

COWBOY WILL WRITING

Incompetence and dishonesty in the UK wills market

This STEP Policy Briefing looks into the UK will-writing market and incorporates a survey of STEP members that illustrates common problems faced by consumers in the industry. The survey results highlight the need for consumers to be protected from cowboy will writers and estate planners by way of effective regulation.

Our survey finds that incompetence and dishonesty are significant problems in the UK will-writing market. Three quarters of the professional trust and estate practitioners surveyed had encountered cases of 'incompetence or dishonesty in the will-writing market' in the 12 months prior to our survey.

The main problem areas are:

- **Invalid wills:** Unqualified will writers are producing invalid wills due to basic drafting errors. These errors range from basic typing errors and the use of inappropriate standard clauses through to errors in designing trusts.
- **Will writers making untrue claims:** Will writers are making untrue claims to consumers. These claims include will writers representing themselves as regulated and insured, some even representing themselves as solicitors. Many are also making untrue claims about changes in the law rendering consumers' current wills invalid, frightening them into unnecessarily having new wills written.
- **Disappearing wills and will-writing companies:** Our survey respondents report high incidences of will-writing companies going out of business and their clients' wills subsequently disappearing. This is despite many of the clients paying substantial sums for the safe storage of their wills.
- **Hidden fees:** Our report highlights the widespread use of hidden fees by will writers. Many consumers are being duped by wills being advertised at a low cost only to find additional costs for 'extras' such as additional clauses, review charges and storage fees, in some cases causing the price to rise more than tenfold from the advertised price.
- **Fraud in estate administration:** Despite the significant costs and stress caused by sub-standard will drafting, it is during the process of estate administration where much of the large-scale fraud and theft from estates occurs. This area is as much in need of regulation as is will writing.

The Solution

STEP believes that both those who write wills and those who administer estates professionally should be regulated to ensure minimum standards of competence and behaviour and to give the public protection in the form of negligence insurance and continuity arrangements.

Introduction: The Will-Writing Market

STEP believes that everyone should be encouraged to have a will. A will helps ensure that someone's estate will be used as they would wish after their death. Drafted properly, a will can provide support to families, friends and charities after a death. The National Consumer Council estimated in 2007 that 64 per cent¹ of adults in England and Wales do not have a will, while the Office of Fair Trading in 2010 estimates the figure at 53 per cent².

Passing-on an estate is probably the biggest financial transaction most people will ever plan for. Those with relatively simple affairs can often draft a usable will themselves with the help of some research.

Those with more complex affairs, however, are usually best advised to seek professional advice. The cost of such advice will normally be modest relative to the potential cost and family distress that can be caused if, for example, a badly drafted will fails to do what was intended or is contested.

The problem consumers currently face is that the business of offering professional advice to those wanting to make a will in England and Wales is totally unregulated. As Lord Hunt, in his 'Review of the Regulation of Legal Services' noted, most people 'would surely be taken aback to learn that anyone can currently set himself or herself up as a will writer.'³ They need have no technical qualifications, negligence insurance or continuity arrangements to protect clients should they cease trading for whatever reason. A survey conducted for the Institute of Professional Will Writers found that 78 per cent of the public thought that these issues should be remedied via regulation of will writers.⁴

STEP is concerned that incompetent, dishonest and unqualified will writers are taking advantage of consumers. Overcharging and basic errors are leading to considerable family upset.

The Scottish government has moved to regulate non-lawyer will drafters and confirmation agents through the *Legal Services (Scotland) Bill 2010*.

In June 2010, the Legal Services Board launched a review of the threat posed to consumers in England and Wales by unprofessional will writers, and is currently seeking evidence of consumer harm.

Although the UK government is now considering taking some action, in the past it has been reluctant to do so because the numbers of officially reported problems have been relatively small.

STEP believes this is a much wider problem than is currently acknowledged and there may be very substantial underreporting of malpractice. One reason for this is that problems with poorly drafted wills are usually only discovered after a death when it is too late to remedy the situation. The consequences for those who pay for sub-standard wills are much added stress and the cost of either redrafting the will, or if post-death, the stress and costs associated with intestacy or unnecessary tax bills.

The Society of Trust and Estate Practitioners (STEP) is the worldwide professional body for practitioners in the fields of trusts and estates, executorship and related issues. STEP aims to promote the highest professional standards through education and training leading to widely recognised and respected professional qualifications. STEP also works to demonstrate the value of good stewardship and planning across future generations to governments, professionals, financial institutions and the public. STEP internationally has over 16,000 members, with almost 6,000 members in the UK. Over 4,000 students worldwide are currently studying for STEP qualifications and in the UK STEP supports an extensive regional network providing training and professional development.

¹'Finding the will', a report on will-writing behaviour in England and Wales, National Consumer Council, 2007

²'Should will writing be a reserved legal activity?', presentation to LSB will-writing workshop, Office of Fair Trading, 2010

³'The Hunt Review of Legal Services', The Law Society, October 2009

⁴Institute of Professional Will writers, June 2007

STEP Will-Writing Survey

To gain a better understanding of the problems currently facing consumers in the will-drafting market, STEP conducted a survey of its UK members and asked for examples of malpractice they had encountered. For the purposes of the survey, 'will writer' is defined as anyone who writes a will and may include solicitors or non-solicitors such as 'will writers' or Independent Financial Advisers (IFAs).

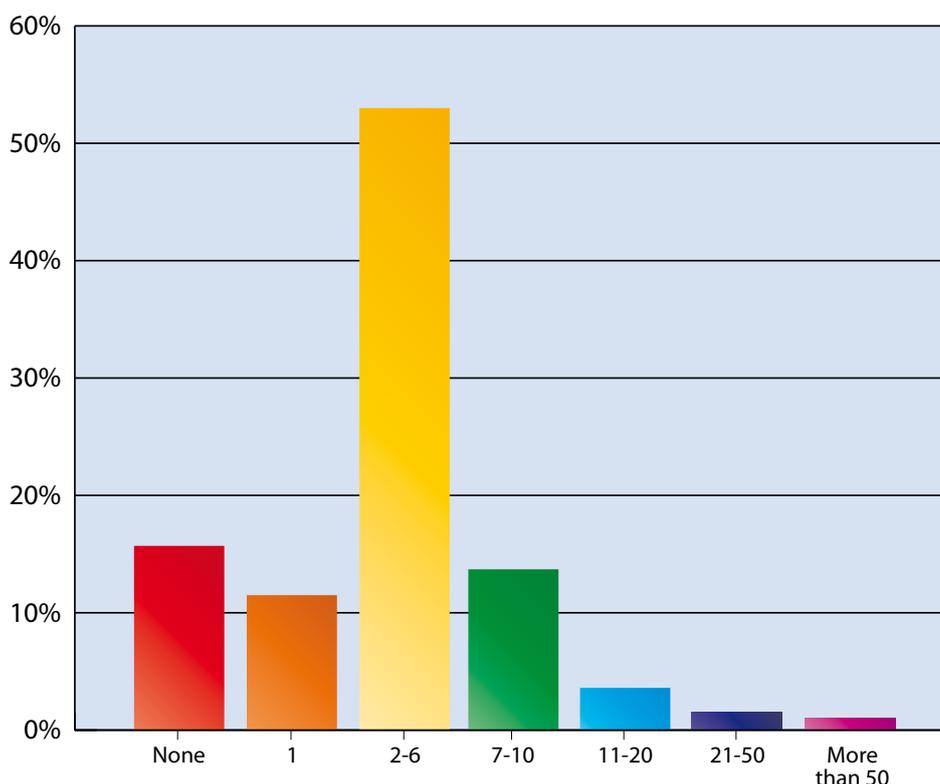
The STEP Will-Writing Market Survey asked 693 members of STEP (over 10 per cent of STEP's UK membership) whether they had encountered a number of problems commonly cited as poor practice, and then asked members to elaborate and provide examples of such encounters.

Main Survey Findings

- 84 per cent of STEP members who responded have come across at least one will containing drafting errors in the last year, with more than 72 per cent coming across multiple wills containing errors.
- 75 per cent of respondents have encountered cases of incompetence or dishonesty in the will-writing market in the last 12 months.
- Two thirds of respondents reported coming across hidden fees that were not outlined in the stated price for a will.
- 63 per cent have direct experience of cases where will-writing companies have gone out of business and disappeared with their clients' wills.
- Just over one third have encountered cases where incompetence has led to significant additional tax bills.

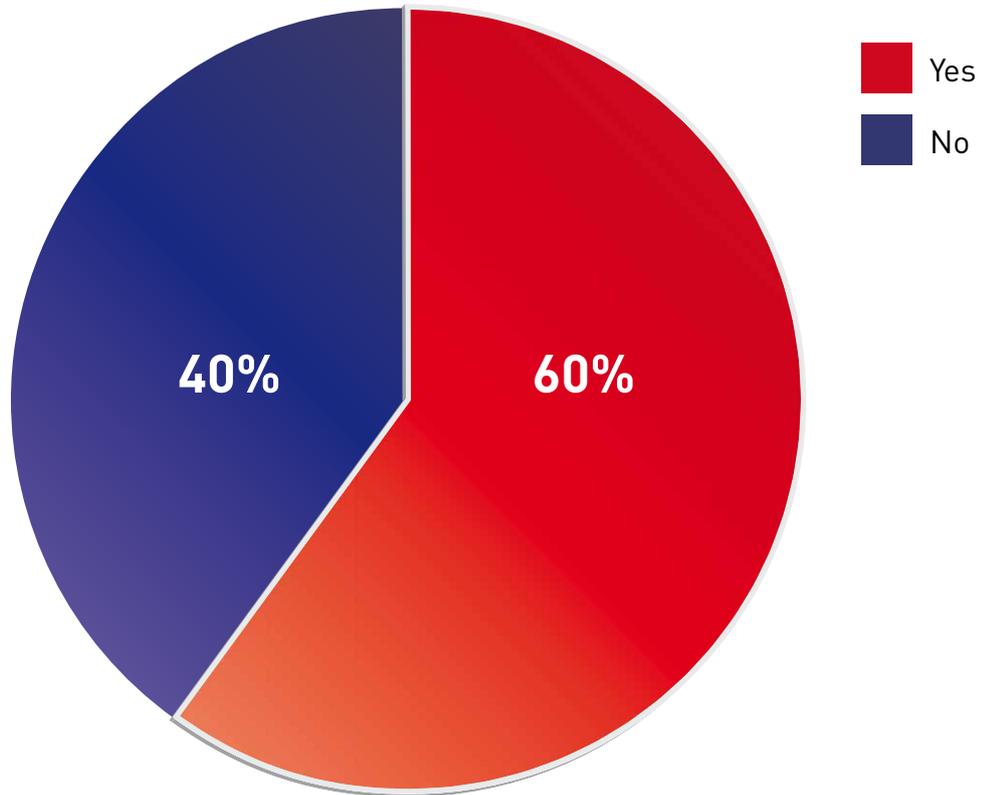
The survey results are presented with the percentages of responses to each question in graphical form followed by a summary of the examples or problems associated with each question. Finally, a number of verbatim responses from our members are included, which illustrate the problems associated with each question.

In the last year how many wills have you come across with drafting errors?



Basic Mistakes

Have you come across will writers whose wills are invalid due to basic mistakes in the will?



Problems outlined included:

- Problems with witnesses
- Basic typing errors
- Trust errors
- The use of standard clauses
- Lack of legal knowledge by will writers

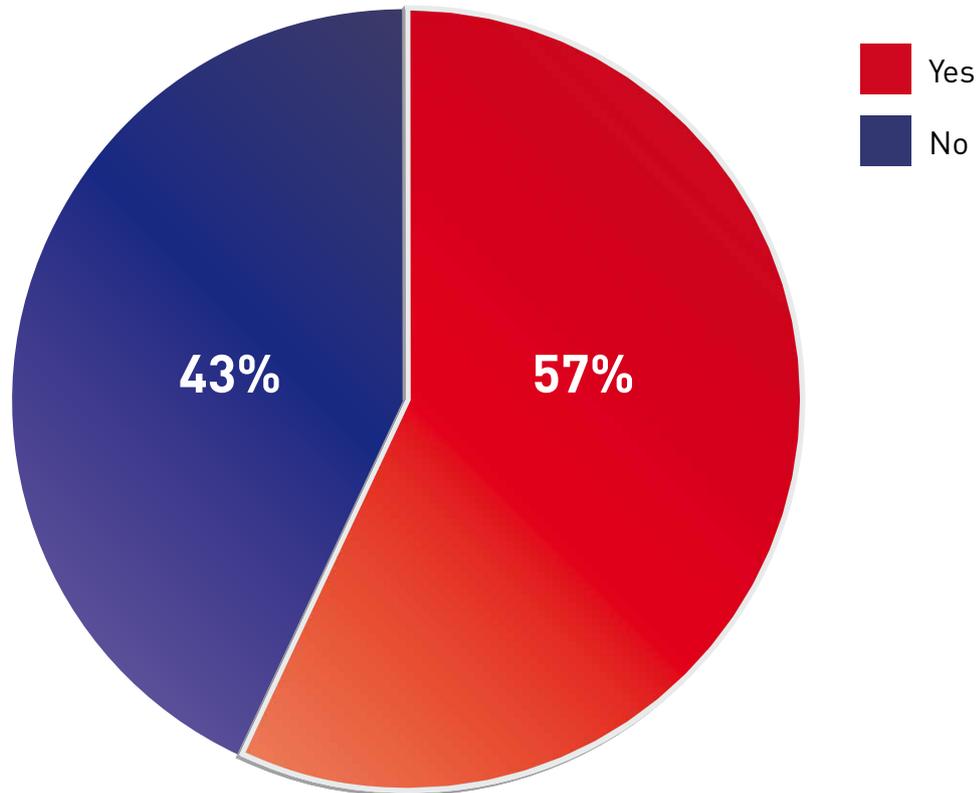
- **Problems with witnesses:** Wills have been signed by only one witness when two are required; witnesses have not been present when signing wills; practitioners have failed to ensure witnesses sign at the same time; witnesses have signed but provided no dates at all; instances have occurred where beneficiaries and their spouses have witnessed wills.
- **Basic typing errors:** Basic errors have been made in the listing of names and address details included in the will; errors have been encountered in page numbering; instances have occurred where names have been completely missed out; wills have been seen with pages missing; other instances where the principal beneficiary was a completely incorrect person unknown to the testator (cut and paste errors); amendments have been made to wills without being initialled by the testator or witnesses.
- **Trust errors:** Errors have been made in designing trusts such that trusts will not be valid when required; complicated trusts have been used within wills in situations where they are entirely unnecessary.
- **The use of standard clauses:** Inappropriate standard clauses are being used without thought and the end product is often worse than intestacy; attestation clauses (clauses wherein the witnesses certify that the will has been executed before them) have been found to have incorrect wording; wills are being drafted in a standard format with standard precedents with nothing particular to the clients, often resulting in the clients not being able to understand them; wills are being drafted where clients never see anyone face-to-face, with everything being done through the post.
- **Lack of legal knowledge by will writers:** Wills have been found containing muddled wording caused by the cobbling together of incompatible precedents; wills have been written with a lack of understanding of the law and taxation; wills have been written that fail to deal with the residuary estate leading to partial intestacy; wills have been found that were written by the main beneficiary causing issues of undue influence; wills have been drafted shortly before a marriage without any clause stating in contemplation of the marriage.

“In one instance the will was not signed, however, after the Testators’ death; the family were told by the will writer that her signature on their terms and conditions would suffice. Needless to say, the will was invalid.”

Dawn Plant, Pinkney Grunwells Lawyers LLP

Will Writers Making Untrue Claims

Have you come across will writers making untrue claims?



Our survey found untrue claims were being made about:

- The law regarding probate and succession
- Qualifications
- Charging
- Existing wills
- Regulation
- Care fees
- Storage
- Tax

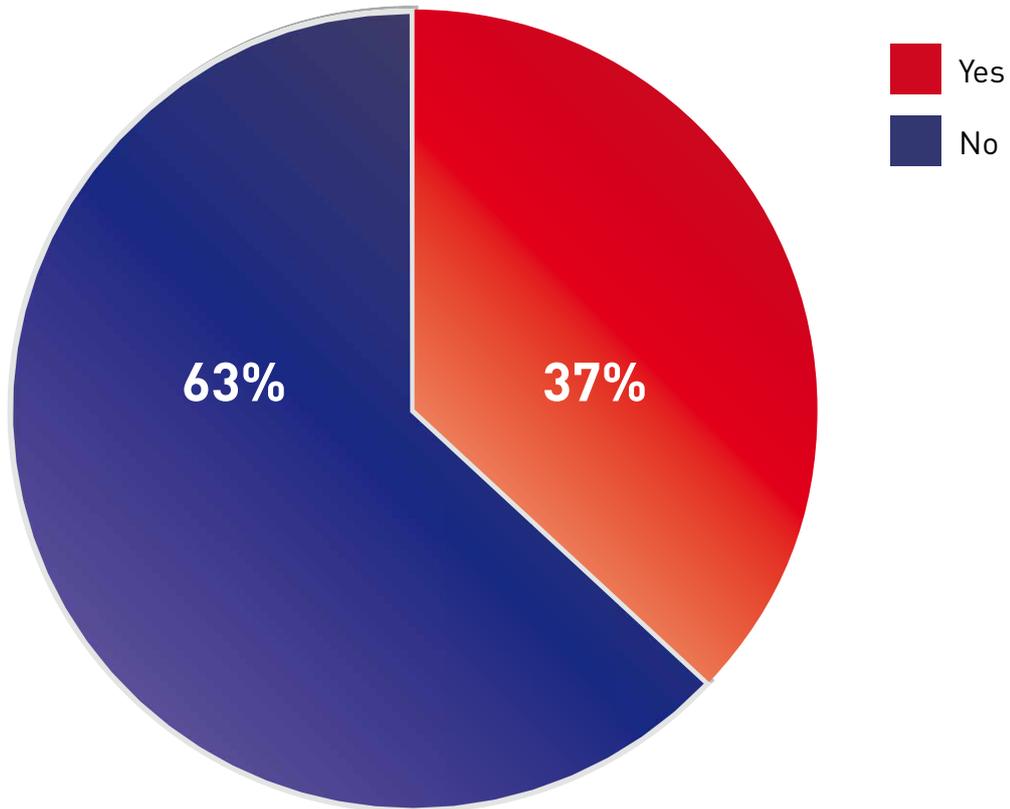
- **The law:** Limited liability will-writing companies have named themselves as being able to act as executors; will writers have implied to potential clients that without a will their estate will go to the Crown, omitting to mention the workings of the intestacy rules; will writers have informed beneficiaries that they cannot be appointed executors; practitioners have told people that wills are invalid unless each page is numbered and signed; clients have been told it is not possible to treat their children unequally; will writers have stopped people in the street to say that the law has now changed so that one could now be an executor and a beneficiary; practitioners have claimed that they [the will writing practitioners] had to be named as executor and that the client had to store their will with them and be subjected to ongoing storage costs.
- **Qualifications:** Will writers have represented themselves as solicitors on the basis that they have a law degree and are employed part-time by a firm of solicitors; clients have used will writers mistakenly, thinking they were qualified solicitors because the company name contains words such as 'Legal' or 'Law'.
- **Charging:** Will-writing company representatives reportedly have made untrue (and unrealistic) claims as to the cost and the necessity of lengthy clauses; will writers have claimed to be cheaper than solicitors and easier to deal with, for example suggesting to clients that solicitors' charges for dealing with estates would be '15 per cent'; clients have been told that if they paid GBP2,500 up-front, when the will came to be proved it would save costs as they would perform probate without further charge.
- **Existing wills:** Practitioners have told people that their existing wills are out of date and need rewriting when they are, in reality, fine.
- **Regulation:** Some will writers are falsely claiming that they are regulated, insured and competent when they have taken no recognised examination.
- **Care fees:** Practitioners have claimed falsely that a transfer of assets would safeguard their assets from care fees; some companies have claimed that by making a will their client will avoid care fees, with some even offering an impossible '100 per cent guarantee' of this.
- **Storage:** Clients have been told that their wills are being stored securely when they are being stored in attics and sheds; some practitioners are charging annually for the storage of wills, which are actually held by a third party free of charge.
- **Tax:** Practitioners are falsely claiming that wills as drafted would preclude any liability to inheritance tax (IHT).

"I recently encountered a non-solicitor will-writing company with a stand in a Milton Keynes shopping centre telling mums with pushchairs that their children will be taken into care if they don't make a will."

Karen Shakespeare, Shoosmiths

Incompetence Leading to Higher Tax Bills

Have you come across cases where incompetence has lead to significant tax bills?



Problems outlined included:

- Failure to understand tax implications
- Basic errors
- Trust errors

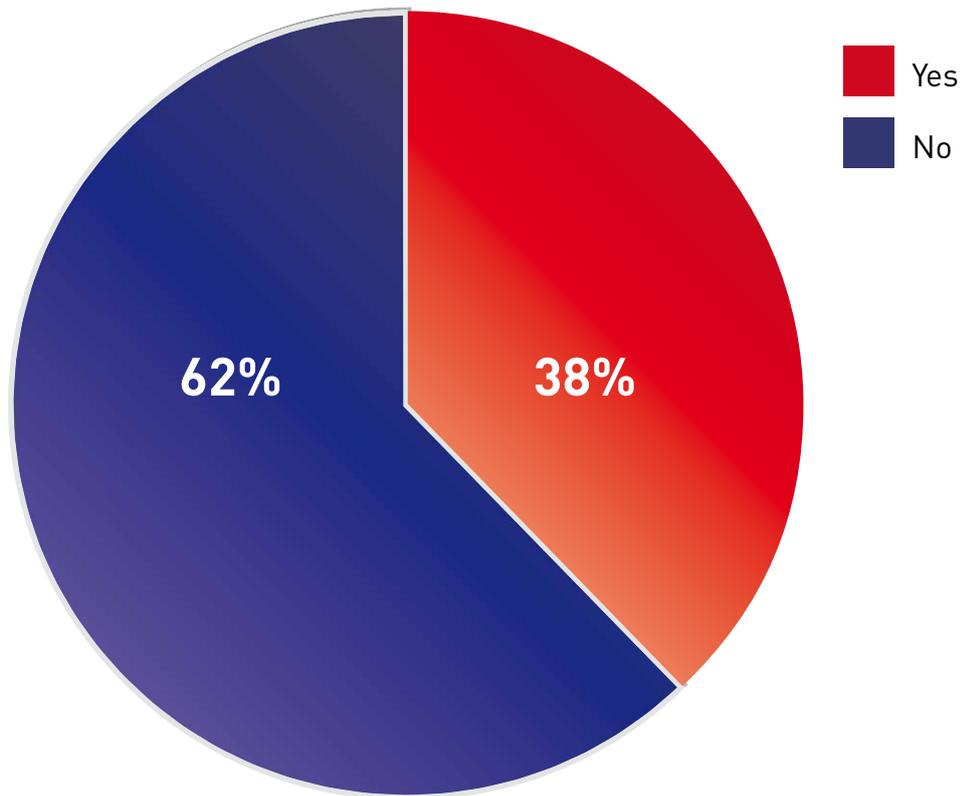
- **Failure to understand tax implications:** Tax mitigation strategies have been used inappropriately or not at all, e.g. nil-rate band (NRB) clauses drafted in a way that meant they did not take effect at the appropriate time, trusts used 'to avoid care home fees' for clients who were not eligible for support under the Charges for Residential Accommodation Guidelines (CRAG), and charitable bequests drafted in such a way that causes litigation between executors and charities over whether the estate was intended to be split equally before or after tax.
- **Basic errors:** Some will writers have not asked for an outline of the estate before drafting a will and therefore have been unable to assess whether the client needed alternative tax or estate-planning advice. In one case, the estate passed to the intended beneficiary's son, incurring additional tax in the process.
- **Trust errors:** The software used by one online company has a major glitch regarding Protective Property trusts, which will cause hundreds of wills to fail; some will writers have made no provision for long-term care protection for elderly and vulnerable clients; life interests have been created unnecessarily; no account has been taken of provisions in the Finance Acts; attempts have been made to place assets already in a trust wrapper into a trust.

"I was consulted by a married couple who own assets in excess of GBP30 million in the UK and other jurisdictions. They had had wills made for them by a will writer with no professional qualifications. They said that he had given them absolutely no tax advice and that he had not even explained to them the effect of the wills in the UK. The wills that he had prepared were totally unsuitable and would have led to significant tax liabilities, both IHT and taxes in other countries. The clients said that the will writer had never advised them that they should seek tax and succession advice in the other countries where they have assets and that they had therefore assumed that the wills would be effective in all the other countries where they have assets. As the clients were alive, the situation could be remedied, but if I had been consulted after one of them had died, the situation could have been disastrous."

Cliona O'Tuama, private client solicitor, London

Inappropriate Relationships with Recommended Companies

Have you come across will writers who have an inappropriate relationship with another company they recommend?



Problems outlined included:

- Inflated fees
- Free wills offered on proviso of subsequent work
- Will writers refusing to renounce as executors
- Self-appointed trustees
- Dubious legacies
- Breaking the self-dealing rule

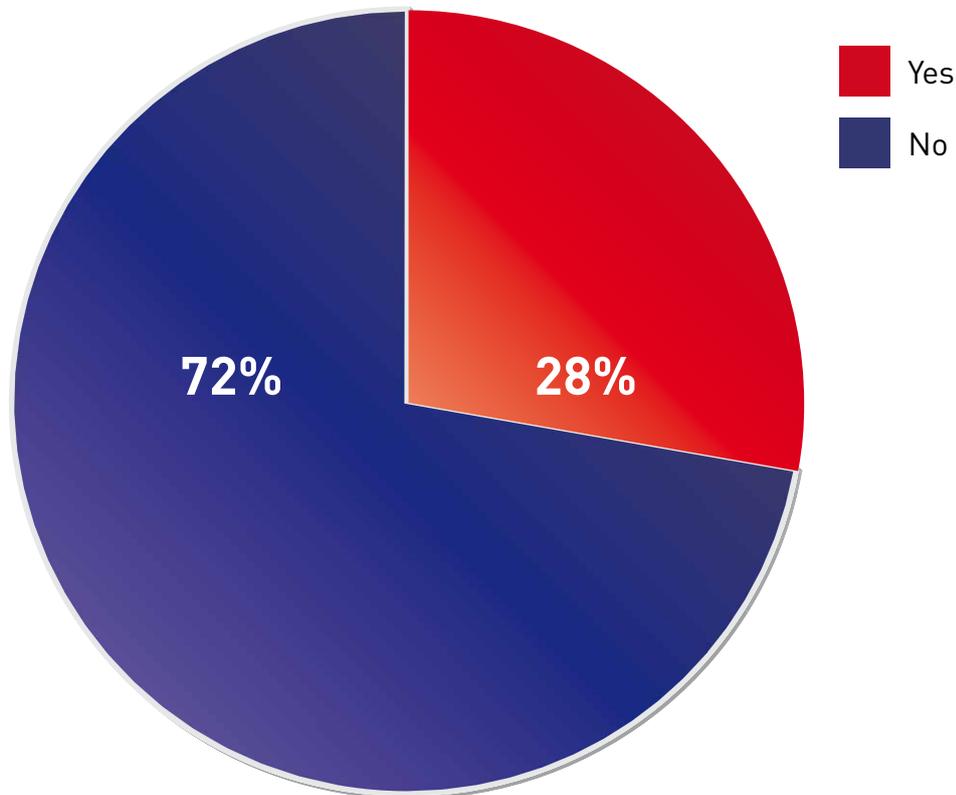
- **Inflated fees:** Work has been referred from England to trust companies in Scotland when the client thinks they are using a local company; will-writing companies have insisted that trust companies they are tied to are made executors at overstated cost.
- **Free wills offered on proviso of subsequent work:** Some IFAs have set up what is described as a complimentary will-writing service to try and keep the investments with the IFA, and have subsequently scrapped the will-writing business due to reoccurring problems with the wills that had been written.
- **Will writers refusing to renounce as executors:** Will writers have made enormously complex wills, appointed themselves as executors and trustees and have refused to renounce after the death when asked to, resulting in significant costs to the estate.
- **Self-appointed trustees:** Will writers commonly take a power of attorney to take out grant of probate, which could leave a vulnerable person open to exploitation; will-writing companies have appointed company owners as trustees of life interest trusts of property (or asset preservation trusts); clients have been forced into transferring their property (sole proprietor) into the joint names of themselves and a trust company as tenants in common – writing a will incorporating a trust whereby the company in question was appointed as trustee. Thereafter the company refused to cooperate in the transfer back to the client and was forced to resign by the invoking of appropriate statutory trusts.
- **Dubious legacies:** Will writers have been recommended to clients by IFAs who are including clauses in the clients' wills leaving 1 per cent of the estates to the IFA; there have been instances of relatives drawing up wills providing legacies to themselves and others that clients did not instruct.
- **Breaking the self-dealing rule:** Executors have been persuaded by will writers to employ a connected company for advice with the companies then working together so that both the adviser and the executor personally benefit, to the detriment of the beneficiaries and in breach of the self dealing rule and the executor's fiduciary duty.

“Where will writers are IFAs, they tend to work in tandem with a bank/building society/ investment provider to persuade clients to make a will and ‘tax planning investments’ at the same time.”

Sian Morris, Jeffreys & Powell

Capacity Issues

Have you come across will writers who have arranged for someone to sign a power of attorney or will when they did not have capacity?



Many issues with respect to capacity were outlined including:

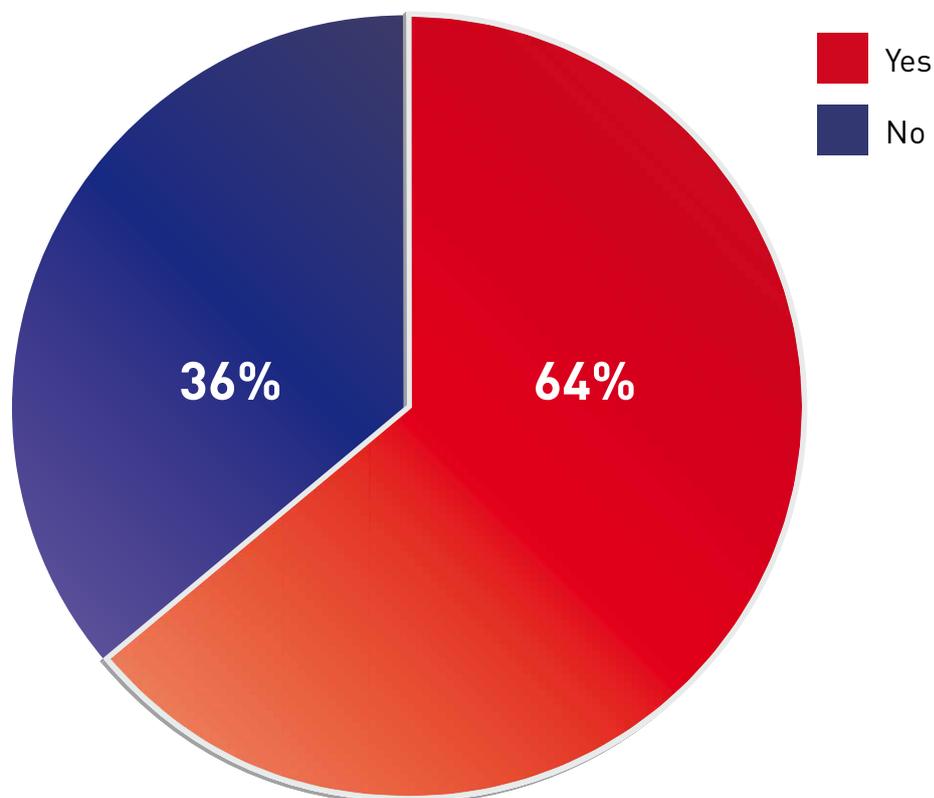
- Capacity issues:** Clients have been asked to sign wills while vulnerable in hospital, leading to family breakdown and huge emotional and physical distress for clients; wills have been witnessed by will writers whose clients are severely affected by Parkinson's and totally lacking capacity; one company sent out letters after the commencement of the *Mental Capacity Act 2005* stating that they were prepared to still draft Enduring Powers of Attorney (EPAs) and backdate them, despite the Act forbidding new EPAs from being written; a will writer who had a client who had suffered a stroke and a medical report concluded he had no capacity had a will signed at the direction of the testator; a will writer was told the client had Alzheimer's but then suggested that the attorneys should transfer all his assets to themselves since he did not have capacity to make a will; a practitioner asked for a copy of their new client's attendance note but the will writers said it was not their practice to make one – they had a tick box instruction sheet for their representatives to use.

"I have a client who was a patient under the Court of Protection and for whom we acted as Receiver. He was under section in hospital and had contacted a will writer who had been out to see him and would have made a will had it not been for the fact that my client did not send him the cheque up-front. When I contacted him, he had given no thought to the question of capacity – despite seeing him in hospital – and hadn't realised that the ward was a psychiatric one."

Victoria Motley, Forbes Solicitors

Company Ceases Business and Disappears with Clients' Wills

Have you come across cases where wills have been written for families by a company that had gone out of business disappearing with their wills?



Examples outlined included:

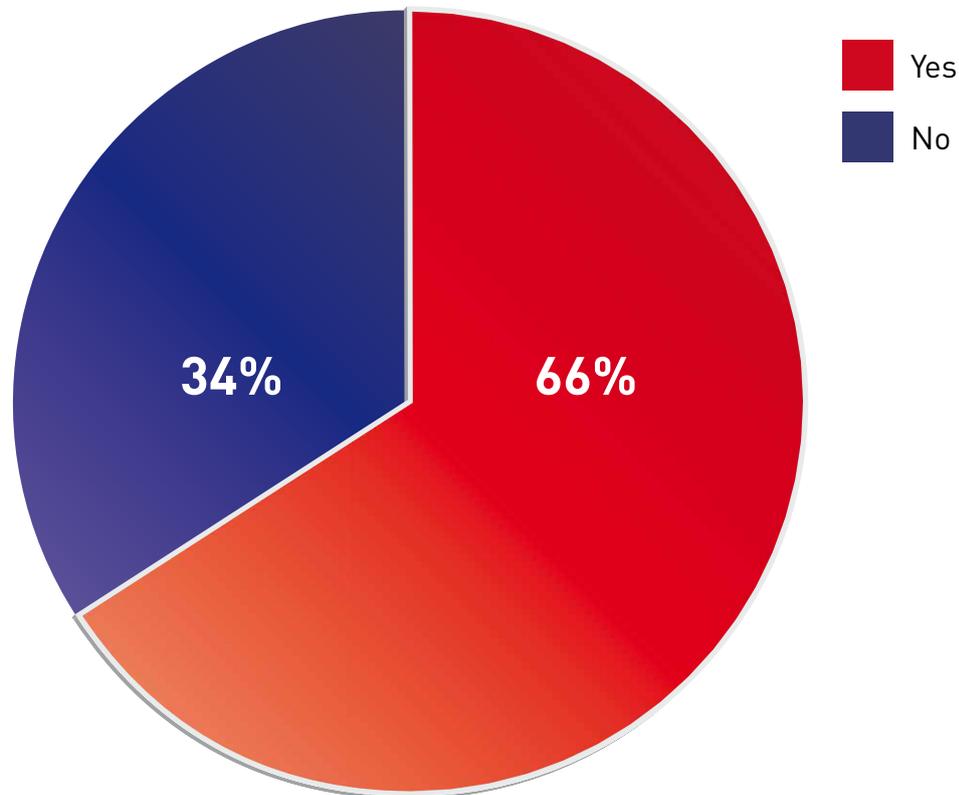
- **Non-notification of changes of address:** Owners of will-writing firms have moved overseas, leaving no forwarding address for service; in one instance a will writer moved but did not tell the client, who cancelled their direct debit after receiving no response from them resulting in the will writer destroying the client's wills and EPA.
- **Company goes out of business and wills subsequently disappear:** Will-writing firms have ceased trading and are uncontactable, and where their directors had been appointed executors and trustees, fresh wills needed to be prepared for the clients; practitioners have attempted to contact will-writing companies to obtain original wills but they have disappeared without a trace.
- **Companies setting-up under new trading names:** Will writers have ceased trading and then set up under another name and started to trade again.
- **Inadequate storage of wills:** A will writer 'stored' wills in his loft, and then moved house but left the wills there; original wills have been discovered in a garage; a practitioner has encountered a company that said it was unreasonable to request an original will that had been prepared three years ago as it was too long ago; a wills bank was found in a garden shed.

"The wills had been dumped in a barn in Essex and it was not clear whether the deceased had ever signed the will."

Susan England, Glazer Delmar Solicitors

Stated Fees Increase Due to Hidden Charges

Have you come across cases where a will writer states a fee for writing a will but where it charges more as a result of hidden charges being applied?



Examples outlined included:

- **Review charges:** Companies have levied an annual review charge when the reviews are only carried out every few years.
- **Storage administration fees:** Clients have been unaware that solicitors generally do not charge an administration fee for holding a will; will-drafting companies have gone into administration and their wills have then passed to another company that charges further fees for their release of the wills.
- **Adding unnecessary clauses:** Will-writing companies have made wills much lengthier and more complicated than is necessary in an effort to justify extra charges.
- **Pressure door-to-door sales tactics:** An instance where a will was advertised for GBP23 but ended up costing several hundred pounds and the will writer refused to leave the client's house without payment, demanding the clients pay GBP800 after the first meeting by credit card before the will writer would leave and then the drafts sent were not as per their instructions.

"Will-writing company representatives are the modern-day 'foot-in-the-door' salesmen."

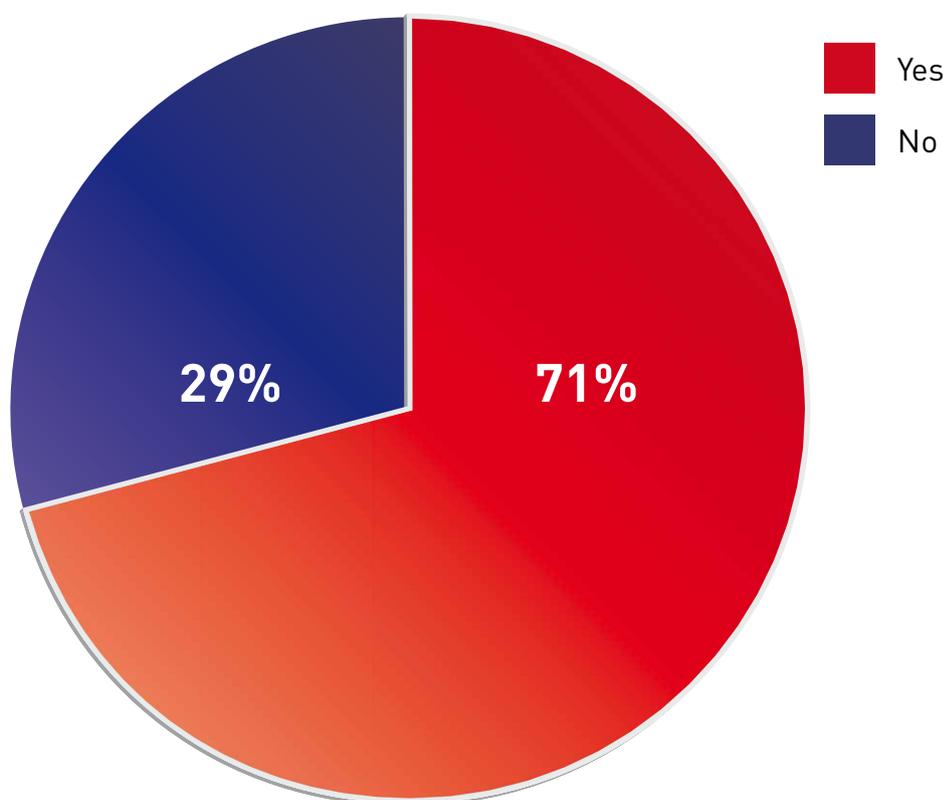
Eric Paul Gardner, Marsden Rawsthorn LLP

"The 'hidden charge' was their fee for subsequently administering the estate, having got themselves appointed as executors. Their fee was cGBP20,000 for a simple GBP100,000 estate, where I would not have expected fees from a solicitor to exceed GBP5,000."

Stephen Morgan, Solicitor, British Heart Foundation

Charging for Will Storage Fees

Have you come across clients who have faced an annual charge by will writers for storing wills?



Examples outlined included:

- **Claims of a National Will Register:** Clients have been charged GBP20-50 per year for will storage and some have even been told that there is a national will register.
- **Storage fees charged for invalid wills:** Clients have been charged by direct debit for unsigned wills.

"I charge an annual fee to my clients to store their wills. It is a good continuing income. It is a modest amount – usually GBP20 per annum and for that they get their wills and LPAs stored in a fireproof and waterproof environment and fully insured. More lawyers should do this! I have worked in law firms where wills are stored in a filing cabinet, disorderly and often resulting in wills being mislaid, lost, etc, and also unregistered title deeds with the same problem. I find my clients prefer to have the comfort of knowing that if I'm storing their important docs they are guaranteed safe and for that they will pay a fee to me in the same way as they will to their high-street bank. I think there is nothing wrong with this at all."

Elaine Theaker, Advantage Wills Limited

Legislative Developments and the Problems Facing Consumers in Estate Administration

New regulations to protect consumers in the drawing up of wills were tabled by the Scottish government in early 2010 and enacted in October of the same year.

The policy, which came in the form of amendments to the *Legal Services Bill (Scotland)*, aims to address concerns that some non-lawyer will-writers may be exploiting a lack of regulation.

The Scottish government has estimated that there are about 100 non-lawyer will-writers operating as businesses in Scotland.

Under the previous legislation, as is still the case in England and Wales, non-lawyer will-writers were not required to have professional indemnity insurance or be associated with a professional body that would exercise disciplinary powers.

The new regulatory framework allows bodies to apply to Scottish Ministers to regulate non-lawyer professional will writers. It provides that any prospective regulator must create a regulatory scheme that includes provisions for: training; a code of practice; professional indemnity arrangements; rules about complaints; and sanctions.

The updated legislation continues to allow non-lawyers to provide a will-writing service, but at the same time protects consumers by providing a set of regulatory rules, enforcement measures and sanctions that apply to such non-lawyers. It does not regulate individuals preparing their own will, or other persons providing a free advice service.

STEP Scotland made a submission to the Scottish government in support of the regulation of will writers, but urging the regulation of estate administration, which is the part of the process during which much of the large-scale theft from estates occurs. STEP's Response to the Scottish Government Consultation on the regulation of non-lawyer will writers, February 2010 included the following excerpt:

"There are concerns in the professional advisory community and the charity world that fraud is a significant problem in the administration of estates, and that this activity should also be regulated. STEP commissioned a report on this matter in 2005 and conducted a survey of its UK members⁵. Nearly half of

its members had come across suspected cases of fraud or theft from an estate. Moreover, the RNIB estimated that in the UK in 2005, estate fraud amounted to between £100-150 million. Anecdotal experience of the police approach to estate fraud is that the police do not have the expertise to investigate such claims, and estate fraud is difficult to detect. Accordingly the Scottish Executive may wish to consider extending regulation to the provision of estate administration services."

Alison Paul, Chair of STEP Scotland, was quoted in *The Scotsman*, 30 August 2010 as saying:

"Unfortunately, the large majority of consumer horror stories regarding wills ... are not about errors in the drafting. Instead they result from crooked or incompetent handling of the estate after the person's death. That activity is quite separate from the will-writing and is often done by someone other than the person who originally drafted the will."

"As long as estate administration can be carried out under the radar by unregulated people or firms, this sort of fraud and/or bungling will be almost impossible to prevent, and may often pass undetected."

In England and Wales, the Legal Services Board (LSB) and the Office of Fair Trading (OFT) are currently considering the possibility of regulating will-writing services.

A stakeholder workshop, attended by STEP, was held in July 2010, during which it was accepted that the lack of regulation could present a risk for consumers.

Following the workshop, the LSB's Consumer Panel agreed to commission research into the type and scale of consumer detriment arising from current practice in the unregulated will-writing market.

The research will investigate will writing from a consumers' point of view and advise the LSB on whether the existing regulatory framework is meeting consumer needs and providing them with adequate protection.

The research is expected to include mystery shopping, structured interviews with consumers and interviews with providers.

STEP will be submitting this report to the LSB's Consumer Panel as a contribution to their research.

⁵Probate Fraud', Arthur Mayson TEP, STEP, 2005.

STEP's View

STEP believes that everyone should be encouraged to have a will. A will helps ensure that someone's estate will be used as they would wish after their death. Passing-on an estate is also probably the biggest financial transaction anyone will ever plan for. Those with relatively simple affairs can often draft a usable will themselves with the help of some research. Those with more complex affairs, however, are usually best advised to seek professional advice. The cost of such advice will normally be very modest relative to the potential cost and family distress that can be caused if, for example, a badly drafted will fails to do what was intended or is contested.

Our survey evidence suggests that wills containing basic drafting errors are rife and that incompetence and dishonesty in the will-writing industry is causing many families unnecessary pain and stress. In the currently unregulated marketplace in England and Wales, professional will writers need no technical qualifications, negligence insurance or continuity arrangements to protect clients should they cease trading for whatever reason. There is also no requirement for will writers to be subject to any professional body's code of conduct or disciplinary proceedings.

The trend in other jurisdictions gives evidence of the dangers of failing to act pre-emptively to tackle potential problems in this area. Inevitably, however, problems with wills drafted recently will often not surface for some considerable time. It is therefore notable that STEP members in the USA report a dramatic rise in recent years in the number of cases involving disputed wills. This rise is widely attributed to a period of rapid expansion in commercial will-writing services using staff with limited qualifications in the US market 20 or so years ago.

STEP believes that both those who write wills and those who administer estates professionally should be regulated to ensure minimum standards of competence and behaviour and to give the public protection in form of negligence insurance and continuity arrangements.

In the absence of regulation, the best way for consumers to ensure they are dealing with an adequately qualified professional who is an expert in the field of trusts and estates is to adopt the services of a STEP member. One can identify if their adviser is a full STEP member by the use of the designation TEP (Trust and Estate Practitioner) after their name. TEPs are the most experienced and senior practitioners in the field of trusts and estates.

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STEP periodically publishes reports and policy briefings on subjects of interest to our membership. These can be found on the STEP website at www.step.org/publications/reports.aspx

Full members of STEP are the most experienced and senior practitioners in the field of trusts and estates. To search for a STEP member visit www.step.org/stepmembersearch

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