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The missing signature on a will that cost a family $10,000

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October 11, 2025 — 1.30pm

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It was the missing signature that cost a family $10,000. A man forgot to sign his DIY will, in an oversight that proved costly in court.

Legal experts have warned that DIY will kits promising simple and cost-effective succession planning may add cost and complexity to the administration of deceased estates, amid a rise in court disputes over wills.

Lawyers have warned that DIY will kits may present expensive problems. MARIJA ERCEGOVAC

Phillip Briffa, director of Sydney wills and estates law firm PB Ritz Lawyers, said that in his experience, “DIY will kits often do more harm than good” and “any money saved upfront is often far outweighed by the legal costs incurred after death”.

“They give people a false sense of security. Many believe they’ve ‘ticked the box’ by signing a will, but in reality they’ve unknowingly left their family with a complex and costly legal problem to resolve at a time when they should be focused on grieving the loss of a loved one.” Briffa said improper signing and witnessing was one of the most common defects he sees with DIY wills.

Under the NSW Succession Act, a will is not valid unless it is in writing and signed by the will-maker, or another person in their presence and at their direction.

That signature must be witnessed by at least two witnesses present at the same time. In addition, at least two of those witnesses must sign the will in the will-maker’s presence.

WHAT IS A VALID WILL?

- Under NSW law, a will is not valid unless it is in writing and signed by the will-maker, or another person in their presence and at their direction. That signature must be made, or acknowledged by the will-maker, in the presence of at least two witnesses.
- At least two of those witnesses must also attest and sign the will in the will-maker’s presence.
- However, a court may dispense with the formal requirements for making a will. An informal document is “the deceased person’s will … if the court is satisfied that the person intended it to form his or her will”.

“I regularly see wills signed without two independent witnesses present at the same time, or where a beneficiary has acted as a witness, both of which can cause validity issues and add to costs,” Briffa said.

“In one case, I came across a DIY will that had been signed by the two witnesses but not by the will-maker himself, who had inadvertently only written the date on the document.

“The Supreme Court eventually issued a grant [of probate, allowing the assets of the estate to be distributed], but only after extensive additional work was completed. It added roughly $10,000 to the usual probate costs.”

The court may in some cases dispense with the formal requirements for making a will, and it has considered novel cases such as whether an iPhone note was valid as an informal will. But this adds considerable expense to the administration of the estate.

A will-maker might also be unsure about which assets formed part of their estate and could be included in their DIY will, Briffa said. Superannuation does not automatically form part of an estate, and a jointly owned home may also fall outside the pool of a deceased’s assets.

Briffa had seen a case in which “a will-maker sought to leave assets owned by a family trust to beneficiaries named in the DIY will” but “the gifts failed because the assets held by the family trust were not estate assets”.

“Everyday language like ‘my property’ or ‘my possessions’ can be unclear. I’ve seen cases where families spend tens of thousands of dollars arguing regarding the deceased’s intention behind a few poorly chosen words,” he said.

Briffa said will kits might also deal inadequately with “digital assets, such as cryptocurrency and providing access to online social media accounts”, or how to divide assets remaining after specific gifts, which could include “remaining bank balances, shares, vehicles, or household contents”.

He said beneficiaries who inherited assets via a basic will kit typically missed out on “significant benefits” such as more favourable tax rates because the kits did not incorporate sophisticated estate-planning strategies.

For example, a legal structure known as a testamentary trust, involving a trustee managing the deceased’s assets and making distributions to beneficiaries, “can provide significant tax advantages and asset protection benefits for beneficiaries, particularly for minor children or those in vulnerable circumstances”, he said.

“A will is your final opportunity to protect the people you care about, so it should be done properly,” Briffa said.

Disputes over wills are increasing: 1171 matters were filed in the NSW Supreme Court’s succession and probate list in 2020, compared with 1460 cases last year. The Victorian Supreme Court also reported “an influx of probate proceedings” in 2023-24.

Teresa Catalano, managing principal of iWills Legal, is an accredited specialist in wills and estates law in Victoria.

She said the “biggest issue” she saw with DIY wills was “a lot of them don’t get admitted to probate” – a court order confirming the validity of a will and allowing the estate to be administered.

“It’s about the court being satisfied the will-maker had knowledge and approval of what is in that document, that they’re not being unduly influenced by anyone, and they had the requisite mental capacity [to make a will],” Catalano said.

“Often that is not on paper as obvious as if it was a formal, signed will with witnesses, and potentially even done by lawyers with their guidance.”

In cases of elder abuse, which are increasing, a child might influence a vulnerable parent with declining cognitive ability to make a will in their favour, “and that’s where some of these DIY wills come into play as well”.

Catalano said DIY will kits could not help will-makers navigate common issues, such as choosing the right executor or executors to administer their estate.

If the will-maker appointed multiple children as their executors but those siblings didn’t get along, it could take “years to even get probate of the will [with] lots of money spent”. It meant nobody would have access to their inheritance until the disputes were resolved.

Catalano said she had never seen a “DIY-type” will with a testamentary trust structure in it.

That structure has tax benefits for beneficiaries, but Catalano said the "biggest reason" trusts were becoming popular with will-makers was to give their beneficiaries asset protection.

For example, assets held by the trust might not be regarded by a court as forming part of the pool of matrimonial assets to be carved up in a beneficiary's divorce settlement.

"If you had a child going through a relationship breakdown, you'd have to be very risk-averse," Catalano said.

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