Will-Making in Difficult Circumstances: How to Comply With Formal Validity Requirements

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In this article David E Grant and Gabor Bognar consider the challenges of making a formally valid will in difficult circumstances, such as those which may arise from the current coronavirus (COVID-19) pandemic.

1. Introduction

When one perceives a greater-than-usual risk of their near-term demise, the mind turns more readily to will-making. So it appears in the present pandemic, during which UK will-writers have reportedly experienced a substantial increase in client enquiries.

The question arises how intending testators and their advisors can execute a formally valid will under the law of England and Wales ("English law"), in particular under the Wills Act 1837 ("1837 Act"), section 9 ("Section 9").[1] Equally, it may be useful to address what should be done when strict compliance with the requirements of Section 9 is not possible.

In this article, we explain some key formality issues relating to Section 9. We then present some ideas which might mitigate the risk of the formal invalidity of a document executed with the intention of making a will. However, we emphasise that no one should regard such risk-mitigation steps, whether individually or taken together, as substitutes for complying with the relevant provisions of Section 9.

The views expressed in this article seek to express the relevant English law as it stands as of the date of its publication. The Ministry of Justice and the Law Society are reportedly in discussion about potential ways to relax the formality requirements of Section 9. Therefore intending testators and those helping them should be vigilant about any relevant legislative or regulatory changes. We note that such changes could cause some or all of this article to become obsolete.

Of course, this article is not intended as, and it is not, legal advice appropriate to the individual situation of any particular person. We suggest that any person involved in the process of making a will should seek advice from a specialist lawyer.

2. Key points

1. Section 9 sets out rigorous formality requirements for the execution of a will, which have general application for wills made under English law.[1] We suggest that intending testators and those helping them should strictly comply with these requirements.

2. The English case law about formal validity concern documents written and executed on paper or on a similar durable physical medium, using ink or a similar physical marking method for the signatures.

3. There is no binding precedent by an English court to recognise the formal validity of any electronic document which purports to be a will, or of any document executed by electronic means.

4. We regard it as possible that an English court might in the future hold that some electronic documents, and/or some documents executed by electronic means, do in fact comply with Section 9. This said, our opinion is that it is in the interests of any intending testator, and their heirs, not to expose the estate to the risk of becoming a litigation test-case.

5. If by reason of difficulty or urgency of the circumstances an intended will cannot be executed in strict compliance with Section 9, then we suggest that its execution should approximate the requirements of Section 9 to the fullest extent achievable.

3. Legislative requirements and the burden of proof

3.1. Statutory wording

The Wills Act 1837, section 9 is worded as follows:[2]

*"**Signing and attestation of wills***
No will shall be valid unless -

- *(a) it is <u>in writing</u>, and <u>signed</u> 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 <u>in the presence of</u> two or more witnesses present at the same time; and*
- *(d) each witness either -*
  - *(i) attests and <u>signs</u> the will; or*
  - *(ii) acknowledges his signature,*

<u>in the presence of</u> the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary." (Underlined emphasis added.)

The formality requirements created by Section 9, the wording of which could have been expressed more clearly in our view, has been interpreted by the English courts in a large body of case law.[3] In this article, we focus only on the simplest, and probably most common, method of will-execution, namely where the intending testator signs for himself or herself and where each witness signs for

himself or herself.[4] We highlight the meaning of three key words and expressions in Section 9, namely *"in writing"*, *"signed"* and *"in the presence of"*, because we consider that these may be particularly relevant when the execution of a will occurs in difficult or urgent circumstances.

3.2. "In writing"

The requirement of Section 9 for a will to be in writing means only that the will must be executed in a visible form. There is no statutory restriction as to the material on which a will must be written. Neither is there a requirement for a will to be written using any particular method, so that a will can be, for example, hand-written, printed, or typed. Further, Section 9 does not require any specific language, such as English, to be used in a will.

3.3. "Signed"

The courts have interpreted the Section 9 requirement for a will to be signed by the testator, having regard to its apparent legislative purposes, including that the function of a testator's signature is to evidence authenticity, as well as to evidence their intention to execute the document as a will. Thus, a signature capable of complying with Section 9 may include, if accompanied by appropriate evidence about authenticity and the testator's intention, for example the following:

a. a handwritten signature which does not state the testator's name but still identifies them (e.g. *"Your loving Mother"*);
b. an incomplete signature;
c. a signature stating an assumed name or using the name of another person;
d. a stamp or seal administered by the testator; or
e. an illegible mark or scribble made by the testator.

As to signing by/for the witnesses, similar methods can be used to comply with Section 9.

3.4. "In the presence of"

For the purposes of Section 9, an intending testator signs the will in the presence of the witnesses, if the latter are conscious of the relevant act of writing and either see it as it occurs, or have sufficient means to see it contemporaneously. Therefore, the witnesses need not know that what is being written is the intending testator's signature, nor do they need to know that what is being signed is a will. What matters is that the witnesses must be situated so as to have an opportunity to see the act of writing in question when it happens, with their respective organs of sight, not whether the witnesses actually see that act of writing. Accordingly, a witness must not be blind.

The foregoing considerations also apply, in similar form, to the requirement of Section 9 that signing by/for the witnesses must be in the presence of the testator. However, a testator's blindness does not preclude the fulfilment of this requirement, because in this regard the law adopts the perspective of the hypothetical testator with eyesight.

3.5. Burden of proof

The burden of proof in relation to compliance with Section 9 is allocated according to common law principles. The starting point is that the burden of proof is on the person propounding the will, i.e. the party seeking to rely on it. This burden is satisfied if the presumption of due execution is applicable: If a will appears on its face to comply with Section 9. then it is presumed to have been duly executed, unless that presumption is rebutted by very strong evidence to the contrary. This is because the English courts' general policy is to seek to give effect to the wishes of a testator and not to allow matters regarded as minor to stand in the way if the essential elements required for the execution of a will have been fulfilled.

Thus, the principle of due execution has effect even if, without more, a witness does not recall the circumstances of the will's execution, or if a witness has died and is therefore not available to give evidence. However, the presumption of due execution is rebuttable by evidence, for example, if it is apparent on the face of a will that it was not executed in accordance with Section 9, or if the available evidence indicates that what is shown on the face of a will does not correspond with the reality of what occurred in relation to its execution. In such cases the person propounding the will must prove by evidence that the will in question was in fact executed in compliance with Section 9.

We have dwelt on the burden of proof and the presumption of due execution to encourage intending testators and those helping them to make every effort to execute intended wills in strict compliance with Section 9 and to ensure that such compliance is shown on the face of the will. Related contemporaneous evidence should also be recorded and preserved, especially if there is any doubt as to whether Section 9 has been complied with. As to the latter, we will provide specific suggestions in part 5 of this article. Before we do so, it may be useful if we address some further relevant legal issues about the execution and interpretation of wills in English law.

4. Issues related to formal validity

4.1. Law Commission views

Opinions expressed by the Law Commission are not infrequently cited by the courts. Therefore it may be useful for us to refer to a Consultation Paper published by the Law Commission in 2017, which recognised that the 1837 Act (and related 19th century legislation) was in need of modernisation to take account of changes which have since occurred in society, technology and other relevant fields.[5]

The Law Commission did not propose any relevant reform of the three formalities considered in parts 3.2-3.4 above. In particular, it expressed preliminary views in favour of retaining the Section 9 requirement of writing, and against allowing audio or video wills.[6] The Law Commission also opined against any relaxation of the requirement for a testator to execute the will in the presence of at least two witnesses, who are present at the same time.[7]

The Consultation Paper addressed in detail the topic of electronic wills, which it defined as including both *"electronically executed"* and *"fully electronic"* wills.[8] In this regard, the Law Commission stated: *"[...] an electronic will has never been recognised as valid in this jurisdiction*

and our view is that the formality rules most likely preclude the electronic execution of wills.'[9] The Law Commission reached this view for two reasons.

First, because its analysis of the case law suggested that the Section 9 requirement of signing, discussed at part 3.3 above, would probably not be fulfilled by any electronic signature.[10]

Second, because in the Law Commission's opinion the case law indicated that the presence requirement, dealt with at part 3.4 above, would be unlikely to be satisfied by a video conference between an intending testator and the witnesses.[11]

However, the Law Commission did provisionally propose that specific legislation should be enacted in the form of an *"enabling power"*, which could eventually be used to create a legal regime for electronic wills that is separate from Section 9.[12]

In our opinion, the Law Commission's restrictive approach outlined above justifies highlighting to intending testators and those helping them, the importance of strict compliance with Section 9.

In relation to electronically executed wills and related matters, we consider it at least arguable that the Law Commission has reached conclusions that are not supported by the precedents it cited. None of the cases in question was about an electronically executed document or about witnessing by video conference, and such scenarios were not considered in the judgments. This said, in our view, best practice remains strict compliance with Section 9, so as to avoid a risk of having to persuade a court to recognise the use of modern technology in the process of executing a will as being consistent with Section 9.

4.2. Statutory interpretation

The consequence of formality requirements designed to evidence authenticity and intention (see part 3.3 above) is that a failure to comply with the requirements may render legally ineffective an intending testator's genuine testamentary wishes.

The English courts' approach to interpreting various types of documents has continued evolving in the last few years.[13] The willingness of the courts to give primacy to either (i) the actual words or (ii) a different interpretation which makes more sense, will depend upon the nature of the document in question. In a testamentary context, notions of commercial common sense which are referred to in the interpretation of contracts, may not be applicable. In particular, ***Marley v Rawlings***, a case which concerned the construction and rectification of a will, confirms that the courts will go to considerable lengths to uphold testamentary intentions which are imperfectly expressed.[14]

Whilst it is not yet clear to what extent there has been a similar change in the courts' approach to statutory interpretation, ordinarily statutes are always-speaking. In other words, the meaning of a statute is not limited by or to the circumstances which existed at the time of the enactment in question. Instead, subsequent developments in society, science and other factors can be taken into account by the courts when interpreting a statutory provision.[15] An updating approach to statutory interpretation may also be followed to take account of technological changes.[16] However,

when considering whether such updating is appropriate, the courts are constrained by the scope of the original legislation.[17]

4.3. Judicial attitudes going forwards

The preceding paragraph begs the question as to whether the provisions of Section 9 could be construed in a way whereby steps taken electronically for the execution of an intended will, which would have been inconceivable to legislators in 1837, could be upheld as being valid. Trying to divine what courts might do is dangerous even at the best of times, let alone in unusual circumstances. We consider that there is a decent prospect that in the future the courts may strive to uphold some wills made during the current pandemic as valid, even if their execution was imperfect in ways that may formerly have caused them to be held to be formally invalid. This said, inevitably, there will be limits to the courts' flexibility in this regard, and we would not venture to predict which side of the line any specific case might fall.

5. Mitigating the risk of formal invalidity, if compliance with the Section 9 requirements is difficult or not possible

Whilst our opinion is that intended wills should be executed in strict compliance with Section 9, as explained in parts 3.5 and 4.1 above, we recognise that this may not always be possible due to difficult or urgent circumstances. In such situations, we suggest that the execution of the intended will should approximate the requirements of Section 9 to the fullest extent achievable.

Recording and preserving evidence concerning the execution of an intended will and/or the testamentary wishes of an intending testator are important in every case. This applies with even greater force when there is any doubt as to compliance with Section 9. Therefore it may be useful if we set out some practical suggestions about steps which, in our view, should be taken by intending testators and those helping them in order to record and preserve such evidence:

1. A smartphone or similar device should be used to video record the process of executing the intended will, starting from at least the time when the finalised text starts to be read out to the intending testator, until at least the time when the last witness signs the document. Care should be taken with the microphone and camera settings, to ensure that the sounds and images recorded do capture on a continuous basis, the presence, actions and words of the intending testator, the witnesses, and anyone else in attendance.

2. If an intended will cannot be executed in a manner that is strictly compliant with Section 9, then in addition to any other steps which can be taken for the execution of the intended will in writing, the intending testator should also read aloud the intended will, or otherwise orally state how they want to dispose of their estate. Ideally, such an oral statement should be made to two or more witnesses in their physical presence or, as a fall-back option, in their presence by video conference. Such an oral statement will not amount to a will due to the absence of writing, which is an essential requirement of Section 9, as discussed in part 3.2 above. However, an oral statement of this kind might still have practical value, for example by informing would-be heirs of the intending testators' wishes and asking them to respect those wishes.[18] A video recording of the intending testator's oral statement should be

made. If no video recording of the intending testator's oral statement is possible, then any witness to it should promptly write down the content of the intending testator's oral statement and then send the resulting document to himself of herself by e-mail, or by registered post, so as provide a verifiable date/time stamp. Upon receipt, the e-mail or other postal item in question should be left un-opened for the time being, but it should be kept securely.

3. If it is impossible for the intending testator and the witnesses to be in the same physical place when an intended will is executed, then at least they should be connected by video conference during the relevant period. The video conference should be recorded.

4. If an intended will cannot be executed on paper or in another durable physical medium, then executing it in electronic form should be considered. From a legal perspective, in our opinion, the closer the execution process approximates the traditional method explained in parts 3.2-3.4 above, the more likely it is to be in compliance with Section 9. To illustrate this, consider the following hypothetical examples:

   a. Scenario 1: The intending testatrix types out the document which she wants to be her will, using a computer and word-processing software. Then in the joint physical presence of two witnesses the intending testatrix types her name at the end of the document in question, again using the same software. Immediately thereafter, each witness in the presence of the testatrix types her name on the document in a place below where the intending testatrix wrote her name to execute it, yet again using the same software. The computer file containing the document and the signatures is then saved on the computer.

   b. Scenario 2: The intending testator types out the document which he wants to be his will, using a computer and word-processing software. Then he types his name at the end of the document in question using the same software, without the presence of any witness, whether physically or by video conference. The intending testator then saves the computer file and e-mails it to two persons as potential witnesses. Each witness then types their name on the document in question, in a place below where the intending testator wrote their name to execute it, yet again using the same software. The witnesses do this when not in the presence of the intending testator, either physically or by video conference. Each witness then e-mails the completed document back to the intending testator.

   In our view, Scenario 1 more closely approximates the traditional method of executing a will than Scenario 2, at practically every turn. Despite the absence of English case law about either of these scenarios, our opinion is that there would be better prospects of Scenario 1 being held to have resulted in a formally valid will pursuant to Section 9, than for Scenario 2.

5. If an intended will is at first executed by a process which does not, or may not, strictly comply with the requirements of Section 9, then at the first opportunity thereafter the

intended will should be re-executed in a manner that clearly does comply with Section 9. Ideally, a video recording of the re-execution should be made.

6. Any electronic file which results from video recording or other electronic steps taken in relation to the execution of a will, should be promptly uploaded to a secure internet-based file-storage service, and/or it should be otherwise saved in archival copies, to reduce the risk of future deletion or loss.

6. Conclusion

We conclude this article by reiterating its main messages. First, intending testators and those helping them should ensure that any intended will is executed in strict compliance with Section 9, whenever that is achievable. Second, when difficult or urgent circumstances make it impossible to strictly comply with Section 9, then the legislative requirements should still be followed as fully as possible, and steps should be taken to keep any non-compliance to a minimum. Third, evidence relating to the circumstances of the execution of an intended will should be contemporaneously recorded and preserved.

Contact us

Please do not hesitate to contact us for help and support concerning will-making issues such as those discussed in this article, or in relation to litigation concerning wills, probate and other inheritance matters:

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Our barristers have appeared in some of the leading cases in the Private Client field, such as: ***Marley v Rawlings*** [2014] UKSC 2; [2015] AC 129, the Supreme Court authority on the validity,

construction and rectification of wills; and ***Futter v Futter*** [2013] UKSC 26; [2013] 2 AC 108, the Supreme Court decision on the existence and limits of the principle known as the rule in Hastings-Bass and the law of equitable mistake.

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Endnotes

1. In the interests of brevity, this article does not address the formal validity requirements for wills made by some particular categories of persons and/or wills made in some specific circumstances, namely:
    a. Adults who lack testamentary capacity, i.e. whose mental state is regarded in English law as making them incapable of executing a will pursuant to Section 9.
    b. Soldiers in actual military service.
    c. Mariners or seamen being at sea.
    d. Cross-border situations, such as when a person intends to execute a will outside England and Wales; or if at the time of the execution of the intended will or at the time of the intending testator's death, he or she is outside their jurisdiction of domicile, habitual residence, or nationality.

2. The full text of the 1837 Act is available here:
https://www.legislation.gov.uk/ukpga/Will4and1Vict/7/26/contents

3. For the key judgments regarding formal validity under Section 9 and related commentary, see: Learmonth, et al, **Williams, Mortimer & Sunnucks: Executors, Administrators and Probate** (21st edn, Sweet & Maxwell 2018) ("**Williams**"), chapter 9; and Martyn, et al, **Theobald on Wills** (18th edn, Sweet & Maxwell 2018) ("**Theobald**"), chapter 4.

4. The scope of this article does not include some execution scenarios allowed by Section 9, in particular where a signature for an intending testator is made by another person *"in his presence and by his direction"*, and/or where the intending testator or a witness merely *"acknowledge[es]"* his signature.

5. Law Commission, **Making a Will** (Consultation Paper 231, 13/07/2017) <https://www.lawcom.gov.uk/project/wills/>. See, in particular, chapter 1.

6. Consultation Paper, [5.47].

7. Consultation Paper, [5.22] and [5.56].

8. Consultation Paper, [6.6].

9. Consultation Paper, [6.15].

10. Consultation Paper, [6.23]. The Law Commission cited mainly ***Lim v Thompson*** [2009] EWHC 3341 (Ch); [2010] WTLR 661.

11. Consultation Paper, [6.32]. The Law Commission relied primarily on ***In the Goods of Chalcraft*** [1948] P 222.

12. Consultation Paper, [6.8] and Consultation Question 30.

13. For example, in relation to contracts, see: ***Wood v Capita Insurance Services Ltd*** [2017] UKSC 24); [2017] AC 1173 (indemnity clause in a share purchase agreement).

14. ***Marley v Rawlings*** [2014] UKSC 2; [2015] AC 129.

15. For example, see: ***R v Ireland*** [1998] AC 147 at 158C-159A (whether psychiatric injury constitutes "*actual bodily harm*" in the meaning of the Offences Against the Person Act 1861); and ***Yemshaw v Hounslow London Borough Council*** [2011] UKSC 3; [2011] 1 WLR 433 at [25]-[28] (whether *"domestic violence"* is limited to violence of a physical kind for the purposes of the Housing Act 1996).

16. As in ***Lockheed-Arabia v Owen*** [1993] QB 806, 814A-E (Mann LJ); 814G-815A (Ralph Gibson LJ) (whether photocopy of writing is *"writing"* under Criminal Procedure Act 1865).

17. ***Kingston Wharves Ltd v Reynolds Jamaica Mines Ltd*** [1959] AC 187, 195-196 (tractors with internal combustion engines not *"carriages"* under Wharfage Law 1895 of Jamaica); and ***R v Fellows*** [1997] 1 Cr App R 244, 253D-255A, (images uploaded to the internet are not *"photographs"*, but they are a *"form of video recording"* pursuant to the Protection of Children Act 1978).

18. From a legal perspective, an intending testator's oral statement about their estate might conceivably amount to a gift, a declaration of trust, or to a donatio mortis causa. These legal doctrines may require the oral statement to be accompanied by a delivery or transfer of the relevant item of property, or of a title document to that item of property, by the giver to a recipient. However, these matters are beyond the scope of this article.

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