get big bucks to sort out mess

A client called last week to say she had just purchased a do-it-yourself will kit for herself and her husband after hearing it advertised on the radio.

Was it okay, she asked, if she filled the blanks in herself? After all, everything she needed was right there in the kit, and she didn't really need a lawyer for this simple task, did she?

I tried my best to persuade her it was dangerous to use the kits and that she should have a professional will drafted by a lawyer. We spent quite a while on the phone, and after we said goodbye, I was left with the distinct impression she remained unconvinced and was going to use the kit anyway.

In the aftermath of that phone call, I decided there was only one thing to do. I had heard the annoying radio commercials for will kits once too often, so I took the plunge and bought one. I wanted to be armed and ready with all the best arguments the next time a client told me a will kit was better and cheaper than a lawyer to prepare a will.

It's not that I really needed a will kit. My law library includes at least four volumes containing hundreds of sample wills for every imaginable situation, and many that are unimaginable.

Over the years, these books, in their print and electronic versions, have cost me hundreds and hundreds. How, I wondered, could this wealth of material be distilled into a simple kit that produces a so-called "simple" will for only \$29.95, plus \$5 shipping and handling?

Two or three weeks after I called the 1-800 number and gave my address and VISA account number, the National Will Kit arrived in the mail. I was underwhelmed when I opened the envelope. The National Will Kit consists of a 28-page, letter-sized booklet, along with a four-page brochure.

The actual will is only two pages long. It provides blanks for filling in the name of the person making the will (the testator or testatrix), the date, the name of the trustee (executor), and the name of a guardian for minor children.

It contains brief and inadequate provisions setting out a trust for minor children, and barely six lines outlining the powers the trustee may exercise in administering the estate.

Buried in the preliminary material is the suggestion that the kit is the easiest and cheapest way to ensure that your final wills are followed, "assuming you have a simple estate to transfer." Unfortunately, it doesn't say what is or what is not a "simple estate."

Some of the explanations in the booklet are quite misleading.

The text states, for example, that the person making the will can fill in a Personal History Form in the booklet, specifying final instructions for burial and cremation. It does not say, however, that those instructions are not binding and can be ignored by the estate trustee.

The brochure accompanying the kit details 11 family situations involving actual or potential family disputes over wills and estates. It urges readers to seek professional advice if they see any similarities between those situations and their own.

To any lawyer, the dangers in using these kits will be obvious, but not necessarily so to a client. I decided to conduct a bit of online research to see if the use of will kits and stationer's forms of wills had given rise to any cases.

I confined my search to Canada and the United States, and was amazed when Quicklaw retrieved hundreds of court cases - many quite ugly - involving people who had used will kits for their wills, but messed up so badly a court had to intervene.

I found dozens of cases where the person making the will used imprecise or ambiguous language, left blanks where something had to be filled in, signed in the wrong place or not at all, or failed to have the will witnessed properly.

I found myself agreeing with Justice John Purtle in a 1982 Arkansas case when he wrote, "This case involves the interpretation of a will, which the testator prepared by filling in blank lines on a commercially printed will kit form. Use of such a device is, at best, risky, as even the most skilled probate attorney would have difficulty with the unsuitable and inept printed provisions in the will kit."

It is not difficult to make a mistake in writing a will

For someone untrained in precise drafting, it is not difficult to make a mistake in writing a will.

When Everett Rankin made his will in Winnipeg in 1973, he gave \$1,000 to each of his sons and the rest of his estate to his wife, Ada Rankin, "and after her death, to my sons Russell and Gordon, equally, share and share alike."

The problem is that if he gave the rest of his estate to his wife absolutely, then she could spend it or give it away as she chose, and there could be nothing left over for the sons.

Did the widow have only a life interest in the estate - the right to interest on the capital, for example - or did she have the absolute right to everything?

The court ruled that she took everything herself, and she could dispose of it in her own discretion. There was nothing "left over" for the sons.

One testator wrote the words "to my wife, Edith Louise Stewart, for her lifetime" in the wrong space on a will form, so that the will actually failed to give her anything. The Ontario Supreme Court corrected that one in 1973.

Another Ontario resident left his nieces and nephews all his money in the bank and cash on hand, but he failed to mention who got his Canada Savings Bonds. The Ontario Supreme Court had to interpret the will to include the bonds in the gifts to the nieces and nephews, since they were included in the definition of "money."

In one Arizona case, the deceased left a will made from a kit giving his "wife" Nona the entire estate. The parties were not formally married but had been living together for 14 years. Unfortunately, Nona had signed as a witness to the will (beneficiaries cannot be witnesses). The court ruled the will was invalid and gave everything to the sister of the deceased.

In 1974, an Ontario farmer died leaving a widow and eight children. He used a will kit to dispose of a very complicated estate that included his farm, a part interest with one son in the farming tools and business, and the rights to a milk quota. Three judges of the Ontario Court of Appeal listened to arguments from four lawyers and delivered a 45-paragraph

judgment to figure out what he really meant.

In 1968, an Ontario Supreme Court judge listened to an application for "much needed advice" to interpret an "ill-framed" will, which he also called an "unhappy document."

Obviously, no one gets any pleasure from trying to decipher the meaning of badly drafted clauses in homemade wills. Over the years, will kits have produced a bonanza in work and fees for lawyers who get paid big bucks to sort out the mess.

Given all the problems will kits can cause, why take the risk of using one?

Make a will, and make sure a qualified lawyer prepares it. It could save considerable grief and expense.

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