Back to Basics: Formal Requirements for the Creation of a Will

Barring the exception of privileged and statutory wills, a will must comply with the requirements set out by section 9 of the Wills Act 1837 to be valid. This month’s CPD will cover these formalities in detail as a refresher for what is required for a will to be valid.

**Historical Basis for the Formalities**

The formalities provide a kind of safeguard against forgery and hasty or ill-considered dispositions. While the testator is free to choose the form the will takes, it must comply with the formality requirements to be valid, expressing reasonable evidence of the testator’s testamentary intentions.

Before the Wills Act 1837 came into force there were different formalities to comply with for different types of property, meaning it was possible for a will to be valid regarding one type of property while invalid for another. Thankfully, the formalities were brought together into one form and s9 of the Wills Act 1837 was enacted.

This Act has since been amended by the Wills Act Amendment Act 1852 and eventually substituted by s17 of the Administration of Justice Act 1982, though the substituted clause was more a change in form than substance. The amended provisions that we are familiar with today apply where the testator has died after 31 December 1982.

**Section 9 Requirements**

For deaths that take place after 31 December 1982 a will must meet the following requirements to be valid:

9. **Signing and attestation of wills**

   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),
IN WRITING

To be valid a will must be made in writing. There are no restrictions as to the material a will must be written with or on, which has led to some liberal interpretations. In the case of Hodson v Barnes (1926) 43 TLR 71 a will written on an empty egg shell was once held to be perfectly valid. For context it was an ostrich egg, but still quite a practical feat.

A Will written on a wall in bad Ukranian has also been held to be valid (Re Slavinsky’s Estate (1989) 53 SASR 221).

The Interpretation Act 1978 provides that in any Act, unless the contrary intention appears, the word “writing” is to be construed as ‘typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form.’ So, a will produced electronically by using will drafting software or a word processor meets this ‘in writing’ requirement.

A will written in braille or in another language is also perfectly valid. A verified transcription or translation must be provided to the probate registrar on proving the will though. We would suggest it is best that the formal will is produced in English and a translation or braille alternative provided to the testator for their own records because of this requirement.

A will written in a combination of ink and pencil may cause issues at probate as there is a presumption that the writing made in pencil was merely deliberative and should be excluded from probate.

SIGNATURE

The will must be signed by the testator, but the form that this signature can take can again be interpreted quite widely. In most cases a testator will sign with their usual signature, though they may sign with their mark in some way as long as it is intended to be their signature. The following methods have all been held to be valid signatures:

- A stamped signature (Re Jenkins [1863] 3 Sw & Tr 93)
- A rubber stamp (Perrins v Holland [2010] EWCA Civ 840,[2010] All ER (D) 210 (Jul))
- An inked thumb print (Re Finn’s Estate [1935] 105 LJP 36)
- Initials (Re Savory’s Goods [1851])
- An incomplete signature (In the Goods of Chalcraft [1948] P 222)
- The words “Your loving mother” (In the Estate of Cook [1960] 1 WLR 353)
- A mark of any shape (In the Estate of Holtam [1913] 108 LT 732)
- A mark made where the testator’s hand was guided by someone else (Wilson v Beddard [1841] 12 Sim. 28)

Signature on the Testator’s Behalf

A person may sign the will on the testator’s behalf as long as it is in the testator’s presence and at their direction, and all other formality requirements are met. The testator must also make some ‘positive and discernible communication’ that they wish the will to be signed on their behalf by a third party. The
person signing may either sign in their own name or in the testator’s name.

This option seems to have seen much use recently in light of the current coronavirus pandemic and the effect it is having on signing wills. There are many reports of will writers and solicitors opting to sign the will on behalf of the testator while the testator looks on through a window, in order to minimise any contact between drafter, testator and witnesses and comply with social distancing rules. Of course, all other requirements regarding witnessing must also be observed.

There are no restrictions on who may sign on the testator’s behalf. This may be an attesting witness, the will drafter, or even a beneficiary of the will. This may be subject to change though as Law Commission’s ‘Making a will’ consultation paper published in 2017 mentioned that they feel there should be restrictions on who can sign on a testator’s behalf. It is suggested that these restrictions mirror the restrictions on who may witness the signing of a will.

Interestingly in a 2012 Court of Appeal case on a dispute over whether a will was validly signed when a person signed it on behalf of the testator the fact that a beneficiary shouldn’t be able to sign on the testator’s behalf was brought up. The case was Barrett v Bem and others [2012] EWCA Civ 52.

One of the two arguments put to the Court of Appeal asked them to consider that as the signature on the will was made by the sole beneficiary under it the will should be declared invalid on public policy grounds, drawing a parallel with the statutory rule that disqualifies an attesting witness to benefit under the will. The court never actually considered this ground, having already allowed the appeal on the first ground that the testator hadn’t actually directed the person to sign on his behalf. In his obiter though, the judge did remark that he agreed that a beneficiary shouldn’t be able to sign on behalf of the testator and that Parliament should address this through legislative change. To date this legislative change hasn’t happened though.

There should be a special attestation clause to reflect the circumstances of the signing.

**Signature by a Blind or Illiterate Testator**

A will may be signed by a testator who is blind or illiterate. Rule 13 of the Non-Contentious Probate Rules 1987 states the following:

“Before admitting to proof a will which appears to have been signed by a blind or illiterate testator or by another person by direction of the testator, or which for any other reason raises doubt as to the testator having had knowledge of the contents of the will at the time of its execution, the registrar shall satisfy himself that the testator had such knowledge.”

When drafting for a blind or illiterate testator a special attestation clause should be included to reflect the circumstances of the signing and the will should be read to the testator in the presence of the witnesses. An example of such an attestation clause is below:

“**SIGNED by the above named [TESTATOR] who is blind the foregoing having previously been read over to him when he appeared thoroughly to understand the same and to approve the contents thereof as and for his last Will in our presence and then by us in his**”
If such an attestation clause is not present, and the probate registrar has reason to doubt the testator’s knowledge and approval then the will can’t be admitted to probate until further checks have been carried out. In practice this will mean the witnesses will need to be contacted and asked to provide affidavits to confirm that the will was read over to the testator, and the other circumstances of the signing.

**Position of the Signature**

The original section 9 of the Wills Act 1837 required the testator’s signature appear at the foot of the will, and this was interpreted very strictly by the courts until the Wills Act Amendment Act 1852 sought to rectify this by providing a wider definition of ‘foot or end’. For an example of just how strictly this was interpreted see the case of *Smee v Bryer* [1848] 1 Robb.Ecc 616 where a will was held invalid as the testator’s signature was not placed within the eight-tenths of an inch left blank at the bottom of the page, but was instead made on a following page.

Following the amendment to s9 made by the AJA 1982 the testator’s signature is no longer required to be at the foot or end of the will to give effect to it.

Where a will consists of multiple pages there is no requirement in English law for the testator to sign every page provided at the time of execution all of the pages are attached. Some Practitioners opt to have the testator sign every page anyway as a precaution, as it is suggested that this would lend extra support towards proving the testator had sufficient knowledge and approval of the will if challenged.

**Intention to Give Effect**

For a will to be valid it must appear that the testator intended by his signature to give effect to his will. This intention is generally presumed where an attestation clause is included.

**Signature Made or Acknowledged in Presence of Witnesses**

The testator’s signature must be made or acknowledged in the presence of at least two witnesses, present at the same time, who then sign or acknowledge their signatures in the presence of the testator. The witnesses do not need to know that the document is a will, but must have the opportunity to see the testator’s signature.

If the testator has not signed in the presence of both witnesses then he must acknowledge his signature in their simultaneous presence. There are three requirements for valid acknowledgement:

1) The will must have been signed before the acknowledgement
2) At the time of acknowledgement the witnesses must see, or have the opportunity of seeing, the signature of the testator. If it is obscured in some way there can be no valid acknowledgement.
3) The testator must acknowledge the signature by his words or conduct.

It is important to note that presence is strictly interpreted as *physical* presence. This is another element of the s9 formalities that has received some attention recently as a result of the coronavirus pandemic. A problem that many testators are facing is how to source two witnesses to sign their will without breaking social distancing rules. The fact that witnesses must be physically present when the testator signs or acknowledges their signature is impossible to overcome, and in England & Wales the witnessing can’t be
carried out by Skype or other video conferencing means.

The Law Society are working with the Ministry of Justice to look at what measures could be introduced to overcome this issue with witnessing wills. Some of the provisions they are considering are:

- Pass legislation allowing for witnessing by video conference to be valid. Removing the need for physical presence, and instead emphasising the need for the witnesses to simply see the signature.
- A system to allow a testator’s handwritten will to be valid if not witnessed – similar to holographic wills seen in some European jurisdictions
- An Australian style approach of giving judges discretion to declare a document a valid will, even if not made in the traditional form.

They were initially looking at extending the doctrine of privileged wills to cover wills executed during the pandemic, so a will can be valid even if it doesn’t comply with the s9 formalities, but this option has recently been discounted.

**THE WITNESSES MUST SIGN OR ACKNOWLEDGE**

Each witnesses must either attest and sign the will or acknowledge their signature in the presence of the testator. There is no requirement for the witnesses to sign in one another’s presence.

There is no requirement for a witness to provide his address or description. It is preferable for them to do so however, in case they need to be contacted later to give evidence of the due execution of the will.

**Form of Signature**

Ordinarily the witnesses should sign using their usual signature and underneath the testator’s signature. As with the signature of the testator though, the methods by which a witness may make their signature are fairly wide. They may sign by marking the will in some way intended to be their signature (Re Goods of Ashmore (1843) 3 Curt 756). Similarly, a signing by way of initials or by printing their name has been held to be valid.

The witness themselves must sign, though their hand may be guided if necessary. Unlike the testator, the witness cannot direct someone to sign on their behalf.

Though the witnesses’ signatures may appear anywhere on the will and there is no requirement for them to by next to or after the testator’s signature it is preferable for the witnesses to sign below the testator. Where a witness’s signature appears above the testator’s there is a presumption that this was the order in which they signed.

If the witnesses’ signatures are not made on the same sheet of paper as the will they must be made on a sheet of paper physically attached to the will. In the case of In the Goods of Braddock (1876) 1 P.D.433 the witnesses to a codicil signed on the back of the will that the codicil was attached to. The codicil was held to be valid.

**Capacity of Witnesses**

A witness can be anyone of the testator’s choosing provided they are mentally and physically capable of attesting at the time they sign. ‘In the presence of the testator’ refers to physical and mental presence.
A person who is blind may not act a witness as they are incapable of witnessing the physical act of signing the will. A person who is drunk, unconscious or otherwise mentally incapacitated cannot act as a witness.

In contrast, a minor may act as a witness provided they are not too young to understand the significance and effect of witnessing the will. A minor may not give evidence as to the validity of a will however so are best avoided as witnesses.

The WA 1837 contains other provisions relevant to who may act as a witness. Section 15 provides that a witness to a will or their spouse or civil partner is deprived of any benefit under it, however as they may still give evidence as to the validity of the will they are still technically a valid witness. Similarly s16 allows a creditor or their spouse or civil partner to witness a will. The executor of a will may also act as a witness (s17).

**Attestation**

Section 9 provides that no form of attestation is necessary. Including an attestation clause is desirable because, in the absence of an attestation clause, a district judge or registrar must, before granting probate, require the due execution of the Will to be established by affidavit evidence.

Where a will appears to be duly executed there is a presumption of due execution, though this is a rebuttable presumption. An attestation clause raises a stronger presumption that the Will was duly executed than if no such clause is present.

**DATES ON A WILL**

There is no statutory requirement for a will to be dated. A will without a date is valid provided all of the requirements discussed above are met. If there is doubt as to when a will was executed the probate registrar may request evidence to establish the date though, if necessary.

When signing a will the date should still be included as a matter of best practice. This avoids any uncertainty at probate. If multiple undated wills were found it could be difficult to establish which is the later will that should be admitted to probate.

If a will is appointing guardians then a date is required. This is because the rules pertaining to guardianship appointments require that the appointment is made by a person who has parental responsibility for the child, in writing, and is signed and dated by that person. If will appointing guardians is not dated then the will itself will be valid, but the guardianship appointment will fail. Conversely, a guardianship appointment in a will may be valid even if the will itself isn’t.

**CONCLUSION**

As you can see from the information here writing the will itself is only part of the process. A testator must ensure that the document they receive is executed in line with the s9 WA 1837 formalities. The SWW would urge all will writers to do as much as they can to make sure their client’s wills are validly executed. The SWWs stance on attestation is in clause 6.4 of the Code of Practice:
6.4. Clients must be provided with the opportunity for the attestation of all documents produced by a Member to be supervised by a Member or his representative and it shall be made clear in the Member’s terms of business whether or not this is chargeable. Where a client does not opt for such an attestation service then the Member shall offer free of charge a service to check, as far as is practical, that such documents appear to have been attested correctly.

These notes are produced solely for the benefit of SWW members when completing the May 2020 CPD test to gain 1 hour of CPD towards their annual quota. The notes do not represent legal advice and no reliance can be made on the content of the notes in any particular or individual specific client circumstances. Having read the notes members should cement their understanding by considering further reading around the subject.