PUMP COURT
CHAMBERS

Formal Validity Of Wills

Advice From Litigators To Drafters

1. It may be considered prudent to treat every testator, seeking to make a will, as a potential negligence claim or complaint. Thus care and attention to detail are required from the outset, in respect of taking instructions, preparing and executing the will, in order to mitigate the risk of a negligence claim or dispute.

2. Even though instructions from a testator to draft a will may appear to indicate that only a simple Will is required, skill is needed in order to ensure it is drafted correctly (i.e. it accurately reflects the testator's wishes) and to an adequate professional standard. The adequacy of the drafting cannot be established unless the original instructions are comprehensive and cover every possibility, even those that might seem remote. The failure to take adequate instructions may only surface many years later when the testator dies, by which time it is too late to correct any errors or gaps. Rectification under Section 20 of the Administration of Justice Act 1982, and ***Marley v Rawlings [2015] AC 129*** is a whole topic in itself.

3. It is desirable to have a clear checklist of factors and procedure in place, with great emphasis being placed on clear record keeping. Many firms have devised standard questionnaires, that are improved and developed with the passage of time. The same operates as a form of quality control.

4. Sometimes it may be possible to invite the testator to complete, as fully as possible, a questionnaire, prior to actually meeting them in the office, or going out to meet them.

5. The style and detail of the questionnaires varies from firm to firm. It would be sensible to devise questions enquiring about:

i) Whether there are earlier wills / codicils
ii) Details of family members
iii) Details of property and values
iv) Details of other Assets
v) Details of mortgage and value
vi) Specific intentions – e.g. Executors to be appointed/ gifts of assets etc
vii) Reasons for changes to a Will

6. There are many issues to be managed, when dealing with a testator. There issues include:

i) Ensuring that the testator has the necessary testamentary capacity;
ii) Guarding against someone's undue influence over the testator;
iii) Monitoring for frauds and scams (this applies if the firm provide online will writing services);
iv) Ensuring that full information is obtained and retained in relation to the testator's assets and the testator' immediate family;
v) A comprehensive and clear recording processes. The same needs to ensure that there are records of any reasons for excluding family members who might otherwise be expected to benefit and that the implications of this are explained to the client;
vi) Ensuring that wills are drafted in a timely manner, having regard to any particular circumstances (e.g. if the testator is in hospital). You want to avoid potential actions by disappointed beneficiaries;
vi) Situations where the testator does not return to execute the Will or return the signed version of their will within a reasonable time; and
vii) A clear understanding of the terms of the Will and the consequences of what the testator intends to do.

Lack of capacity

7. The legal principles as to testamentary capacity derive from ***Banks -v- Goodfellow [1870] LR 5 QB 549***, in which Cocburn CJ said at 565 that:

"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

8. The ***Banks v Goodfellow*** test for testamentary capacity has not been displaced by the Mental Capacity Act 2005 – e.g. ***Clitheroe v. Bond [2012] EWHC 1102 (Ch).***

9. Where there is any doubt about the capacity of a prospective testator, it is good practice for a doctor to satisfy himself of the testator's capacity and record his examination results. A report from the deceased's GP would be in compliance with the "*golden rule*" per Templeman J in ***Kenward v Adams 1975 CLY 3591***. If the practitioner is satisfied that the person does have the requisite capacity, he should act as one of the attesting witnesses. Thus a report from a medical practitioner is preferable to that of a social worker or amental health advocate.

10. In ***Key v. Key [2010] EWHC 408 (Ch)*** *Briggs J held at [8] that* :

"*Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does noncompliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope. As the expert evidence in the present case confirms, persons with failing or*

impaired mental faculties may, for perfectly understandable reasons, seek to conceal what they regard as their embarrassing shortcomings from persons with whom they deal, so that a friend or professional person such as a solicitor may fail to detect defects in mental capacity which would be or become apparent to a trained and experienced medical examiner, to whom a proper description of the legal test for testamentary capacity had first been provided."

11. An illustration of where the assessment by a medical practitioner was rejected in a clam under the Inheritance (Provision for Family and Dependants) Act 1975 is ***Hughes v Pritchard [2021] EWHC 1580 (Ch***). It is an unusual case in which the GP case some doubt on the assessment he conducted at the request of the solicitor.

Undue Influence

12. Guarding against someone's undue influence over the testator is an important consideration. The Court will pronounce against the will if, the execution of it, is shown to have been procured by actual undue influence. A useful summary of undue influence is found in ***Edwards v Edwards [2007] EWHC 1119 (Ch).*** Remember that it is important to;

i) See the testator on their own;

ii) Consider how the appointment for the will came to be made;

iii) If one child is to receive the majority or all of the testator's estate, consider why this is to occur.

The statutory provisions

13. Section 9 Wills Act 1837 as amended provides that:

"*No will shall be valid unless—*

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears that the testator intended by his signature to give effect to the will; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness either—

(i) attests and signs the will; or

(ii) acknowledges his signature,

in the presence of the testator (but not necessarily in the presence of any other witness),

but no form of attestation shall be necessary."

14. Under Section 9(a) no will is valid unless it is writing. The testator's mark is a sufficient signature, regardless of where he or she can write or not. Signatures by initials or a stamped name is sufficient.

15. If the testator dies after 1982, Section, as amended, does not require the signature to be at the foot or end of the Will. If the testator died before 1983, the original Section 9 required the signature to be "at the foot or end" of the Will.

16. Whilst there is no requirement for the Will to be dated, it is good practice for the will to be dated. It provides confirmation of when the will was signed, which could be significant, if there were to be challenge about the validity of the will. It should enable the whereabouts of the testator and attesting witnesses to be confirmed.

17. Under Section 9(b), it must appear that the testator intended by his signature to give effect to the will.

18. The burden of proving due execution, whether by presumption or by positive evidence, rests on the person setting up the will (Halsbury's Laws of England, vol 17(2)). An attestation clause will usually provide sufficient evidence that both witnesses were present when the testator signed or acknowledged the will.

19. A blind person is incapable of being a witness to a will – ***In the Estate of Gibson [1949] P434.***

20. The testator's signature must be made or acknowledged by him in the presence of two or more witnesses present at the same time pursuant to Section 9(c). Theobold on Wills 18th Edition para 4-008 opines that *"The signature of the testator must be either written or acknowledged by the testator in the actual visual presence of both witnesses together …"*

21. The presence of one witness is not enough e.g. ***Re Garner's Goods (1861) 25 JP 183; Re Swift's Goods (1900) 17 TLR 16; Brown v Skirrow [1902] P3*** (a second witness near but not really cognisant of the signing); ***Re Groffman, Groffman and Block v Groffman [1969] 2 All ER 108*** (witnesses called in one after the other).

22. Both witnesses must see or have an opportunity of seeing the signature - ***Re Dinmore's Goods (1853) 2 Rob Eccl 641***. Both should be able to say that each knows of their own knowledge that the testator had signed the document - ***Brown v Skirrow [1902] P3*** *in which Gorell Barness held at 7 that:*

"I fail to see how the testatrix's signature can be said to have been affixed to the document in the presence of Mr. Read, when, although he was in the shop, he had no idea and saw nothing of what was going on at the time, and, moreover, had no opportunity of seeing, there being, as I have said, another person in the shop between him and the testatrix."

23. The testator must sign or acknowledge his signature before either of the witnesses signs the will. In ***Watts v Watts [2014] EWHC 668*** one of the witnesses gave evidence that she did not see the testator nor the other witness sign the document, thus the will was held to be invalid.

24. Acknowledgment must surely mean the testator informs the witnesses that the signature was his signature, either by actions or words. This requirement was not expressed in Section 9 but was thought to be implicit in the wording. That interpretation is in keeping with the view expressed in the follow passages from the leading texts, namely:

i) Tristram and Coote's Probate Practice opines that "*An acknowledgment of the testator's signature may be made expressly by words, by gestures, or by implication, e.g. by the testator producing the will, with his signature visibly apparent on the face of it, to the witnesses, who must both be present together, and requesting them to subscribe it, or assenting to a like request made by some other person in his presence*."

ii) Williams, Mortimer and Sunnucks on Executors, Administrators and Probate 21st Edition opines at para 9-21 that: "*Where the will is not signed by the Testator (or by another on his behalf) in the presence of the attesting witnesses, the testator may acknowledge his previously written signature to such witnesses present at the same time. For a valid acknowledgment the signature of the testator must have been on the will and some words must have been spoken by the testator or some act must have been done by him (or suffered by him to be spoken or done by another in his presence and on his behalf) as may properly be regarded as an acknowledgment of his signature unless the witnesses at the time of the alleged acknowledgment saw the signature or had the opportunity of seeing it.*

For the signature to be acknowledged, it must, therefore, already be on the will. While it is not essential that there should be positive evidence that the testator's signature was on the document before acknowledgment, the court must be satisfied that it was.""

iii) Halsbury's Laws of England Volume 102 (para 68).

25. The following authorities suggest that the testator must sign the will prior to the attesting witnesses:

i) ***Moore v King (1842) 3 Curt 243***, Sir Herbert Jenner Fust said (3 Curt 253):

"I am inclined to think that the Act is not complied with, unless both witnesses shall attest and subscribe after the testator's signature shall have been made and acknowledged to them when both are actually present at the same time."

ii) ***Wyatt and Berry v Berry and others [1893] P5*** Gorell Barnes J held that at page 8 referring to ***Moore v King*** that:

"In the first of them the will had been signed by the testator in presence of his sister, who attested it, and on a subsequent day, when both the testator and his sister were present, the testator requested another person to sign it, his own signature and that of his sister being acknowledged at the time. By the way, the document was a codicil and not a will, but that makes no difference. In that case Sir Herbert Jenner Fust said, at p. 253:

"I am inclined to think the Act is not complied with unless both witnesses shall attest and subscribe after the testator's signature shall have been made and acknowledged to them when both are actually present at the same time. If the one witness has previously subscribed the paper and merely points out her signature when the testator acknowledges his signature in her presence and in that of the other witness, which latter witness alone then subscribes, that I hold not sufficient."

iii) ***In the Estate of Davies; Russell v Delaney - [1951] 1 All ER 920*** Morris J held that:

"as the testatrix should have acknowledged her signature in the presence of both of the attesting witnesses before either of them signed."

26. Attestation clauses frequently state that the testator's will was signed "*in our presence and attested by us in his presence"*. Each witness must then either attest and sign the will or acknowledge his signature under Section 9(d) in the testator's presence. Williams, Mortimer and Sunnucks on Executors, Administrators and Probate 21st Edition opines at para 9-25 that: *"In the case of deaths on or after 1 January 1983, s.9(d) as substituted provides that a will made in any of the circumstances listed above will now be valid, provided each of the witnesses acknowledges his signature to the testator after the testator has made or acknowledged his signature."* The crucial word is "*after*", which is in keeping with the order of events prescribed by Section 9 (subject to below and subject to acknowledgments).

27. To attest, it must be shown that the witness is confirming that he witnessed a person signing his name or acknowledging his prior signature to a document of some sort.

28. Under Section 9(d) it is a requirement that *"each witness either (i) attests and signs the will; or (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness)." Witnessing through a window, during Covid times, would appear to comply with this requirement.*

29. The attestation clauses will usually, but not always, provide sufficient evidence that both witnesses were present when the testator signed or acknowledged the will. Where a will bears on it the testator's signature and two witnesses, even if there is no attestation clause, and it is proved that both witnesses are dead or they cannot be

traced, the court will presume due execution. The presumption guards against defective memory.

30. That presumption dates back to ***Wright v Rogers (1869) LR 1 PD 678*** and exists because often many years later the attesting witnesses may have died (***Sherrington and others v Sherrington[2005] EWCA Civ 326*** para 42), or forgotten about signing the will (***Wilson v Lassman [2017] EWHC 85*** para 15). Strong evidence is required to rebut the presumption.

31. ***Wilson v Lassman [2017] EWHC 85*** illustrates the dangers of home wills and proper investigation of issues. One witness failed to recall being present with the other witness, but it emerged at the trial that he suffered with dementia.

32. In ***Wright v Rogers*** Lord Penzance held at 682 that:
"Where both the witnesses, however, swear that the will was not duly executed, and there is no evidence the other way, there is no footing for the Court to affirm that the will was duly executed."

33. Theobold on Wills 18th Edition para 4-018 opines that "*Witness acknowledges previous signature. If the testator dies after 1982, the amended s.9 of the Wills Act 1837 makes an acknowledgement by a witness of his previous signature have the same effect as his actual signature. A witness who acknowledges his signature is not required to attest. The same principles apply to the acknowledgement of a signature by a witness as applied to the acknowledgement of a signature by a testator*."

34. In applying the same test to a witness as that applied to a testator, Theobold opines at para 4-011 (iii), that: "*The testator may acknowledge by his words of conduct*" and "*The testator may acknowledge by gestures, or simply by proffering the will as a will*".

35. In terms of gestures ***In the goods of Ownston, [1862] 10 WR 410***, a case concerning the execution of a will by a deaf, dumb and illiterate man. Sir C Cresswell held that "*I shall require a further affidavit of the nature of the signs and motions with which Bradley communicated with the deceased before I grant the motion.*" ***In the Goods of Geale [1864] 3 SW & TR 431*** another case concerning the execution of a will by a deaf, dumb and illiterate man, Sir J.P. Wilde granted the motion. Both cases are fact specific, requiring confirmation that the testators understood and approved the contents of their wills, due to their disability. If the testator, had no disabilities, thus a lesser degree of acknowledgment is likely to be required from him. It is possible that a facial expression or a nod of the head might be deemed sufficient

Knowledge and Approval

36. The testator must know and approve the contents of his will, because the will must be the result of his own intelligence and volition. A will is invalid if its contents originate from another person and the testator executes it in ignorance of its contents. Care must be taken with testators, who are for example blind or deaf.

37. The testator's knowledge and approval of the contents of the will are part of the burden of proof assumed by a party in propounding a testamentary document – ***Cowderoy –v- Cranfield [2011] EWHC 1616***. Ordinarily the burden of proof is discharged by proof of testamentary capacity and due execution, from which knowledge and approval by the testator of the contents of his will are assumed.

38. In ***Gill –v- Woodall [2011] Ch 380*** the approach to considering knowledge and approval was to ask had the testator understood (a) what was in the Will when she signed it, and (b) what its effect would be. That question should be considered in the light of all the available evidence, and the appropriate inferences to be drawn from that evidence. Lord Neuberger MR went on hold that where the will had been

professionally prepared by a solicitor, and duly executed and read over to a testator before signing, a strong presumption arose that the will represented the testator's intentions at the relevant time, namely at the point of its execution. It was a presumption and not conclusive thus all of the circumstances must be considered to decide if the propounders of the will had discharged the burden of proving knowledge and approval.

39. Whilst feebleness of body or mind may be relevant to knowledge and approval – ***Richards –v- Allan [2001] WTLR 1031*** at 1043G, that issue will be resolved by the medical evidence and any witness evidence available.

40. A reading over of the will must be proper and sufficient to show knowledge and approval.

Julian Reed
Pump Court Chambers
E. j.reed@pumpcourtchambers.com