

Reforming the Formal Requirements for the Execution of a Will

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INTRODUCTION

A will takes effect only on the death of the person making it and it has long been recognised that some formality is necessary to ensure that a will embodies the true intention of the testator.¹ As the Law Reform Commission of New South Wales said, the law of will “. . . must operate at a time after the principal actor has left the stage. The fact of death removes the best witness, leaving the court with only secondary materials with which to judge what that witness really intended.”² Others who might testify as to his or her intentions may have pre-deceased him or their memory may fail them or they may be affected by self-interest. The formalities prescribed for a will must therefore perform a number of functions.³ First, they should ensure that the statements of the deceased regarding the devolution of his property were truly intended to have dispositive effect and were not made inadvertently or by way of draft or even in jest. This ritual function requires that the formalities are such as to enable a court to infer that the testator must have understood the seriousness and significance of the act he was performing. Secondly, the formalities have an evidentiary function, namely increasing the reliability of proof as to the deceased’s intentions. Thirdly, formalities may have a part to play in protecting the testator from the improper pressure and influence of others at the time of execution. Fourthly, formalities should help to achieve a degree of standardisation so that the classification of documents of transfer is made easier and their processing more efficient and less expensive.⁴ This has been called the channelling function.

On the other hand, it is clear that formalities represent a limit on the power to dispose of property. Failure to observe strictly the prescribed formalities will cause a will to be rejected however clear it may be that it embodies the wishes of the testator as to the disposition of his property. They represent a hurdle at which many a would

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1. An elaborate procedure for wills of real property was introduced by the Statute of Frauds 1677.

2. L.R.C.47 (1986) *Wills—Execution and Revocation*, para.3.2.

3. See Gulliver and Tilson, “Classification of Gratuitous Transfers”, (1941) 51 *Yale L.J.* 1 and Miller, *The Machinery of Succession* (1977), Ch.1.

4. For an example of a case where documents had to be classified as testamentary by the court, see *Milnes v. Foden* (1890) 15 P.D.105. See also the discussion in *In re Berger deceased* [1990] 1 Ch. 118.

be testator has fallen.⁵ A balance has to be struck. For some time many in the common law world have felt that an appropriate balance was not being achieved. During the last quarter of a century the formalities have come under close scrutiny and some jurisdictions have been much bolder than others in the direction of reform. This article looks first at developments in England and then at developments in other parts of the common law world.

THE WITNESSED WILL

A distinctive feature of the law of succession in the common law world is what may be called the "witnessed will." This can be said to have been introduced into English law by the Statute of Frauds 1677. It was refined by section 9 of the English Wills Act 1837, which prescribed formalities for a valid will which remained unchanged in England for almost one hundred and fifty years. Section 9 became the model for many, perhaps most, common law jurisdictions. However, it was not only the formalities themselves which were adopted but also their strict interpretation by the courts. The traditional view is that literal compliance is essential if a document is to take effect as a will. One approach to reform has been to seek to reduce or modify the prescribed formalities. The other has been to relax the requirement of literal compliance by conferring some form of dispensing power on the probate court.⁶

FORMALITIES IN ENGLAND

(1) Reform in England

The Law reform Committee in their Report on *The Making and Revocation of Wills* rejected the idea of introducing a dispensing power and recommended two changes to the formalities prescribed by section 9.⁷ These changes were carried into effect by the Administration of Justice Act 1982⁸ and the reformulated section 9 has now been in force for ten years. There have been only two reported decisions on the reformulated section, but they give a good indication of the problems involved in interpreting the statutory requirements.

5. See, e.g., *Re Davies* [1951] 1 All E.R. 921; *Re Colling* [1972] 1 W.L.R. 1440.

6. A reduction in formalities may of course be combined with the introduction of a dispensing power. Another approach is to increase the required formalities so as to emphasise the importance of the act of making a will and encourage the use of professional assistance. This is inspired by the notarial will in civil law countries and has led to attempts to make wills self proving as in the Uniform Probate Code s.2-504. It also underlies the concept of the International Will recognised in the Administration of Justice Act 1982, s.27. See also the Report of the Justice Committee on *Home made Wills* (1971).

7. Twenty-second Report (1980) *Cmd.* 7902, paras.2.4-2.6.

8. s.17.

Section 9 has at all times required a will to be in writing and signed by the testator or by some person in his presence and by his direction. It also continues to require the signature to be made or acknowledged by the testator in the presence of two or more witnesses present at the same time (who must also subscribe their names as witnesses). In its original form section 9 required a testator's signature to be "at the foot end of the will." This requirement was removed by the 1982 Act and replaced by the requirement that it must appear "that the testator intended by his signature to give effect to the will." The second change made by the Act of 1982 was in relation to the signature of the witnesses. In its original form section 9 required the witness to attest and then subscribe the will in the presence of the testator. This was relaxed by the 1982 Act to the extent that a witness may now either (i) attest and sign the will, or (ii) acknowledge his signature in the presence of the testator though not necessarily in the presence of the other witness.

(2) The cases

(a) *Re White deceased*

The first case in which the reformulated section 9 was considered was *Re White*⁹ where Mr. Andrew Park QC, sitting as a deputy High Court judge, was concerned with alterations made by the testator in 1984 to a will which he had duly executed in 1981. The testator made the six alterations which he desired in manuscript on his copy of the will. He then dictated the alterations to the second defendant who wrote them in manuscript on the original will. The testator was then handed the original will and, having checked it, he wrote in his own handwriting in a blank space at the foot of the last page of the will: "Alterations to Will dated 14-12-84." They were joined by another person who was asked to sign as a witness. He did so after the word "witnesses" which the testator had written, and the second defendant also added his signature at that point. The testator, who had signed the will in 1981, did not sign it again in 1984.

The judge first considered whether the amendments to the will in 1984 were valid as alterations by virtue of section 21 of the Wills Act 1837. An alteration to a will may be valid under section 21 if it has been executed in like manner as required by section 9. It was clear that each alteration had not been so executed. Neither the testator nor the witnesses had purported to execute each alteration as required by the first limb of section 21. In this sense the judge was clearly right to conclude that "the alterations to the will were not signed by the testator nor were they signed by any other person in his presence and by his direction," and that when the two signatories "wrote their names against the word 'witnesses' they were not purporting to sign the alterations."¹⁰ It followed, in his view, that the alterations could not be valid by virtue of section 21 and he went on to consider whether the process by which

9. [1991] Ch.1. Judgment delivered January 15, 1990.

10. *Ibid.*, at p.8.

the amendments were made amounted to the making of an entirely new will complying with section 9. He concluded that the testator had failed to comply with three out of the four requirements of section 9.

There appears to have been no discussion of the second limb of section 21 which reads as follows: "but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will." This, it is submitted, can be regarded as providing a means whereby the whole will, including the alterations, can be validated which is separate from a re-execution of the will under section 9 which might take place for reasons other than an alteration in the wording of the will. This might have been crucial to the interpretation of what the testator and the signatories did in 1984 and might have led to a different conclusion from that reached by the court in the light of arguments based, it seems, principally on section 9. It is possible that what they did could be regarded as satisfying the second limb of section 21 even if it did not satisfy paragraph (d) of section 9, though section 21 does not provide for an acknowledgement by the testator of a signature made on a previous occasion. This will be discussed further in relation to the interpretation of paragraph (d).

(b) *Wood v. Smith*

The second case was *Wood v. Smith*¹¹ heard by Mr. David Gilliland QC sitting as a deputy High Court judge and then by the Court of Appeal. This was concerned with the efforts of Percy Winterbone to make a new will two days before he died. The new will was in his own handwriting and it started: "My will by Percy Winterbone of 150B High Street Margate. . . ." He did not sign his name at the end of the will. The only place where his name appeared in his own handwriting was in the commencement of the will as already quoted. When one attesting witness pointed out to him that he had not "signed" the will, Percy Winterbone replied: "Yes I have. I have signed it at the top. It can be signed anywhere." The two witnesses signed at the bottom of the will. The judge refused probate to the handwritten document. In essence he held that when the document was "signed" by Percy Winterbone it was not a valid will. He accepted the argument that there had to be something in the nature of a testamentary disposition in existence which could be signed. Accordingly, when the testator wrote his name on the document he could not by that "signature" have intended to give effect to the dispositive dispositions which followed. The Court of Appeal took a different view holding that "if the writing of the will and the appending of the signature are all one operation, it does not matter whereabouts on the document or when in the course of the writing the signature is appended."¹²

11. [1993] Ch.90. Judgment at first instance was delivered June 27, 1990 and in the Court of Appeal on February 20, 1992.

12. *Ibid.*, at p.112.

However, the Court of Appeal held that the judge had been entitled to find that the onus of establishing Percy Winterbone's testamentary capacity had not been discharged. The document therefore failed as a will, but the judgments provide an important discussion of the interpretation of the amended section 9.

(3) Interpreting the amended section 9

(a) *The signature of the testator*

The two cases highlight different aspects of the requirement of a signature. The first question is what can amount to a signature for this purpose. Is a signature the same thing as writing your name? In *Wood v. Smith* it was clear that Percy Winterbone had written his name on the document concerned, but it was not clear from the document that this should be regarded as his signature. At first instance, a submission that it was not a signature at all was not pressed in the light of decisions on section 40 of the Law of Property Act 1925. In the Court of Appeal,¹³ Scott LJ said that no assistance could be gained from such cases since the object of a signature in a memorandum under section 40 was to identify a party to a contract whereas the object of a signature by a testator is to authenticate the written document in question as the will of the testator. He indicated the wide scope of the concept in this context when he said:¹⁴

“A signature is usually, but need not be, the signer's name. The signature may consist of initials. It may, in the case of a person who cannot write, be merely a mark. It must be appended to the document either by the signer or by some person acting at the signer's direction and in the signer's presence.”

The difficulty in *Wood v. Smith* at first instance at least lay in paragraph (b) and this too was the case in *Re White*.

However, *Re White* draws attention to the need to view this first requirement in the context of section 9 as a whole. The first method of complying with section 9 is by writing the signature personally at the operative time. It is submitted that the judge in *Re White* was right to conclude that the “writing by the testator on the document in 1981 was in no sense part of the process of the creation of the 1984 will on 14 December 1984.”¹⁵ However, this need not have been fatal for the *writing* of the signature, whether by the testator personally or by some other person in his presence and by his direction, is only one method of complying with section 9. Section 9 also envisages the *acknowledgement* of a signature placed on the will by the testator before the start of the section 9 process or ceremony. This will be considered in relation to (iii) below.

13. *Ibid.*, at p.111.

14. *Ibid.*

15. [1991] Ch.1, at p.9.

(b) *The position of the signature*

In *Wood v. Smith* the judge at first instance refused probate to the handwritten document on the basis that there had to be something in the nature of a testamentary disposition in existence which could be signed. Accordingly, when Percy Winterbone wrote his name on the document he could not by that "signature" have intended to give effect to the dispositive provisions which followed.¹⁶ The Court of Appeal took a wider view. Scott LJ, giving the judgment of the court, said that:¹⁷

"A normal signature placed at the foot of a testamentary document would in most cases carry the implication that the testator intended the signature to give testamentary effect to the document. Affirmative evidence rebutting that implication would . . . be needed if it were to be contended that paragraph (b) had not been satisfied."

On the other hand, the writing by a testator of his name on a testamentary document, as for instance by writing 'My will by John Smith' or perhaps by typing 'The will of John Smith' or in some other passage that left it uncertain whether in doing so he was intending to authenticate the document, would not, by itself, satisfy either paragraph (a) or paragraph (b) of section 9. In such a case affirmative evidence that, in writing his name, the testator did intend to authenticate the document would be necessary. Sufficient evidence of that intention would, in his judgment, both justify treating the written name as his signature and also satisfy the requirements of paragraph (b). It followed that he agreed with the judge that the written name, not being a normal signature, is capable of being a signature for paragraph (a) purposes but he did not agree that the signature must necessarily, if paragraph (b) is to be satisfied, be appended to the document after the substantive testamentary contents have been written on the document. He said that ". . . if the writing of the will and the appending of the signature are all in one operation it does not matter whereabouts in the document or when in the course of the writing the signature is appended."¹⁸ In *Wood v. Smith* the writing by the deceased of the contents of the April 18, 1986 document was completed in one operation. He left open the question of what the position would have been if, "say, half of the contents including the signature had been written on one occasion and the rest of the contents on another, later, occasion, with the deceased indicating on the later occasion to the two witnesses that he regarded his signature as authenticating the whole contents . . ." However, he did say that having regard to certain observations

16. [1993] Ch.90, at p.97.

17. *Ibid.*, at p.111.

18. *Ibid.*, at p.112. He agreed with the example given by Andrew Park QC in *Re White* [1991] Ch. 1, at pp. 8-9 that a valid will would be created where, "First, the testator takes a blank piece of paper and signs it at the bottom. Secondly, as part of the same continuing process, he writes above his signature 'This is my last will and testament. I leave everything to my wife.' Third, he gets his signature attested by two witnesses. In that case it is all one operation, and it could not matter that he wrote his signature on the document before the dispositive wording of the will."

made by Mr. Park in his judgment, he was not satisfied that the requirements of paragraphs (a) and (b) would necessarily not have been satisfied.¹⁹

(c) *The signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.*

In *Wood v. Smith*²⁰ the judge said that “if (b) is not satisfied there can be no signature which can be acknowledged under section 9(c).” As noted above, paragraph (b) was not in his view satisfied in that case because at the time Percy Winterbone wrote his name on the document there could not be said to be any will in existence to which the signature could have been intended to give effect. However, this seems to assume that the intention required by (b) is to be judged in all cases at the time the signature is written. It is submitted that this is not so. A testator may choose one of two ways of executing his will personally.²¹ He may sign the will in the presence of the witnesses, or he may acknowledge in the presence of the witnesses the signature which he previously placed there. If he chooses the latter it should not matter when the signature was placed on the document and, moreover, it is by reference to the time of acknowledgement that the intention required by (b) must be satisfied. By the process of acknowledgement the testator has identified his signature and the fact that he was intending thereby to give effect to the will. In *Wood v. Smith* it appears that the two witnesses were in fact present while the testator was writing out the document and so in that sense were present when he signed it. However, it could be argued that what Percy Winterbone did amounted to an acknowledgement of his signature. On that basis there was a signature and at the time of acknowledgement he intended thereby to give effect to his will. However, whether or not such a conclusion is justified on the facts, the important point is to recognise the two methods open to a testator and to recognise that the paragraphs must be read as a whole. There is a danger in reading the paragraphs of section 9 in isolation. In the Court of Appeal the judgment of Scott LJ appears to leave open the possibility of this argument being accepted.²²

In relation to the facts of the case before him he noted that the deceased had indicated in clear terms to the witness that he regarded his name, written by him as part of the phrase “My will by Percy Winterbone”, as being his signature. That, in his view, established “his writing of his name as his signature for paragraph (a) purposes.” The evidence established also that “the deceased intended, by writing ‘My will by Percy Winterbone,’ to give testamentary effect to the document he was in the course

19. [1993] Ch.90, at p.113.

20. *Ibid.*, at p.103.

21. The actual signature may alternatively be that of another person acting on the direction of the testator, *i.e.* a proxy signature

22. [1993] Ch.90, at p.112.

of writing.” The evidence satisfied, in his judgment “the paragraph (b) requirements in respect of the contents of the document as a whole.”²³ In other words the requirements of section 9 were satisfied by the *writing* of his signature with the necessary intention in the presence of the two witnesses. It was therefore unnecessary to consider the question of acknowledgement. Unfortunately, although the requirements of section 9 had been satisfied, the court went on to find that the deceased had lacked testamentary capacity.

The facts of *Re White* may be thought to present more difficulty because the signature clearly relied upon by the deceased and validly acknowledged (as found by the judge) was not written as part of the same process as the 1984 execution. Certainly it was also part of the process of the execution of the original will. However, the bulk of the “1984” document (*i.e.* minus the alterations) had been written in 1981. If paragraphs (a) (b) and (c) are viewed as a whole then the time when the signature was written is not crucial if it is subsequently acknowledged. The deputy judge said that the effect of paragraph (c) was that the testator’s signature must have been either made or acknowledged by him in the presence of the two witnesses to the 1984 document. While it was certainly not made in their presence, it might be that it was acknowledged in their presence. He noted that in *Daintree v. Butcher*²⁴ Cotton LJ said:

“ . . . it is not necessary for the testator to say ‘this is my signature,’ but if it is placed so that the witnesses can see it, and what takes place involves an acknowledgement by the testator that the signature is his, that is enough.”

The deputy judge said that although his general conclusion was that the conditions of section 9 were not satisfied, he “would be disposed to accept that this particular condition (c) was satisfied.”²⁵ It is submitted that this was correct but, with respect, if it was accepted that there was a valid acknowledgement in 1984, then paragraphs (a) and (b) should have been judged on the same basis.

(d) *Attestation and signature by the witnesses*

In *Wood v. Smith* no question was considered to arise in relation to paragraph (d) either at first instance or in the Court of Appeal. However, in *Re White* the altered will was considered to have failed on this ground too. The deputy judge accepted the view that what they had attested were the alterations to the 1981 will and not the amended will as a whole. The conclusive fact in his view was that what the testator had written at the end of the will (and immediately preceding the signatures of the

23. *Ibid.*

24. (1888) 13 P.D.102, at p.103.

25. [1991] Ch.1, at p.10.

witnesses) was “Alterations to will” and not, for example, “Altered will”.²⁶ The deputy judge relied upon two cases, *In the Goods of Martin*²⁷ and *In the Goods of Shearn*.²⁸

It has already been noted that section 21 envisages two ways in which alterations to a will can be made effective. The first is if the *alteration* is executed in the same way as a will. Secondly, the whole *will*, including the alterations, is deemed to be duly executed “if the signature of the testator and the subscription of the witnesses is made . . . at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end of some other part of the will.” In *Martin* the testatrix had simply traced her dry pen over her original signature on the will. Sir Herbert Jenner Fust said: “There is not any notice in the attestation clause of the re-execution of the will, nor is there in any part of the instrument, a memorandum referring to a due execution of the alterations. The signatures of the attesting witnesses alone appear in the margin near the alterations.”²⁹ He rightly concluded that “. . . as the instrument appears on the face of it they attested the alterations only.”³⁰ Similarly in *Shearn*, where the testatrix relied on an acknowledgement of her original signature on the will, the two witnesses “placed their initials in the margin of the paper opposite the interlineations.”³¹ In no way could the initials be related to a signature elsewhere in the will. In both cases the testatrix had not chosen to sign at or near the alterations. She had chosen to acknowledge her signature at the end though without incorporating any memorandum as specified in the second limb of section 21.

In contrast, in *Re White* the witnesses had not placed their initials near the alterations but near a memorandum written by the testator at the end of the will. This was similar to *Re Dewell*³² where the testatrix had again relied on acknowledgement of her original signature, and the witnesses had not only placed their initials in the margin opposite the interlineations, but had also placed their names immediately below a memorandum at the end of the will. The amended will was admitted to probate. It is true that the memorandum in *Re Dewell*³³ may have been more elaborate than the terse words of the testator in *Re White* but had not the testator in the latter case done enough to satisfy the method envisaged in the second limb of section 21? This method requires the memorandum to refer to the alterations and this he had done. The “memorandum” had also been written at the end of the will and underneath the testatrix’s signature as required, but the deputy judge considered that the force of the point was substantially removed by the circumstance that the words appeared

26. *Ibid.*, at p.11.

27. (1849) 1 Rob. Ecc. Rep.712.

28. (1880) 50 L.J.P.16.

29. (1849) 1 Rob.Ecc.Rep.712, at p.713.

30. *Ibid.*, at p.714.

31. (1880) 50 L.J.P.16.

32. (1853) 1 S.Ecc & Ad.103. The deputy judge in *Re White* [1991] Ch. 1, disagreed with the result in *Re Dewell*.

33. *Ibid.*, at p.104.

on the only convenient blank space on either of the two pages on which the alterations had been made.³⁴ However, section 21 envisages the memorandum being at the end of the will and the advantage of this method is that it avoids the need to initial each and every interlineation in the will.³⁵ It appears that the evidence of the two witnesses was inconclusive and it was accepted that they probably thought that there was no difference between attesting the will and merely attesting the alterations. While the former rather than the latter is required for the purposes of paragraph (d) of section 9, it is arguable that what is required for the second limb of section 21 is attesting the execution of a memorandum referring to the alterations. Whether or not the testator appreciated the distinction it seems that almost certainly he thought that he was giving effect to the whole document as altered. His expectation seems not unreasonable in the light of the wording of the second limb of section 21 rather than paragraph (d) of section 9.

(4) The current position in England

Some of the difficulties which arose with section 9 in its original form have been removed by the amendment in 1982 permitting witnesses to acknowledge a signature made previously, thereby reversing *Re Colling*, but it is clear from *Re White and Wood v. Smith* that others remain. It is true that there is little litigation in England about the formal requirements for the execution of a will. The number of contested probate applications is small. In 1991 there were 200 and in 1992 there were 109.³⁶ The number of wills rejected is also small. The Justice Committee reporting in 1971 were informed by the Principal Probate Registry that probate of a will was refused only an estimated eighty to a hundred times a year.³⁷ In 1978, at the request of the Law Reform Committee the Principal Registry of the Family Division conducted a survey of all wills submitted to probate in England and Wales during the period September 4th to December 1st.³⁸ This showed that the total number of wills admitted to proof was 40,664 and the total number rejected was 97, that is, about 0.24 per cent. In the case of 91 of those rejected (93.8 per cent), the will was home-made. The total number of wills rejected for failure to comply with section 9 was made up as follows:

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|--|------------|
| (a) testator's signature incorrectly placed | 8 (8.6%) |
| (b) less than two witnesses | 34 (36.6%) |
| (c) witnesses not present at the same time | 20 (21.5%) |
| (d) not signed in the testator's presence | 19 (21.5%) |
| (e) other reasons (including 9 not signed by the testator) | 12 (12.9%) |

34. [1991] Ch.1, at p.11.

35. It is true that doubt may arise if there are several alterations which are not individually specified in the memorandum but this will depend on the facts of an individual case.

36. Civil Judicial Statistics (1992) p.20.

37. *Home Made Wills*, p.2.

38. 22nd report, *The Making and Revocation of Wills*. Cmnd.7902, Annex 2.

However, this is not necessarily the whole picture for many “wills” may not be put forward for probate as they so obviously fail to comply with section 9. Even if the problem appears limited in its effect – to a “tiny minority” of cases³⁹ – this does not mean that alternative approaches need not be considered especially when such approaches are being adopted in other common law jurisdictions. It may well be a matter of great practical importance in as many as 400 cases a year.

It may be argued too that the present approach enables the court to concentrate on the written document and avoid the dangers inherent in considering oral evidence of the testator’s intention. The underlying idea is perhaps that somehow the document should speak for itself – that it be self proving. This is not, in fact, the case. A properly prepared attestation clause (which is not essential) may in practice perform this function in many cases (even though execution was defective).⁴⁰ However it does not prevent oral evidence being presented to show that the execution ceremony was not in fact properly carried out. In *Re Colling*⁴¹ Unged Thomas J said of section 9:

“The section is designed for the avoidance of fraud: but it is open to the comment that, in any event, oral evidence has to be relied upon of the circumstances in which the signature or mark of the testator and the witnesses are appended to the document. So that despite the requirements of the section, the requirement of oral evidence is itself embedded, although not expressly, in the terms of section 9 itself. It is, perhaps, unfortunate, particularly in circumstances where the section itself contemplates oral evidence as necessary, that the section has manifestly on occasion, defeated the intention of the testator and, in some cases, of which this is one, glaringly so.”

The 1982 Act may have removed the pitfall that proved fatal in *Re Colling*, but others remain. Oral evidence may show that the testator did not sign or acknowledge his signature in the presence of both witnesses present at the same time or that one of the witnesses signed the will in the absence of the testator.⁴²

Moreover, the reformulated section 9 requires the court to consider more directly the intention of the testator in relation to the signature. Is it more difficult to consider whether Percy Winterbone, the testator in *Wood v. Smith*, intended the document to be his will than to determine whether he intended the writing of his name in a particular place to give effect to his will? Is it not avoiding the real question at issue?

39. *Ibid.*, para.2.5.

40. In the absence of such a clause the witnesses will be required to swear affidavits confirming that the statutory requirements were complied with. If the witnesses are no longer available then reliance may be placed on the maxim *Omnia praesumuntur rite esse acta*.

41. [1972] 1 W.L.R.1440, at p.1441.

42. See, e.g. *Re Groffman* [1969] 1 W.L.R. 733.

A DISPENSING POWER

(1) The growth of the idea

The idea of conferring a dispensing power to enable a court to admit to probate a will notwithstanding failure to comply literally with the prescribed formalities has in practical terms been developed principally in Australian jurisdictions, starting with South Australia in 1975.⁴³ One Canadian jurisdiction has also introduced such a power.⁴⁴ In 1989 the Scottish Law Commission recommended the introduction of a dispensing power.⁴⁵ In 1990 the Uniform Probate Code was revised to include a dispensing power.⁴⁶ The idea of a dispensing power now has a significant support in the common law world. The idea has not, however, been translated into practice in identical terms in all jurisdictions. Indeed, the form of a dispensing power has also been a matter of debate and clearly influences views as to desirability. Two main approaches are evident in existing statutory provisions while some proposals suggest further possibilities.⁴⁷

(2) The “testamentary intention” approach

The first approach may be called “the testamentary intention” approach. The best known example is section 12 of the Wills Act 1936-1975 of South Australia. This provides as follows:

“A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.”

In the first reported case on this provision the testatrix, having signed her will, gave it to her nephew and told him to “get it witnessed”. He took the document to two neighbours who knew the testatrix, and they both signed the document “as

43. The underlying inspiration for much of the development has undoubtedly been the article by Professor Langbein, “Substantial Compliance with the Wills Act”, (1975) 88 *Harvard L.R.* 489. It should be noted that Israel introduced such a power in 1965: Israeli Succession Law 5725, s.25.

44. Manitoba, Wills Act, s.23. See also Law Reform Commission of British Columbia, Report No.52 *The Making and Revocation of Wills* (1983), p.54. In 1987 the Uniform Laws Conference of Canada approved a dispensing power for the Canadian Uniform Wills Act.

45. Scot.Law Com. No.124, *Report on Succession*, para.4.20.

46. s.2-503.

47. See the writer's earlier article, “Substantial Compliance and the Execution of Wills”, (1987) 36 *I.C.L.Q.* 559, and Langbein, “Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law”, (1987) 87 *Col.L.R.* 1.

witnesses'. There was independent verification of the signature of the testatrix and the witnesses verified their own signatures. Jacob J said that he had "not the slightest doubt that the deceased intended the document . . . to constitute her will", and it was admitted to probate.⁴⁸ There have been a number of subsequent cases where a document has been admitted to probate notwithstanding that the witnesses were not present or both present when the deceased made or acknowledged his or her signature. It has also been applied where there was no witness to the testator's signature. Most significantly, it has been applied in the case of documents which had not been signed by the testator. In *In the Estate of Blakely*,⁴⁹ a husband had signed his wife's will by mistake and she had signed his will by mistake. After the death of the husband the document signed by the wife was admitted to probate as the husband's will as there was no reasonable doubt that the husband had intended the document to constitute his will. In *In the Estate of Williams*,⁵⁰ a husband and wife had again arranged to execute their respective wills on the same occasion. Unfortunately, the wife omitted to sign her will though two neighbours had signed as witnesses. The full Supreme Court agreed in admitting the will to probate. King CJ said:⁵¹

"Signature is simply one of the formalities required by the Act for valid execution. There is no reason, as a matter of construction or logic, to differentiate between signature and any of the other formalities for execution required by section 8. All that is required for the operation of section 12(2) is that there should be 'a document purporting to embody testamentary intentions of a deceased person' and that the Court 'is satisfied that there can be no reasonable doubt that the deceased intended the document to be his will.' "

The statutory provisions in Western Australia and the Northern Territory are in almost the same terms as section 12(2).⁵² The same broad approach is adopted in New South Wales except that the court is not required to be satisfied as to the deceased's intention "beyond all reasonable doubt". It also expressly provides that in addition to the document the Court may have regard to any other evidence relating to the manner of execution or testamentary intentions of the deceased, including evidence of statements made by the deceased person.⁵³ The Law Reform Commission of Manitoba had also recommended that the relevant standard of proof should be that

48. *Re Graham* (1978) 20 S.A.S.R.198, at p.201.

49. (1983) 32 S.A.S.R.473.

50. (1984) 36 S.A.S.R. 423.

51. *Ibid.*, at p.425.

52. Wills Act 1970, s.34 as inserted by the Wills Amendment Act 1987 (Western Australia); Wills Act 1938 as amended by the Wills Amendment Act 1984 (Northern Territory).

53. Wills, Probate and Administration Act 1898, s.18A inserted by the Wills, Probate and Administration (Amendment) Act 1989.

applicable generally in civil matters, namely proof on the balance of probabilities, and the ensuing provision likewise does not require proof beyond reasonable doubt.⁵⁴ Both the New South Wales and the Manitoba provisions are worded so as to make it clear that defects in revocation and alteration as well as in execution of a will are covered though the absence of such a provision in South Australia has not prevented the application of section 12(2) to alterations and additions to a will.⁵⁵

The new provision in the Uniform Probate Code also falls into this category. The Code had already reduced the requirements for a witnessed will. Under section 2-502 a will must be:

- (1) in writing;
- (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and
- (3) signed by at least two individuals, each of whom signed within a reasonable time after he (or she) witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgement of that signature or acknowledgement of the will.

It goes on to provide that a will that does not comply with these requirements is valid as a holographic will, whether or not witnessed, if the signature and the material portions of the document are in the testator's handwriting. Section 2-503 then provides:

“Although a document or writing added upon a document was not executed in accordance with section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (v) a partial or complete revival of his (or her) formerly revoked will or formerly revoked portion of the will.”

(3) The “substantial” or “attempted” compliance approach

The second approach directs the attention of the court, in practice at least, to the degree of compliance with the prescribed formalities. This approach is found in the Queensland Succession Act of 1981. After prescribing the formalities for the execution of a will, which are essentially those of the original section 9 of the English Wills Act, section 9 of the Queensland Act goes on to provide that:

54. Law Reform Commission of Manitoba, Report No.43, *The Wills Act and the Doctrine of Substantial Compliance*, p.28; Manitoba Wills Act, s.25.

55. See *e.g.*, *In the Estate of Possingham* (1983) 32 S.A.S.R.227.

REFORMING THE FORMAL REQUIREMENTS FOR THE EXECUTION OF A WILL

- (a) the Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator; and
- (b) the Court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument.

The first cases on this provision showed that it was not sufficient to satisfy the court that the document expressed the testamentary intention of the testator. It was necessary to show that there had been an attempted compliance with the prescribed formalities. This was a question of degree. In *Re Grosert*,⁵⁶ the court found that there had been insufficient compliance when the testator had failed to sign the document in the presence of both witnesses. In *Re Johnston*,⁵⁷ the court reached a similar conclusion when the document had not been signed by the testator in the presence of any witness. In the unreported case of *Re Henderson*,⁵⁸ the Full Court refused an appeal from the judge's refusal to grant probate of a document signed in the presence of only one witness. The contrast with the decisions of the courts in South Australia, and *Re Graham* in particular, will be obvious.

Two subsequent decisions are, however, more encouraging. The first is *Re Matthews*,⁵⁹ where the deceased had completed a will form which he signed in the presence of one witness. He asked the witness to arrange for a neighbour to sign the document "as a witness". This was done but in the absence of the testator. Carter J took the view that *Re Henderson* did not establish that where there was only one witness there could never be substantial compliance. Taking into account the fact that the deceased was aware of the need for two witnesses and particularly the fact that no second witness was reasonably available, he held that it would be unduly harsh to insist on rigid formalities. This decision was distinguished in the subsequent case of *Re Eagles*,⁶⁰ where the two attesting witnesses had not been present at the same time. Williams J noted that unlike the position in *Re Matthews*, in the case before him there was no real urgency which compelled the testatrix to proceed in the presence of only one witness. What appears to have been of particular significance was that there was uncertainty as to the exact sequence of events. Williams J said that where a party seeking probate was relying on there being "substantial compliance" there was an "onus on that person to establish with some degree of precision what had

56. [1985] 1 Qd. 513.

57. [1985] 1 Qd. 516.

58. (1985) unreported. See de Groot, "Wills Execution Formalities—What Constitutes Substantial Compliance?", [1990] *Queensland Law Society J.* 93.

59. [1989] 1 Qd. 300.

60. [1990] 2 Qd. 501.

happened and when.”⁶¹ He had earlier noted that in *Re Matthews* Carter J had been influenced by the fact that he was satisfied that the document expressed the testamentary intention of the testator. Williams J commented: “That, in my view, will always be a relevant circumstance for the Court to take into consideration, but it can hardly ever be decisive. If that was the decisive consideration then there would be no need for the formalities which have for centuries been associated with the due execution of a will.”⁶² This indicates the dangers of the Queensland approach which still focuses on formalities rather than intention. The second encouraging case is *Re Cashin*,⁶³ where the testator had again used a will form. The signatures of the witnesses appeared in different parts of the document. The first witness had witnessed the testator’s signature and signed in his presence. The other witness had signed the will on the following day in the presence of the testator and the first witness. Demack J said that it seemed that proviso (a) clearly indicated that Parliament wanted to allow clear testamentary intention to override a lack of formality. It had chosen the words “substantial compliance” to define a judicial discretion.⁶⁴ The word “substantial”, when used in a quantitative sense, did not necessarily mean “most”, but might mean “only” or “some”. He continued:⁶⁵

“What seems to me to be important is that ‘the Court is satisfied that the instrument expressed the testamentary intention of the testator.’ Thereafter, the consideration of whether or not the testamentary instrument has been executed in substantial compliance with the formalities is a question that can only be answered according to the facts of each case.”

He concluded that in the particular circumstances of the case the lack of compliance had been slight, but warned that there might well be cases where a similar lack of compliance might be very significant indeed.

(4) Threshold requirements

It will be noted that even where there is a broad dispensing power, as in South Australia, writing remains as the one essential positive formal requirement that cannot be dispensed with. This does not mean that all the other requirements may be dispensed

61. *Ibid.*, at p.506.

62. *Ibid.*

63. [1992] 2 Qd. 63.

64. *Ibid.*, at p.65.

65. *Ibid.*

with in one particular case. The absence of any one or more requirements will affect the burden on the person propounding the will for probate. The greater the departure from the prescribed requirements, the greater the burden.⁶⁶ It means that the requirement of writing is a threshold requirement to which the dispensing power cannot apply. It would be possible to prescribe more than one threshold requirement. This was recommended by the Law Reform Commission of British Columbia, who favoured a dispensing power combined with two threshold requirements of writing and the signature of the testator.⁶⁷ In other words, the Commission was prepared to see a document signed by the testator admitted to probate notwithstanding the absence of witnesses if the court was satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect. The threshold requirements can be set at a lower level than the standard requirements for execution, so that the importance of the latter can be reaffirmed while enabling the court to alleviate failure to comply literally with those requirements in other aspects. This approach is not, therefore, the same as simply reducing the prescribed formalities. The disadvantage is that it narrows the scope of relief so that, for example, it would prevent relief in cases like *Blakeley* and *Williams*.

The question of threshold requirements was considered by the Scottish Law Commission which favoured the introduction of a dispensing power. They did not favour a dispensing power limited to cases where there had been "substantial compliance" with the normal requirements nor to cases where the testator had "attempted to comply" with those requirements.⁶⁸ They were in little doubt, however, that the power should be limited to written expressions of testamentary intention. While choice of this requirement as a threshold could be said to be arbitrary, the justification for this was a practical one. Oral expressions of intention would give too much scope for dispute and fraud.⁶⁹ On balance the Commission concluded that the signature of the testator should not be a threshold requirement for the exercise of the dispensing power.⁷⁰ They found strong support for confining a dispensing power to signed documents. It would reduce the number of difficult cases and reduce the opportunities for fraud. On the other hand, a "dispensing power limited to signed documents would not cover all the cases where such a power would be useful. It would not cover the type of case where, because of mistake, oversight or interruption, a testator omits to sign even though the circumstances leave no room for doubt as to his or her intention that the document should take effect as his or her will. It would

66. For a discussion of the appropriate standard of proof see Langbein, "Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law," (1987) 87 *COL.L.R.* 1, at p.34.

67. Law Reform Commission of British Columbia, Report No. 52, p.54.

68. Scot. Law Com. No.124, para.4.14.

69. It was acknowledged that this might not apply to certain types of oral will such as tape-recorded or video-recorded wills which might need to be examined at a later date.

70. Scot. Law Com.No.124, para.4.16.

not meet the case where a husband and wife mistakenly sign each other's wills."⁷¹ The absence of a signature should therefore be a factor to be taken into account by the court in deciding whether the document did represent the deceased's concluded testamentary intentions. It would no doubt weigh heavily with the court, but it should not be an absolute bar.

(5) An evaluation

It is hoped that this brief account has shown the advantages of a widely drawn dispensing power on the model of the South Australia provision. Objections to such a power have been voiced — in particular by the Law Reform Committee in England. The Law Reform Committee was concerned about the increase in litigation which they considered would be likely to follow the introduction of such a power.⁷² A dispensing power can, of course, only be exercised if an application is made to the court and it is likely that some documents would be presented which are so obviously defective that they would not now be presented. Some increase in litigation might therefore be expected, but, as the Law Reform Committee acknowledged, some of this would be uncontested where the evidence of testamentary intention is strong.⁷³ At any rate, it is unlikely that hopeless cases would be the subject of an application. Moreover, such applications would replace existing attempts to show literal compliance with the prescribed formalities. Efforts to establish a technical defect by someone who disliked the provisions of the will would be discouraged. In the first ten years or so of the operation of the dispensing power in South Australia there were thirty-two applications.⁷⁴ A higher figure could be expected in England in view of the larger population. The figures quoted above suggested that about 400 defective wills are presented for probate each year. Not all of these would be made the subject of an application but there might be others not now presented which would lead to an application. Even if there was some small increase in litigation, much of it probably by consent, would this not be preferable to allowing clear attempts to make a will fail in a not insignificant number of cases because of some technical defect?⁷⁵

The Law Reform Committee was also concerned that the courts would "not find application of their dispensing power an easy matter."⁷⁶ This does not generally seem to have been the case in South Australia and other jurisdictions where such a power has been introduced.⁷⁷ Moreover, the first part of the article will, it is hoped,

71. *Ibid.*, para.4.15.

72. Twenty-second Report, para.2.5.

73. Consultative Document (1977), para.13(g).

74. See Law Reform Commission of New South Wales, Report No.47 (1986), para.6.10.

75. There also seems to be an inconsistency in fearing an increase in litigation when it is also suggested that it is only in a "tiny minority of cases" that things go wrong.

76. Para.2.5.

77. Only in one reported case — *Re Kelly* (1983) 34 S.A.S.R.370, at p.384 — has there been any expression of unease on the part of the court. See further (1987) 36 *I.C.L.Q.*559, at p.582.

have shown that the question which the court faced in *Wood v. Smith* and *Re White* were far from easy. What is of particular significance is the nature of the questions which the court has to face in each case. At present a court in England has to focus its attention on the formalities which are a means to an end. The real issue is whether a particular document was intended by the deceased to operate as his will. Even if all the prescribed formalities are precisely followed, this is not guaranteed. Thus it is recognised that the formalities may not perform the protective function and a duly executed will may nevertheless be refused probate because of lack of testamentary intent due to mental incapacity, fraud, undue influence, suspicious circumstances or mistake. The prescribed formalities are no guarantee of protection of the testator. The fact that the prescribed formalities have not been precisely followed should not prevent evidence that the document nevertheless incorporates the testamentary wishes of the deceased. In exercising a dispensing power such as that in South Australia the court is facing the true issue – was the document intended by the deceased to be his will? There is naturally a reluctance to admit oral evidence of the testator's intentions but there is a distinction between oral evidence as to intentions as to the disposition of property and oral evidence as to whether a particular document was intended to embody those intentions. To permit the former would be to permit an oral will. To permit the latter is to deal with the real issue with which section 9 is concerned. Oral evidence is now admitted as to whether the formalities have been complied with and this includes evidence as to the testator's intention in placing his signature on the document. It would, of course, be possible to go to the other extreme and refuse to admit any oral evidence. This would seek to make the will "self-proving" and such a provision is also to be found in the Uniform Probate Code.⁷⁸ This it does by providing in effect for increased formality in the shape of a prescribed certificate. This section 9 does not seek to do because presence of an attestation clause does not prevent oral evidence that the formalities were not complied with.

A dispensing power would be open to objection if it led to a weakening in the attitude to formalities. However, this seems unlikely and has not proved to be the case in those jurisdictions which have a dispensing power. Strict compliance remains the norm because testators and their advisers will always prefer to avoid litigation. There is an incentive to comply strictly, but a safety valve where something goes wrong usually because of a misunderstanding about the details of the formalities.⁷⁹

CONCLUSION

It may be argued that the problem of defectively executed wills affects a relatively small number of people and that there is a danger that a radical new approach may, by increasing litigation and contention amongst members of a family, provide a cure

78. s.2-504. The operation of such provisions has also not been without difficulty. See Mann, "Self-proving Affidavits and Formalism in Wills Adjudication", (1985) 63 Wash.U.L.R.39.

79. See Langbein, (1975) 88 *Harvard L.R.*489, at p.524 and Miller, (1987) 36 *I.C.L.Q.*559, at p.575.

which is worse than the disease. The numbers affected cannot be stated with certainty, but bitterness within a family can be exacerbated by the inability to seek a remedy as well as by litigation. Even if the number affected is not large is this a reason for denying the possibility of relieving the problem? The conclusions of the Scottish Law Commission are worthy of note. They said:⁸⁰

“We think that reform of the law is desirable in this area. Some of the reported cases where the courts have been forced to deny effect to defectively executed wills cannot be read without a feeling that the law ought to be able to do better than this in giving effect to the wishes of the testators. We have no doubt that there are also cases which never reach the courts where everybody concerned recognises that a document cannot take effect because of some formal defect, such as the deceased’s signature being in the wrong place. We do not regard this as satisfactory.”

They went on to say that the position was also unsatisfactory in relation to alterations and additions to a will. It is submitted that the same can be said of English law. Moreover, the concept of a dispensing power has now gained acceptance in a significant number of common law jurisdictions. Experience over almost eighteen years in South Australia suggests that the adverse consequences feared by some have not materialised. The experience in South Australia and Queensland also show that a dispensing power focusing on the intention of the testator is preferable though the expression “substantial compliance” has performed a useful function in the development of the concept of a dispensing power. Further consideration should now be given to the introduction of a dispensing power in England and Wales.

80. Scot.Law Com.No.124, para.4.13.