

RESPONSE TO LSB CONSULTATION -
ENHANCING CONSUMER
PROTECTION, REDUCING
REGULATORY RESTRICTIONS: WILL-
WRITING, PROBATE & ESTATE
ADMINISTRATION ACTIVITIES

LAW SKILLS

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Comments by Gill Steel of LawSkills Ltd

Reservation of Will-writing, probate and estate administration activities

Response to LSB consultation - Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate & estate administration activities

COMMENTS BY GILL STEEL OF LAWSKILLS LTD

ABOUT THE AUTHOR

Gill Steel and LawSkills Ltd

Gill Steel qualified as a solicitor in 1983 via a law degree at Sheffield University and the College of Law at Chester. From the start she specialised in Wills, Probate, Trusts and Tax. She became a partner in a three partner firm in 1986 and following the merger of her firm with another firm in 1990 became head of the Private Client Department and Training Partner in a 17 partner firm. In the latter role she undertook the design and delivery of the appraisal and training system within the firm to support the new business plan which resulted in a culture shift within the firm. This encouraged a greater interest for Gill in management and service delivery; learning and development and leadership in the legal world.

In 1996 Gill set up in business on her own account advising other law firms and providing training. In 1998 she graduated from Nottingham Trent University with an MBA in Legal Practice Management. For many years Gill sat on the Law Society's Wills & Equity committee and was on the inaugural committee of the Private Client Section. She currently sits on STEP's UK Practice Committee; edits Tolley's IHT Guidance and the Private Client Yearbook and has written the Trust Practitioner's Handbook (now in its 3rd Edition) for Law Society Publishing.

In 2000 LawSkills Ltd was formed. It is a niche consultancy and training company which helps practitioners manage and develop their skills and knowledge in the areas of Wills, Probate, Trusts and Tax. It offers an informative website; all kinds of specialist training and is in the process of expanding services to include an e-commerce solution for learning and development.

QUESTIONS ARISING FROM THE PROVISIONAL REPORT

Question 1 – Do you agree with the scope of the proposed reserved will writing activities and estate administration activities? Can the scenarios provided in Annex 1 of the Provisional Report be caught within the scope of the proposed activities as described?

The scope of the proposed reserved legal activities tries to ring-fence tightly what are said to be the essence of Will-writing or estate administration services but in doing so reveals insufficient understanding of the content of either and creates uncertainty.

For example, Inheritance tax (IHT) advice is seen as separate from Will-writing. Whilst this might be true of many Wills it is not true of others. Equally, solicitors are supposed to explain the IHT effect of any Will they draft so why shouldn't other providers of these services? How would a consumer know which type of Will-writer they needed until contacting someone? How will they be able to distinguish between the services offered at this initial stage? Since apparently discussion and recommendation as to what should be contained in the Will are not within the scope of the reservation the boundaries are difficult to fathom and look like a way of enabling accountants to provide ancillary services without being regulated.

Equally, in relation to estate administration the focus is on the handling of money and not the preparation of estate accounts or the collecting of information to enable a Grant to be obtained. Whilst this is admirable to protect the mis-use of client's money it is again missing the point that if two persons are appointed as executors and simply vest the assets in themselves as trustees then suddenly there are no regulatory constraints upon them as to the handling of the trust fund because nowhere does the reference to trusts appear in the report.

Also, what about the costs to the bereaved of paying for the collection of details only to have to then pay in addition a regulated person to actually collect those assets and pay liabilities, which will inevitably result in extra costs.

Scenario 1 - Giving advice about what should be in a Will or trust could prove to be wrong or inadequate so why is it seen as not ancillary to the core activities of creating a Will or administering an estate. If a consumer has paid for this advice and subsequently, after his period of reflection, prepares his own Will incorrectly, based on the advice he received, why should he not be protected? If he instructs someone else to prepare the Will for him and they spot the mistake in the advice he received previously who is he to believe – the regulated person or the unregulated person? What about the wasted costs?

Scenario 5 – This is similar to scenario 1 – How does an accountant know what to include in a Will if he has not been trained in the preparation of Wills and trusts? I have known several cases where a client's accountant has recommended a particular type of trust be included in the client's Will and working with the client's solicitor shared this advice on which the client wishes to act until the solicitor has pointed out the practicalities involved and the advantages and disadvantages. Again, it seems wrong to exclude the protection for the consumer from one professional's advice.

Scenario 9 – What is the difference between this scenario and the testator leaving a legacy for the personal representative? Could not the PR who is left a legacy but is otherwise 'unpaid' for acting in the estate be said to be being remunerated for his services?

If we approach this from the consumer's perspective a different approach to the reservation of these legal services might result. Who is the consumer of Will-writing, estate administration and probate work? For example, it could include:

- The new family anxious to provide for their child/children?
- The Spinster or bachelor who wants to provide for friends and charities not the Chancellor
- The business man wishing to organise the succession to his business and provide for his family
- The farmer
- The newly retired spreading themselves between visiting their holiday home and looking after their grandchildren
- The elderly person who needs holistic advice including making a Will
- The bereaved:
 - Spouse with or without..
 - Son or daughter or issue
 - Charitable recipient
 - Carers
 - Friends
 - Distant relatives

How each of these many and varied types of consumers access legal services will depend on their existing professional connections; their time available and its cost, their pressure of work or accessibility; their use of the internet; their networks of family and friends; their own skills and many other ways.

As a result a consumer of any type will want reassurance that whoever it finds who offers Will-writing; estate administration and probate services will be regulated to a similar standard for those services; provide advice of an equal proficiency and service their needs in an appropriate way for them.

Certain brands or professional qualifications evoke some of the same consumer feelings of confidence such as a solicitor for older people who would traditionally turn to a solicitor for these types of work; an accountant because some clients in business or with investments needing tax returns completing will have more regular contact with their accountant and trust them and banks as surveys show that young people would regard them as their first port of call for things such as professional services connected to money etc.

Therefore, requiring targeted and proportionate regulation for Will-writing, estate administration and probate services means it is necessary to look first at the needs of the potential consumers of such legal services and consider what knowledge, skills and behaviour the providers of these services should have to properly service them and link individual knowledge, skills and behaviour to that present in an entity.

The SRA has moved to regulating the entity, be it a traditional law firm or the new ABS, so this regulator is in line with the LSB's desired thinking already. STEP, by contrast has focused on individual qualifications and provides no entity regulation because most members (but not all) are regulated professionals already within a wide range of trusts and estate professions.

Whilst the LSB is understood not to want the traditional brands or professional qualifications to hold sway and wishes to encourage new entrants to the market to thrive and provide innovation in the delivery of these services, there is still the need to balance the actual personal knowledge, skills and behaviour of the individuals providing the service against the regulation of the entity.

It seems to me that if the entity is to be the regulated provider of Will-writing, estate administration and probate services it needs to be accredited in some universal way to undertake this work and provide safe services to the consumer – a bit like the Corgi standard for gas installation providers! This would need a badge which was universally recognised and heavily promoted to reach all consumers. It would be a guarantee of professional standards as to how the entity was managed and would hold the owners of that entity to account to always be compliant or lose the badge.

In some ways the existing professions have offered this but not in specific knowledge, skills and behaviour in relation to particular legal services and certainly as far as solicitors are concerned not in a particular way, save in so far as the handling of client's money and professional indemnity insurance is concerned.

If our consumer seeks help to make a Will how do they approach it? They ask their network or the internet to recommend or find them the sort of provider which meets their personal needs for accessibility – e.g. online at night on a Sunday or someone willing to call to see them at their home at noon on a Tuesday. This is not a search for technical knowledge or skills but at this stage about convenience.

They make contact with the entity and depending on whether they have used a similar or the same service previously they may wish to know what is involved and what the service offered will cost – at this stage this requires generic knowledge about the process and the skill of selling the service in a suitable package to encourage purchase. It may involve some questioning to ascertain the right price to offer depending on the circumstances of the consumer – mirror Wills rather than a single Will; whether other services may be needed (like a power of attorney for the older consumer) and whether it may involve complication (like the business owner or farmer; the foreign property owner or the person needing a range of help like the older or more vulnerable client). Who decides whether the entity should offer that sort of questioning in order to quote an appropriate cost? This will at this stage be the entity who will take risk management decisions as to how it decides on profit margin and the nature of the cases taken on. It will not be the consumer who is not necessarily aware of the risks to them of choosing only on price.

A selection is made by the consumer and the process begins but what if the entity chosen has only one type of practitioner who is able to undertake the service – whether that is via a sole practitioner or a multi-purpose conglomerate? The price has been set, the service chosen and at that stage if the entity is badged to provide the service then the consumer will take it as read that the person is able to undertake their case, whatever is involved.

The young parents above are seeking Wills on the basis of providing for their children. It is quite likely that they will use their own network of contacts which may include a solicitor, an accountant, IFA or entrepreneur offering Will-writing services particularly if they were at college with someone who entered these fields but otherwise they may turn to their bank or scour the internet.

Depending on the size of their estate it is highly likely that tax will not be the main issue but rather the appointment of guardians (something which is highly sensitive and can take the consumers a long time to decide unless appropriate advice from a person who is aware of the difficulties facing bereaved children is available) and the creation of an appropriate trust to manage the money on the death of the second parent. A Will has to work from the moment it is written and assumes a type of disaster planning approach i.e. it will still work in that unlikely event e.g. the catastrophic loss of both parents in a car accident.

Under the Report there is mention of the need to regulate only the core services and not trusts and yet in a case such as this it would be necessary to know the difference between bare trusts, bereaved minor trusts, aged 18-25 trusts and discretionary trusts and to be able to explain them to the young consumers to enable them to choose which is most appropriate for them and then to draft it accordingly. In my opinion, it should also be necessary to explain in brief terms the tax consequences of the chosen trust. A person within the entity and not 'the entity' will have to have the relevant knowledge, skills and behaviour to provide all this advice or else put the entity at risk of regulatory breach.

Would each of the likely candidates for selection by the couple to prepare their Wills be in a position to offer the correct mix of knowledge, skills and behaviour to provide an appropriate set of Wills? Only if the person has met certain educational standards and has maintained those standards plus has some experience and can explain the concepts in a way which enables the consumers to make appropriate choices; or the IT service is sophisticated enough to provide clear guidance and answer technical queries or provides a mixture of on-line convenience, accurate technical content and the prospect of personal advice to resolve any confusion or uncertainty.

If the large conglomerate offers a sophisticated IT solution how does it cover the soft questions like 'who should I choose as guardian, my brother and his wife who are local but childless; or my husband's sister who lives many miles away and is busy with her brood of children?' In the one-person firm without an on-line presence how will all the regulatory requirements be met and the technical knowledge, skills and behaviour which attracted the person to the legal service in the first place, be kept up to date, for example, has the person realised the full impact of the changes which occurred to trusts in 2006 and will they be talking about the correct choices with the couple?

What about the businessman who regularly meets with his accountant? He will choose as the entity to prepare his Will one in which he has faith - the accountant who has discussed succession planning to his business, estate planning, eligibility for business property relief (BPR) from Inheritance Tax (IHT) and the need to make a Will will probably be his first choice. However, if the accountancy firm is used to providing audit services and preparing the annual corporate and personal tax returns but not used to dealing with estate administration how familiar will it be with the case law and Her Majesty's Revenue & Custom's (HMRC) policy towards the giving of BPR? If the accountancy firm decides to offer a Will-writing and estate administration service how will it deal with the inherent problems of conflict between the desires and concerns of their businessman client and the objectives of his wife when it comes to dealing with their respective Wills? A truly IHT saving Will may not be the most beneficial family Will and may result in the surviving spouse being forced to make a claim under the Inheritance (Provision for Family & Dependents) Act 1975. In my experience of providing training to accountants there is little recognition of such technical legal points in the drafting of Wills and the risks in the administration of estates nor in the niceties of when there is likely to be a conflict of interest.

Whilst the LSB may say this is something which the entity has to take on board in deciding to offer these services in reality it is the consumer who suffers if the entity believes it can offer the service and satisfy the regulator that its policies and management is satisfactory to be appropriately badged but falls down on the practical implementation of these services unless the individuals involved in designing the service and delivering the service are fully aware of the implications of what is required.

The same is equally true of a firm of solicitors who do not usually deal with business clients and who might not focus adequately on the pension needs, the income needs of the surviving spouse following the death of the business person, the tax treatment of the business now and on death etc.

Similarly, what about the bereaved seeking estate administration services? A Will containing a trust will need appropriate attention as to whether that trust is still needed and whether it can be brought to an end or whether it should continue. If it is to continue it needs to be set up correctly and subsequently be administered. Not all those involved in Will-writing undertake estate administration and similarly not all those who provide probate and estate administration services are familiar with trust administration.

It seems strange to regulate those handling estate proceeds but then to abandon those same proceeds once they are transferred to trustees (who are probably the same people as the executors) so that the regulatory protection ends when there remains the opportunity for mis-management and worse of those funds for many years to come, in the hands of the unregulated trustees.

In advising law firms I am seeing several cases where on the death of the first spouse to die there was a trust contained in the Will but the family administered the estate without professional help and ignored the trust. Now dealing with matters on the second death additional complication arises in the administration; potentially increased IHT charges and other taxes; possible penalties for tax paid late and other sanctions. Of course a family is entitled to undertake estate administration themselves but encouraging them to consider all cases as straight forward is overlooking the reality of the situation. I am sure HMRC will be able to advise further on the number of cases they see where trusts are incorrectly treated.

Finally, to make the point about the dangers of ring-fencing these legal services too tightly, what are the needs of the most significant group of consumers of these services, the older person who has a range of needs, which may not be apparent to them but which are desirable and even necessary? The older person who recognises that they should make a Will and contacts a supplier may use someone they have used before, or who they are recommended to use by, for example, a family member or friends or carer. An on-line service would be unlikely and if it was accessed by someone on their behalf presents extreme difficulties – how could the capacity of the true intending testator be ascertained? How would the element of undue influence be gauged and dismissed or explored as appropriate? How would the actual verification of the identity of the intending testator be confirmed?

Once the provider has been selected how vulnerable will be the older person be to the different extremes of:

- The provider who just writes that Will without any consideration given to capacity or undue influence and certainly no thought about how this person is coping and whether they need attendance allowance or access to local services or a power of attorney to help with the management of their funds for everyday living
- The provider who is fully aware of the sales opportunities and proceeds to offer all kinds of related services like the Will, funeral plan, estate administration, Will storage and power of attorney for an ever increasing amount of upfront payment
- The provider who assesses the needs of the consumer by visiting them at home, complying with the consumer regulatory requirements of that but chooses to do this to make sure that the older person is capable, free to make the choices they do and able to cope with daily living. If not, is able to follow through with appropriate links to local services or an application to the Court of Protection

I know which provider I would want if I was an elderly person but also I appreciate that the third one could seem to be 'selling' a range of services just as much as the second one; that the second one may have all the right elements but just not on every occasion rather now and then and the first one may be already a solicitor not simply a Will-writer in so far as I agree the current job title and qualification does not automatically mean that they will be any more competent, as sadly case law has shown, because the solicitor's qualification,

although admirable (I am myself a solicitor) does not demonstrate particular specialities only experience and separate qualification would do so.

A badge for an entity would work if there were also personal levels of knowledge, skill and behaviour which were recognised to be available in the entity and maintained in the entity. Part of the entity's accreditation therefore would have to address the minimum standards of knowledge and skill available to offer a comprehensive service since no consumer could know at the time of contracting with an entity about the actual range of knowledge and skill their particular circumstances would need and no entity would be able to easily ascertain these without some interaction.

There is nothing in this position which would prevent an entity of any kind from entering the market apart from ensuring that at all times the people within the entity were able to meet the full range of knowledge and skills necessary either through different people and IT employed in or outsourced through the entity e.g. a barrister or through one person competently qualified to work unsupervised in these fields who could meet the regulatory standards of the entity.

For all this to be possible it seems to me that the LSB needs (with the help of regulators) to set the occupational standards to be met to be competent at different levels within the Will-writing, estate administration and probate dimensions. These occupational standards will range from the introductory level through the range to expert level and will be identified as being reached through qualifications which are part of the National Qualifications Framework. The occupational standards will reflect the reality of the situation not some tight ring-fenced and frankly arbitrary range envisaged by the LSB proposals.

The entity regulation will address the need to operate on a safe and secure basis for a consumer and will prevent an entity offering services for which they are not badged or accredited without severe penalties & ultimately intervention and closure.

The practical problem is how to address a perfectly managed entity who only employs entry level practitioners but is badged to offer the service as opposed to the imperfectly managed entity who only employs expert level practitioners.

One could argue that the imperfectly managed entity who employs only expert practitioners will in the end fail because of dissatisfied consumers seeking better service delivery elsewhere or poor financial management and pricing and failure through lack of profit to continue but this would overlook the risk to consumers of having bad service experiences and confusion over where their Will may be stored etc. following closure of the entity. It is therefore right to expect expert level practitioners to work within perfectly managed entities and the regulation of the entity should address that.

As far as the perfectly regulated entity which employs only entry level practitioners is concerned, it seems to me this makes the consumer very vulnerable indeed. The unsupervised entry level practitioner may take on cases which are above their skill level unwittingly and provide an inadequate service which the entity cannot spot due to the lack of expertise in the entity. Equally, the decision to refer to an outsourced expert might never be made for the same reason.

How would an entity regulator spot this kind of behaviour? By stipulating the range of knowledge, skills and behaviour required to be available within an entity, by ensuring each entity has at least one relevant level person responsible for a range of entry level practitioners, who may not need to be an expert but who the regulator deems to be of a satisfactory supervisory level with sufficient technical knowledge and skills to identify when the particular consumer's needs had to be addressed by an outsourced provider.

If the regulator could distinguish between entities which were unable to provide a full service in-house and those which need to utilise outsourced assistance then it might require extra regulatory requirements to be satisfied so that the consumer is protected in respect of the choice and referral arrangements between the entity and its outsourced agents.

In essence the scenarios do not clarify sufficiently which activities will and will not be caught within the scope of the proposed new reservations and leaves out of the regulatory net areas of practice which are intimately bound up in Will writing and estate administration.

What are the likely impacts of the scope of the proposed activities? As outlined in the Report confusion and increased costs in cases where two or more different advisers are involved because one is not regulated and the work moves into regulated territory.

One set of rules should apply for all entities providing **any** form of Will-writing, estate administration and probate services (including trust services in my opinion) should be the goal. Simplicity is best; complexity breeds confusion.

Question 2: What are your views on the options for implementation that we have described?

For the reasons given in the Report Options 1 and 2 are preferred to Options 3 & 4. Option 2 appears to be the most straightforward.

Question 3: Do you agree with the initial assessment of the consequential amendments that would likely be needed? Are there any other consequential amendments you consider would be necessary?

No comment.

Question 4: To prospective approved regulators: What legislative changes do you think will be required in order to implement regulatory arrangements for these activities (in line with the draft s.162 guidance?)

No comment.

QUESTIONS ARISING FROM THE DRAFT GUIDANCE

Question 5: To prospective approved regulators: Will this guidance help you to develop proportionate and targeted regulation for providers offering will-writing and or estate administration activities? What challenges do you think that you will face?

Whilst I am not a prospective approved regulator I can envisage practical problems with the development of proportionate and targeted regulation for providers with different sets of skills operating within a market which is partially regulated and not wholly regulated.

The LSB's desire to prevent regulatory spread is stopping sensible debate about what level of knowledge is needed at the most basic level in order to advise upon and draft Wills and to administer estates. A single regulated 'badge' for all entities operating within these legal fields is required as indicated in my answer to question 1.

The LSB has said it does not wish to regulate by existing labels and qualifications but rather wishes each entity to be regulated and to therefore demonstrate it has appropriate systems & controls in place to ensure the right combination of knowledge, skills and behaviours are present in staff so that they can consistently deliver good quality advice and services.

Different regulators may set out different skills and knowledge that they believe is required to perform particular activities. If the skills and knowledge required is of a higher level than the regulatory scope set out in the Report there will be practical problems in as much as those regulators who do not recognise the significance of trusts in Will writing and estate administration will not include those skills and that knowledge within their regulatory system and the LSB will not mind because it does not seem to appreciate the true nature of English Wills and the use of trusts in most Wills.

By contrast, those regulators which know the central importance of understanding trusts and tax as part of the Will writing process and the estate administration of those Wills will include skills and knowledge requirements for these tasks. The result – confusion for the consumer – which type of regulated practice will best serve their needs?

Regulators will also find it difficult to specify the skills and knowledge elements required and ensure that there is adequate training in place for these routes into practice whilst the Legal Education Training Review is awaited. As part of that project it is possible that the regulatory bodies will in the end set the standards but leave the qualifications which underpin them to examination bodies working within the National Qualifications Framework.

One overarching regulator or the LSB should set the standards and this would avoid these problems and enable different lower level regulators to deal with monitoring and compliance.

QUESTIONS ARISING FROM THE IMPACT ASSESSMENT

Question 6: Do you agree that having mandatory regulation for all firms in the market will improve consumer confidence?

Yes if it is clear and easy to identify what is and what is not within the scope of the reserved activities. Confidence will follow if the consumer believes any provider giving legal advice about what should be included or excluded from a Will, what the consequences of making a Will in a particular way are and how it is drafted is part of the regulatory safety net. Similarly with estate administration – the consumer will be assured if anyone he seeks to pay to deal with any part of the administration process is fully within the scope of the regulatory regime.

It seems to me that having lots of different entities offering these services will encourage competitive service delivery at a range of prices and this can only be beneficial to the consumer. There should be no artificial limits on what each entity can do as this only causes confusion and leads to the consumer being passed potentially from one provider to another at a critical juncture. It is more important to set the standards of skills and knowledge required to operate adequately in these fields and to require any entity to demonstrate it

can meet them through a combination of staff and IT and appropriate outsourcing; than to set arbitrary boundaries beyond which a particular provider may not go.

Question 7: What business impacts (both positive and negative) do you envisage will occur with the proposed reservation of will-writing and estate administration? How will any such impacts affect your business?

Some operators will not be permitted to continue without a radical overhaul – this will include some solicitors practices. Others will be pleased to be recognised as different but now regulated and be confident that the consumer will find them as reliable as previously recognised services from more traditional offerings.

There will be change; there will be winners and losers but over a period of time there will be a well-regulated, innovated and energised set of entities delivering appropriate, safe and adequate services to consumers at different vulnerable times in their lives. There will be a better state of affairs than at present.

QUESTIONS ARISING FROM THE EQUALITIES IMPACT ASSESSMENT

Question 8: We are keen to understand the potential impacts of our proposals on equalities. Do you envisage any positive or negative impacts on equalities for either consumers and/or providers of will-writing and estate administration activities? Please provide details including of any evidence that you are aware of?

There will be a positive impact on equalities since a range of means of entering the market will present itself rather than just the traditional routes to practice. If my suggestions are adopted there will be more choice for consumers and there should be a positive outcome of nationally recognised qualifications for anyone who wishes to become skilled in this area. Hopefully, those qualifications will better recognise the communication skills and emotional intelligence required to offer these proposed reserved services and this will advance the status of women and ethnic minorities who are competent in the languages and culture of their ethnic origin. It should also enhance the quality of service for disabled consumers if the knowledge, skills and behaviours in which the practitioner needs to show competence include the practical ways in which the deaf and the blind and others might receive appropriate help to achieve their desired services and outcomes from those services.

Question 9: Do you envisage any specific issues arising from the proposals to impact negatively on consumers at risk of being vulnerable? Would any of the proposals actually increase their risk of becoming vulnerable?

As the Report is drafted, for the reasons given in answer to Question 1 above, it is likely that vulnerable consumers of all kinds would not be benefitted by these proposals unless there is recognition as to quite what occupational standards are required to offer a proper and appropriate Will-writing, estate administration and probate service or services.

A handwritten signature in black ink that reads "Gill Steel". The signature is written in a cursive style with a large, sweeping initial 'G'.

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