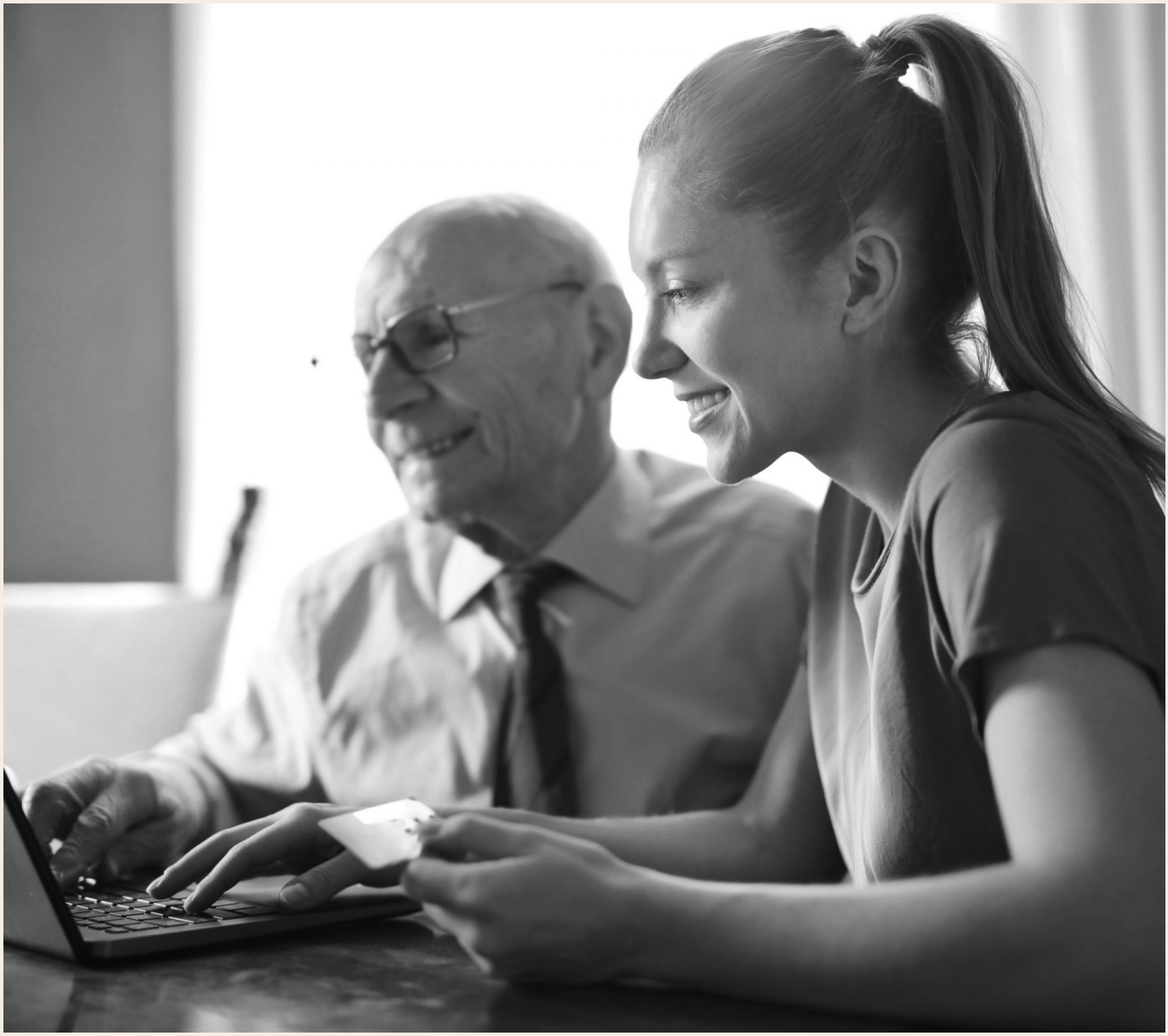


Are Online Wills too good to be true?

In recent weeks, I have been receiving a number of promotional emails about getting an online Will done. The algorithms of social media sites and search engines must have picked up on my keen interest in articles about Wills and Estate Planning. Well, they got me right there, I am a Wills and Estate Planning solicitor after all. I wonder how many other people, who have been searching for "Will", have ultimately received an email or two in their inbox, showing them a cheap and easy solution to get their estate planning needs sorted out. "5 easy-steps", they say. One doesn't even need to step out of his or her home. One can do it at 2AM when he or she lies awake in bed, not needing to book in an appointment! Too good to be true?

I have been thinking more about online wills and whether this can be a solution for the legal profession moving forward because I am all for efficiency. However, I have come to the conclusion that whilst an online Will can be convenient, it presents similar problems that a will-maker would face in doing a DIY Post-Office Will.

Why an online Will is too good to be true:

1. **"One Size Fits All" Solution?**

One of the biggest issue of online Wills is the fact that the options offered to the will-maker are very limited. The Will-maker will only be shown the options that the website developer has deemed fit to give.

For example, options such as life interest, right to occupy, specific gifts, minor trusts, perpetuity trust might not be suggested or included at all. What about superannuation and life insurance policy? Does it form a part of the estate and follow the direction of the Will? What about gift over provisions? These issues are often not addressed in the current online Will platforms either.

A website that offers online Wills, in essence, provides the will-maker with a pathway that has been developed by a web-developer. The Will that a Will-maker purchases online is only as good as the legal knowledge of the person who designed the webpage, i.e. a web developer and not a lawyer.

Most of the online Will websites that I have seen are often very basic. If it endeavours to capture anything more complex, the questionnaire would be too complicated and unworkable. Imagine hundreds of questions filled with legal jargons! Oh what joy! The webpage is therefore, by necessity, likely kept basic in a "one size fits all" model. However, that model can be inappropriate for many circumstances.

Making a Will is one thing, whether that Will is suitable for your circumstances is an entirely different issue altogether. If I need to build a house, I don't call my dress-maker!

2. **Lack of Advice in relation to an *Inheritance (Family Provision) Act* claim**

In South Australia, a number of classes of people are entitled to make a claim against a deceased estate if they have been left without adequate provision from a deceased's person estate. These include the spouse, former spouse, domestic partner, a child, a grandchild, "Adequate provision" is a fact-finding exercise by the Court, which looks into the circumstances of the parties' relationship, as well as the needs of the particular claimants. When a person prepares a Will with a solicitor, one of our main jobs is to advise the Will-maker of the potential claims against his or her estate. It is ultimately up to the Will-maker as to how he or she wishes to distribute her estate, but it is essential that the Will-maker is well aware of the potential risks against the estate so that their loved ones can be spared of protracted litigation, which carries with it the significant stress, time costs and legal costs inherent in the process.

3. **Lack of Proper Execution**

The Wills Act sets out the requirements of what a properly executed Will is required. Most online Will-provider services simply provide the Will-maker with a draft Will based on the questionnaires that

they provide. It is up to the Will-maker to organise the execution of the Will.

I have come across a fair amount of home-made Wills that often will raise the question as to whether the Will was duly executed. Different coloured pens. Markings on documents. Beneficiary witness. Undated Will. Witnesses unable to be located. Non-English speaking will-makers signing a Will which is entirely in English and there are no indication, on the Will, that the will-maker understands what he or she is signing. It is often the case that an Affidavit of Due Execution would be required to show that the Will-maker has knowledge and approval of the Will.

Online Wills are no different. If it is not signed properly, the executor of the estate will have a hard time trying to locate the witnesses of the Will, many of whom might have moved around, and out of those whom you could locate, many can't remember what exactly happened! Uncertainty means, once again, costs to the estate.

4. **Incorrect Details**

"I GIVE my guitar to my nephew BOB DYLAN".

It sounds fine? Except for the fact that the Will-maker does not have a nephew named BOB DYLAN. There is a nephew named ALLAN DYLAN, and there is an uncle named ROBERT DYLAN. So who is to get the guitar?

Whilst this is not an issue specific to online Wills, the potential of the Will-maker putting in an incorrect description or incorrect name of a beneficiary in an Online Will questionnaire cannot be neglected.

Where there are multiple possible meanings of a clause in the Will, the executor might be required to issue a rectification application or construction application seeking the Court's determination of the meaning of the clause.

5. **Informal Will**

Another potential issues with online Wills is the possibility of having to deal with an informal Will.

If the document is found to not be compliant with the requirements of the Wills Act (i.e. a document which is not signed at all, or not property signed by the will-maker), but that document still clearly contains testamentary intention of the Will-maker, the executor is obliged to issue an Originating Application seeking the Court's determination as to the validity of such a document.

Only a Court can declare the validity of the Will. The Court, has to be satisfied on evidence that the document being propounded is the deceased's last valid Will. Even where the parties related to the estate come to an agreement with each other in respect of the validity of the testamentary document, any resolution reached by them is still subject to the Court's determination.

Now, back to the issues of an online Will, it is arguable that if a Will-maker has created an account, filled in the questionnaire, printed the Will out, was making a document that resembles a Will! I am not saying that this is definitely a Will. However, an unsigned online Will is a material that may fit requirements set out under S 12(2) of the Wills Act, and no matter how inconsequential it is, it ought to be thoroughly investigated. Indeed, this is the expectation that the Court requires of an applicant who wishes to apply for a Grant of Probate or Letters of Administration. The executor or administrator is expected to bring to the Court's attention any material that is relevant to the estate before the

Court. This means that this could be a long drawn-out application with myriads of affidavit evidence to be presented to the Court.

Costs vs Benefits of an online-Will

What is attractive about an online Will is that it is relatively cheaper than a solicitor-prepared Will, and it is fast! A few questions answered and that is it, it is done!

Some might be drawn to making an online Will because of the modest size of their estate. However, trying to cut down on costs of preparing a Will could mean that his or her estate will have to put up significant costs due to the potential issues as outlined above (and I can assure you, they are much higher than the costs of doing a Will) to prove the validity of that document. That just does not make a lot of business sense to me. Imagine having over $40,000 in a bank account that the bank will not release without a Grant of Probate, and yet the estate might have to pay for $10,000 or more to address all the issues that the document might have. This is what my wise mother-in-law would call “penny wise, pound foolish”.

Good things take time. When I think about it, a Will-maker has spent all his or her lifetime building up assets and nurturing relationships, so it just makes sense that a Will-maker should also invest in getting proper advice and having a legally binding Will prepared, so that the assets earned with sweats and tears can arrive at the destination he or she intends it to go.

> One of the biggest issues of online Wills is the fact that the options offered to the will-maker are very limited.

This blog was written by Lynn Pham, Senior Associate in our Wills and Estates team. To get in touch with Lynn or any of our other Wills and Estates Lawyers, contact us today.

The information in this article is general in nature and was accurate at the time of publication. Laws and circumstances can change. For advice specific to your situation, please seek professional legal advice.