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Wills in the Covid Era

I address you today on, inter alia, the Law Society guidance necessarily introduced as a result of the Covid19 crisis. I will also share my thoughts on other changes which might (and perhaps should) follow in the aftermath of the same.

As a first point, I have to say that I think that the Law Society of Scotland responded very well and very quickly to the difficulties which individual Practitioners might face in the field of Private Client work (and not just in that field) in relation to Wills. The Law Society of Scotland is to be thoroughly recommended in that respect.

We have effectively seen guidance in a number of areas but I wish to concentrate on three:-

1. in relation to Willmaking.

2. in relation to Powers of Attorney.

3. in relation to the Notarial execution of documents.

I will briefly consider each of the same (I assume that all of you have already read the relevant guidance and are reasonably familiar therewith).

However, as indicated, I wish also to go on to consider how our practice might change – irretrievably, but not just in relation to Wills – once the current crisis has ended.

Wills

The guidance on Wills was updated on 25 March 2020. It is fairly lengthy but I think there are certain parts of the same which I would wish to highlight.

One of the most important messages given by that guidance appears in the second paragraph where it is stated:-

> "It will rarely be appropriate to delay fulfilment of an instruction to have a Will prepared and signed and accordingly we have looked at ways that Solicitors are able to discharge their professional obligations. As such, we have produced the following temporary guidance during this time – this will be removed at a future date."

"This will be removed at a future date" – I think that things have changed irretrievably and I am not sure that we will ever go back to the way things were prior to 23 March 2020 when the Prime Minister announced the formal lockdown. However, I will expand upon this later in this Webinar.

I do not intend to rehearse the guidance at great length but there are certain parts which I think are of importance.

I would refer to paragraph (c) under the heading "Where instructions have already been taken".

Paragraph (c) states:-

> "If the isolation of the client is such that no witness is available physically with the client and there are no video facilities available the client can be told that their signature alone at the end of the Will is effective to make a valid Will, which can then be returned to the Solicitor after signature. If such a Will remains in that state until the death of the client, while it will be valid, it will be necessary as part of the Confirmation process to "set up" the Will as having been signed by the client, by Affidavit evidence as to their signature. For this reason, it will generally be preferable to replace such a Will by a formally executed version when the current conditions no longer prevail."

The guidance indicates that where possible, the Solicitor should attempt visual contact with the client by Skype or some other appropriate IT visual method. It should be noted that many firms have forbidden the use of Zoom owing to the (justified) concerns about security in using that medium. However, paragraph (h) of the guidance states:-

> "…where no possible visual contact at all can be made, what a Solicitor can do is limited. However, there is nothing wrong in telling an actual or prospective client that a testator can write out clearly their own Will or other testamentary instruction. Solicitors can confirm that subscription alone, while not ideal, will generally create valid testamentary instructions; and may also supply details of what is required for formal validity (that is subscription on each page before a single witness) (who need not know the contents of the document) and who signs on the last page after the testator's signature and to which should be added the date and place of signature and the witness's full name and address."

Although I appreciate that I have perhaps taken this out of order, I consider that paragraph (b) of the Wills guidance is of particular importance. This states:-

> "It maybe however that a suitable witness is not available and able to be physically present when the client is in a position to sign the Will. It may then be feasible to arrange a video link with the

client. If this can be done, the Solicitor can witness the client signing each page (taking care that the Solicitor is not excluded from being an effective witness, for example by being appointed as Executor directly or through a Trust Company) or have someone else on the video call do so. The further opportunity may then be taken to assess the capacity of the client and, using their professional judgement, the Solicitor can consider whether any undue influence is being exerted on the client.

The Will can then be returned to the Solicitor. We consider that the witness, as long as they have seen the client actually sign each page, can on receipt of the signed Will, legitimately sign and complete the signing details on receipt of the signed Will. We would anticipate that this would be deemed to form one continuous process as required by the legislation. However, as set out in the next paragraph, the key point is that the client will have signed a fully valid Will."

I think that this is a very useful way of ensuring that a client's Will is self-proving in terms of the Requirements of Writing (Scotland) Act 1995 and in my view is a stance (on the part of the Law Society) justified in terms of the existing legislation. There is also authority for a similar view in respect of Wills signed prior to 1 August 1995, when the Requirements of Writing legislation came into place and was enacted.

When the Law Society were considering how to address the question of making a Will during the Covid crisis, it had to consider a number of factors. However, perhaps the redeeming feature was that, if all else failed, as long as the testator signed his Will on the final page it would still be valid if not self-proving. However, representations were received from a small number of Solicitors regarding the provisions of Section 3 of the Requirements of Writing (Scotland) Act 1995. Section 3(4), paragraph (e) states that a document cannot be self-proving if it is shown:-

"That the person who signed the document as the witness of that granter's subscription did not sign the document after him or that the granter's subscription, or as the case may be, acknowledgement of the subscription and the person's signature as witness of that subscription were not one continuous process."

The provisions of Section 3(7) of the 1995 Act also required to be taken into consideration. That sub-section provides:-

"For the purposes of the foregoing provisions of this section a person witnesses a granter's subscription of a document:-

(a) If he sees the granter subscribe it;

(b) If the granter acknowledges his subscription to that person."

Subsection (7) does not state exactly when the granter has to acknowledge the subscription although I accept that looking at paragraph (e) of sub-section 4 the acknowledgement appears to require to be of a continuous process. How do we define "continuous process"? That is a point which I think will require to be considered in the aftermath and after the recovery from the current Covid crisis.

As a warning note, the guidance states at paragraph (i):-

> "This should not be taken as any kind of general encouragement towards the creation of "homemade" Wills which have generated much difficulty in many cases over the years and of course such a process does nothing to address capacity, undue influence and similar matters. In the present circumstances and for many people, however, it may be better to give such limited advice to enable Wills to be created rather than for prospective testators to have nothing at all in place.
>
> For any Solicitor undertaking this type of work we would remind you that there is Vulnerable Client Guidance available on our website."

I agree with the viewpoint of the Law Society. So far as possible, people should not endeavour to make their own Wills – but they always have done and I believe that they always will. However, society is changing.

Much of my work over a number of years has been the giving of Opinions to other Solicitors. A sizeable proportion of the Opinions which I have to give relates to whether or not a particular "homemade document" can be regarded as a valid testamentary writing.

I have to say that even before the Coronavirus crisis, it seemed to me that some Practitioners were not aware of the provisions of the Requirements of Writing (Scotland) Act 1995. All that is required under the 1995 Act is that an individual should sign his or her Will on the final page. Such a Will would not be self-proving but would still be valid – and as the Law Society indicate in their guidance, will require to be set up by an additional process in Court. However, surely that is preferable to having a situation where an individual, in a quandary, does nothing and dies without their last testamentary wishes being fulfilled.

We should bear in mind that 67% of those who die in Scotland each year do not have a Will. I suspect that in a very small number of those cases the individual has deliberately chosen (for whatever reason, however misplaced) to die intestate – but not in the great majority. An even more telling statistic is that 53% of those who die aged over 50 don't have a Will.

If an individual chooses to draw up his own Will and signs and dates it then it will still be valid if not self-proving. I suspect that we may find that an increasing number of our clients will, as a result of the current crisis, decide that they will make their own Wills (cutting out the expense of the "middle man") and we, the legal profession, may require to get used to this.

I also suspect that we may also see a change in relation to what is regarded as a valid Will – but of that more later. The Scottish Government has expressed an interest in digital wills, and the Law Society has already set up a working party to consider this matter.

The Position in England

The making of Wills in England & Wales during the Coronavirus crisis has been more problematical than for Scottish Practitioners.

The problem for Practitioners in England & Wales is that they have to deal with the very strict requirements set out under Section 9 of the Wills Act 1837 – a statute which does not apply to Scotland but which still governs much of how to assess the validity of a Will made in England & Wales.

Section 9 provides that no Will is valid unless:-

1. It is in writing and signed by the testator or by some other person in his or her presence and by his or her direction.

2. It appears that the testator intended by his or her signature to give effect to the Will.

3. The signature is made or acknowledged by the testator in the presence of two or more witnesses present at the time.

4. Each witness either:-

    - Attests and signs the Will.

    - Acknowledges his or her signature in the presence of the testator (but not normally in the presence of any other witnesses) but no form of attestation shall be necessary.

The provisions of Section 9 of the 1837 Act have been challenging for English and Welsh Practitioners. In England & Wales, the view is that normally the witness needs to be physically present alongside the testator and sign the Will at the same time as them. However, during the Coronavirus crisis, many Practitioners have been resorting to Zoom or other forms of video conferencing in order to deal with the execution of a Will.

This has raised doubts as to whether or not Wills witnessed in such fashion can be valid in terms of the 1837 Act.

Perhaps some examples from England might assist in demonstrating the difficulties here.

In the case of **Brown -v- Skirrow 1902 P 3,** the testator signed her Will in what was described as a "hectic shop". One witness saw her sign the Will. However the other witness was not immediately nearby and was having a conversation with another customer when it was signed. That other witness signed the Will afterwards because the testator asked him to do so. The judge in that case held that it was not validly executed. The judge took the view that the witnesses must have a clear line of signing and this must mean "visual presence". It did not matter that the testator had acknowledged her signature to the second witness since that acknowledgement needed to take place in the presence of both witnesses before they attested the document.

However, in the earlier case of **Casson -v- Dade 28 ER 1010 (26 June1781)**, a housemaid was in a horse drawn carriage and witnessed a Will being signed through a window when one horse pulling the carriage reared up. This offered the maid a clear line of sight at the moment of signature. The judge took the view that this was sufficient to meet the witnessing requirements (it should be borne in mind that this case was decided prior to the introduction of the Wills Act 1837).

However, and notwithstanding the fact that Casson -v- Dade preceded the 1837 Act, its validity was upheld in the English case of **Re Clarke 2011 COP 19/9/11** when a lasting Power of Attorney was held to have been validly executed where the granter was in one room and the witnesses in another separated by a glass door.

As indicated, however, doubts have been raised in England and Wales as to the validity of Wills witnessed via video conferencing. That being so the Westminster Government has taken action.

Bearing in mind the doubts and difficulties in England & Wales, on 25 July 2020, the Westminster Government published a paper on the topic of Wills made during the Coronavirus crisis. Quoting from that Ministry of Justice paper the Government stated:-

> "Currently, the law states that a Will must be made "in the presence of" at least two witnesses. However, whilst isolating or shielding some people have understandably turned to video link software as a solution – for example via platforms such as Zoom or Facetime.
>
> Ministers have today (25 July) acted to reassure the public that Wills witnessed in such a way will be deemed legal as long as the quality of the sound and video is sufficient to see and hear what is happening at the time.

> These changes will be made via new legislation in September, which amends the law to include video witnessing.
>
> Crucially, the move maintains the vital safeguard of requiring two witnesses – protecting people against undue influence and fraud."

The legislation to be introduced will backdate to January 2020 and will last until 31 January 2022.

Interestingly, the announcement from the Ministry of Justice states that 31 January 2022 might not be the ultimate stop date as it provides that this change to the law will last:-

> "… as long as deemed necessary, after which Wills must return to be made with witnesses who are physically present.
>
> The use of video technology should remain as a last resort and people must continue to arrange physical witnessing of Wills where it is safe to do so. Wills witnessed through windows are already considered legitimate in case law as long as they have clear sight of the person signing it." (**See my reference to the Casson case above**).

Similarly, and whilst the Ministry of Justice indicated that the new law will amend the Wills Act 1837 so that the presence of the witnesses can be either physical or virtual, it will emphasise that Wills still need to be signed by two witnesses who are not its beneficiaries and electronic signatures will not be permitted (see **Ross v Caunters 1980 Ch 297**)

The publication from the Ministry of Justice also states:-

> "In longer term, the Government will be considering wider reforms to the law in making Wills and responding to a forthcoming Law Commission Report. The Law Commission has been consulted in the development of the Government's response to this issue."

I have my doubts as to whether or not it will be possible to revert to the old regime of witnessing Wills. However, I must accept that my views can only truly be expressed in relation to Wills made in Scotland as how the Government in England and Wales decides to proceed on this very tricky matter is of course a matter for that Government.

One point which I think is interesting is that if you look at some of the articles on the internet in relation to this change in the law, there are constant reminders that the Willmaking Solicitor requires to be satisfied that his client has sufficient capacity to make the Will in question.

It will be interesting to see how matters develop in England and Wales.

Powers of Attorney

The Law Society of Scotland introduced new guidance in relation to Powers of Attorney on 8 April 2020.

The guidance is headed "Best Practice for Execution of Powers of Attorney When It Is Not Possible to Meet with the Client".

On this occasion I do intend to quote fairly substantially from the guidance:-

> "Sections 15, 16 and 16A of the Adults with Incapacity (Scotland) Act require that the Solicitor certifying capacity has interviewed the granter ***immediately*** before the granter subscribed the document.
>
> We appreciate that, given the current situation, Solicitors may not be able to meet clients, or may wish to avoid meeting them, for the safety of their clients, themselves and others. At the same time they will, as far as possible, wish to maintain accessibility to the legal services that the public requires. It will rarely be appropriate to delay complete fulfilment of an instruction to have a Power of Attorney granted and registered. We have therefore been looking at ways that Solicitors are able to discharge their obligations and, with agreement and approval of the Public Guardian, the following procedure may be adopted to satisfy the legislative requirements:-
>
> 1. The Solicitor would require to provide the granter with a Power of Attorney document in advance either by post or where the client has facilities to print it off by email (preferably a PDF version which cannot be altered).
>
> 2. The granter of the document should not sign the document in advance of the interview.
>
> 3. The granter must show the Solicitor via video conference that the document is unsigned prior to the interview.
>
> 4. The interview will take place and all the normal requirements for such an interview should be fulfilled, during the video conferenced interview.
>
> 5. If, following all normal criteria, the Solicitor is satisfied that the document can properly be certified, then, at the Solicitor's request, the granter should sign the document and the witness should sign as appropriate. The granter should then show the Solicitor the signed copy Power of Attorney document.

6. The client should be instructed promptly to return the original hard copy signed copy to the Solicitor.

The interview of the granter can take place by way of video conference between the Solicitor and their client. This may be Skype, Facetime or other video conferencing means. While it is not essential that a Power of Attorney is witnessed, as the document becomes self-proving at the point of registration, it would be prudent that the document is witnessed by someone attending with the client, where possible. The witness, of course, cannot be the Attorney or one of the proposed Attorneys.

Where it is possible to have a witness attend with the client, the Solicitor should involve the witness in the process as viewed by the Solicitor.

Once the document is signed the client should arrange to return the original, hard copy signed document to the Solicitor as soon as possible. A photocopy or scanned copy will not suffice for this purpose as Sections 15(3) and 16(3) of the Act set out that a Continuing and/or Welfare Power of Attorney shall be valid only if it is expressed in a written document which is subscribed by the granter. The Solicitor can only register the document once the principal, wet ink copy is received. This requires to be incorporated into that original document. It should be signed by the certifier on the same date as execution by the granter and attached to the original document once it is received."

The guidance goes on to indicate that is of course a matter of professional judgement for a Solicitor asked to certify as to whether or not these arrangements are appropriate in any individual case. Again this also acknowledges that even where the arrangements are followed, it is a matter for the Solicitor to decide whether he or she can properly certify the same. In particular it is stated:-

"This guidance refers only to the practical methodology for signing and certifying it at distance from the granter. It will mostly only be appropriate where the client is an existing client and you are satisfied the client has capacity, there is no undue influence and there is no other vitiating factor."

An interesting point to note from the guidance is the acknowledgement that even where no witness has signed the Power of Attorney, once the document has been registered, it will be treated as self-proving. This is of course completely different from a Will.

The guidance also acknowledges that different factors may apply where the individual who wishes to grant the Power of Attorney is an entirely new client. The guidance states:-

"It is for those reasons that caution should be exercised in proceeding in this way for new clients."

The guidance of course makes it clear that a Solicitor must adhere to his professional obligations to ascertain relevant capacity and that there is no undue influence or other vitiating factor.

I will revert to the future for Powers of Attorney later in this Webinar.

I turn finally to the question of notarial execution.

Notary Public – Execution of Document

The guidance in this area was updated by the Law Society of Scotland on 27 May 2020.

It states:-

"The Coronavirus (Scotland) (No.2) Act 2020, Schedule 4, Part 6 came into effect on 27 May 2020 and has made changes to the requirements for the personal presence of a Notary or Solicitor when executing certain documents.

Schedule 4, Part 6 states:-

1. The following requirements (however expressed) do not apply:-
   (a) A requirement for the relevant person to be physically in the same place as another person when that person:-

      (i) Signs or subscribes a document;
      (ii) Takes an oath;

      (iii) Makes an affirmation or declaration.

   (b) A requirement for another person to be physically in the same place as a relevant person when the relevant person signs or subscribes a document.

2. "Relevant person" means:-
   (a) A Solicitor;
   (b) An Advocate;
   (c) A Notary Public.

"Requirement" means a requirement arising from an enactment or rule of law.

3. For the avoidance of doubt:-

(a) The requirements described by sub-paragraph (i)(a) include a requirement that may be fulfilled by the physical presence of a professional of a type not mentioned in the definition of "Relevant Person" as well as by a professional of a type that is (for example, includes a requirement with physical presence of a Solicitor or a registered Medical Practitioner) but

(b) Sub-paragraph (i) only causes such requirement not to apply in relation to a professional of a type that is mentioned in the definition of "Relevant Person.""

As the guidance states, what does this mean for notarising documents?

Schedule 4, Part 6 has relaxed rule of law or statute which requires a Solicitor or Advocate (Section 9 of Requirements of Writing (Scotland) Act 1995) or Notary (General Notarial Law) to be physically present when the granter signs a document where physical presence would have been ordinarily needed. It does not affect the ordinary law which requires witnesses to certain types of documents such as Wills or registerable deeds where there is no need for a Solicitor or Notary to be present. This approach is limited by the validity of the Coronavirus legislation.

Accordingly, a Solicitor or Notary may authenticate the subscription or execution of a document using video technology during the Coronavirus crisis whilst social distancing measures or the provisions of the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 apply including meeting individuals in person.

The guidance goes on to useful assistance with identification and verification and sets out a process to be followed by the Notary.

One feature of the various sections of the guidance is clearly that the different strands of guidance are to apply only during the current Coronavirus crisis – that being stated or applied that matters will change – back – once the current crisis is over.

I wonder if that will happen?

Our clients are very demanding. The Law Society suggests that things that we are/were able to do during the current crisis may no longer be appropriate thereafter. Will our clients agree that this should be the case? Put another way, many of our clients might (not unreasonably) say if dealing with Wills

etc by video conferencing was considered to be legal and appropriate during the Coronavirus crisis why is our legal system not capable of extending that for the future? In my view, such a viewpoint may have some justification.

Many of our clients think that we charge too much for the preparation of their Wills and Powers of Attorney. Such clients may (wrongly in my view) consider that if we can deal with matters by video conferencing etc this should reduce our time etc and therefore entitle them to expect lower fees. I cannot agree with that viewpoint. Much of what we charge out to our clients for making a Will or indeed a Power of Attorney is "invisible" in so far as the client is concerned. The clients do not realise the degree of responsibility which the draftsman has in relation to, in particular, the drafting of a Will. I have said on a number of occasions that I believe that we will see a great increase in cases alleging professional negligence on the part of a Will drafting Solicitor following the various decisions we have seen in recent years (admittedly to date, largely English cases), all based on the House of Lord's case White -v- Jones 1995. I have already had to advise on a small number of occasions on the question of the acting of a well meaning Attorney whose decisions were retrospectively challenged (after the death of the granter) by other members of the same family for what might be viewed as essentially self-interested financial reasons.

When we draw up a Will or a Power of Attorney we have to be mindful of our duties to our clients and to protect them from their own possible lack of capacity or understanding (in which case we should decline instructions), as also undue influence more facility and circumvention where by definition the individual retains capacity but is perhaps vulnerable. That aspect surely forms an inchoate part of the charges which we make for the preparation of such documents.

I hope I may be wrong but I suspect that we will see a number of our clients in the future querying why their Wills and Powers of Attorney were so expensive when they could have been done by video conferencing and at arm's length – and I am not sure that now that the genie is out of the bottle, we can simply say that the steps which the legal profession took to facilitate the requirements of our clients during the Coronavirus are no longer appropriate once the crisis is over. What do we say when the client says "Why?".

Post Covid Landscape

I think (as I have already stated) that we may see changes to our practice which will become irreversible. In any event, some of the changes which I will now discuss with you were probably in the offing anyway. What are these changes?

1. Intimation of Executry Petitions

Prior to the Covid19 crisis, we found that Executry Petitions require to be "intimated" under an antediluvian procedure – they would be posted on the walls of Court and if there were no objections thereto, the Commissary Sheriff would discern the Petitioner as Executor Dative. That I would submit needs to change. I think that, in any event, change was likely to occur here as the Scottish Government had been considering for some time how intimation might be given to others interested in an intestate Estate when a Petition for appointment of a particular individual as Executor Dative had been received by the Commissary Office.

In its Consultation on Technical Issues in relation to the Laws of Succession published in 2014 the Scottish Government can risk a number of issues some of which we saw embodied in the Succession (Scotland) Act 2016. However, the Scottish Government also enquired as to whether or not the period for intimation of a Petition to appoint and Executor Dative should be extended from 14 to 21 days. Over and above that, the Scottish Government also sought views as to whether or not there should be a requirement to intimate a Petition on other or all beneficiaries.

I would be totally in favour of such a requirement. The "race" to be appointed Executor Dative in an intestate Estate can be highly competitive. I am sure that some of you will have been consulted by disgruntled clients who complain that one of their relatives (with whom they did not get on) had himself appointed as Executor Dative in an Estate (with the client consulting you having the same right to seek appointment) without telling anybody else. Such matters can be difficult to deal with. The Succession (Scotland) Act 2016 has introduced provisions here – but they are not yet enacted.

2. Bonds of Caution

Again, the Succession (Scotland) Act 2016 introduced provisions which have not been activated in relation to the question of a Bond of Caution. However, in the early part of the Covid19 crisis it was impossible to seek a Bond of Caution in relation to an intestate Estate. I think that the provisions of the 2016 Act should now be activated. In truth, I would not be in favour of a provision which abolished the need for a Bond of Caution in intestate Estate as I believe that there are circumstances where that would be appropriate – for example, where the Court is given evidence that the person who has applied to be appointed as Executor Dative (although entitled to do so in law) may not be a fit and proper person.

I would have to say that I am aware that there have been grumblings about the performance of RSA during the current crisis.

3. **The Digital Signature of Wills**

Although I do not favour digital signature of Wills, I think that this is almost certainly coming. The Scottish Government has already invited views on this very topic, and the Law Society has already set up a working party in response.

Why do I think we will see digital Wills?

The UN Convention on the Rights of Persons with Disabilities (2006) has already been ratified by the UK. There were 163 signatories to the Convention and there have been 181 ratifications/accessions.

I would refer you to Article 12 of the Convention. Article 12 is headed "Equal Recognition before the Law". It states inter alia:-

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognise that persons with disabilities enjoy legal capacity of an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."

Exercising legal capacity means the ability to enter into any legal transaction or act. This includes the making of Wills.

The UK, I think, will have to recognise that at present, given the requirement in both Scotland and England for subscription of a Will, it is almost impossible for individuals with severe physical disabilities to sign their Wills – the late Stephen Hawking may be a classic example. However, Stephen Hawking could write at great length, using his digital skills. I think that he did leave a Will but how he managed to sign it is, for me, a matter of conjecture He also might have benefited had he been able to sign his Will digitally. Under the Convention, it is the duty of ratifying Estates to ensure that processes are put in place so that people with severe disabilities can enter into the same legal acts as you or I could – and this includes the signing of a Will. There is a duty imposed on ratifying countries to ensure that the Articles of the Convention can be given effect to in so far as disabled persons are concerned. In my view, the introduction of a digital signature to a Will for disabled individuals would be part of a State's duty.

To foregoing does of course mean that we will require some form of absolutely secure digital signature – see below.

There is already legislation in place in respect of digital signatures.

I would refer you to the Requirements of Writing (Scotland) Act 1995 as amended by the Land Registration etc (Scotland) Act 2012. We already have provisions for the recognition of digital signatures – but they are yet to be brought into force. For the reasons expressed above, I believe that we may shortly see the Scottish Government taking steps to bring those provisions more fully in to effect.

The Law Society has guidance on the electronic signatures:-

www.lawscot.org.uk/media/368577/electronic-signatures.pdf

There are effectively three different formats of electronic signatures.

The first is the very simple version – an individual typing their name into a document. The second is an advanced electronic signature (AES – such as an Adobe sign and DocuSign). Thirdly, there is the qualified electronic signature (QES – such as the Law Society Smartcard). This is the standard that the 1995 Act as amended will treat as self-proving.

Obviously, there are steps which require to be gone through before an individual can get a qualified electronic signature. This includes showing ID which should be verified and a signature which is protected with a PIN. ID verification can now be done via video with a Qualified Trust Provider – the Provider will take a photograph of the individual in question and their identification, check this, ask for certain movements to confirm that a photograph is not being held up etc.

What is a "Qualified Trust Provider"? This is a third party who is permitted/qualified under EU based Trust Service Provider Regulations and is registered with the Information Commissioners Office – i.e. this would not be the Solicitor.

Where a firm undertakes work which involves electronic signatures, they will typically have Adobe sign or DocuSign and could opt to add QES services onto their account. Are costs involved for a Solicitor's firm having an account with QES? However, once the document is signed by an AES or QES, I understand that the programme uses encryption technology to secure the document (as if there had been attached thereto a wax seal). The signature "falls off" the document if it is amended after E-signing. This allows a check to be made as to whether or not the document may have been tampered with after signature and therefore there should be some confidence in the integrity of the document.

At least 60 countries in the world now recognise digital signatures as being valid for at least certain legal documents

We have now seen cases in other parts of the world where a digital document has been found to be a valid Will even although it was not signed by the testator.

I have to be acknowledged that the use of digital technology has increased greatly in recent years.

Recent statistics from the ONS indicate that our Society is becoming very accustomed to using digital technology. Thus:-

- It is estimated that in 2019, 87% of all adults used the internet daily.
- In 2019 for the first time more than 50% of adults over the age of 65 shopped online (54%).
- In 2019, the percentage of adults who made video or voice calls over the internet had more than trebled to 50%.
- In 2019 in the UK 93% of households had access to the internet – up 23% over the last decade.
- However, there are still many over 55's who had not used the internet over the previous three month period.

I bring these statistics to your attention as our clientele are becoming much more used to digital technology and as time goes by they would be, I think, entitled to expect that our legal profession also demonstrates that it is forward looking and prepared to use digital technology in the services which we provide to our clients.

What is happening in other parts of the World

In California, it is still the case that for a Will to be valid it must be in writing and signed by the testator and under current laws in California this means effectively a physical or "wet" signature. This is still the law under the California Probate Code, Section 6110. Electronic documents, with electronic signatures are valid for many other transactions in California under the Uniform

Electronic Transactions Act (Civ. Code Sections 1663.1-1663.17). However, the Uniform Electronic Transactions Act does not apply to Wills (Civ. Code Section 1633.3(B)(i)).

I understand that, however, there is pressure for California to change its laws to allow for the digital signature of an electronic Will.

In many states, it is still the case that there has to be a physical or wet signature. However, Florida changed its rules on electronic Wills in July 2020. I set out the rules below. They appear to me to authorise an electronic signature and also to combine features of the guidance adopted by the Law Society of Scotland at the early stages of the Coronavirus outbreak.

Under the new law in Florida which came into effect on 1 July 2020, the signing of a Will can be conducted entirely electronically online via remote presence through video. Section 732.522, Florida Statutes, governs the method and place of execution of electronic Wills and states:-

- Method and place of execution – for the purposes of execution or filing of an electronic Will, the acknowledgement of an electronic Will by the testator and Affidavits of witnesses under Section 732.503, or any other instrument under the Florida Probate Code:-

    (i) Any requirement that an instrument be signed may be satisfied by an electronic signature [*Note: my emphasis*].

    (ii) Any requirement that individuals sign an instrument in the presence of one another may be satisfied by witnesses being present and electronically signing by means of audio video communication technology that meets the requirements of Part II of Chapter 117 and any rules adopted thereunder, if:-

        (a) the individuals are supervised by a Notary Public in accordance with Section 117.285;

        (b) the individuals are authenticated and signing as part of an online notarisation session in accordance with Section 117.265;

        (c) the witness hears the person signing make a statement acknowledging that the signor has signed the electronic record.

        (d) the signing and witnessing of the instrument complies with the requirements of Section 117.285.

    (iii) Except as otherwise provided in this part, all questions as to the force, effect, validity and interpretation of an electronic Wil which comply with this section must be

determined in the same manner as in the case of a Will executed in accordance with Section 732.502.

(iv) An instrument that is signed electronically is deemed to be executed in this state if the instrument states that the person creating the instruments intends to execute and understands that he or she is executing the instrument in, and pursuant to the laws of, this state.

This of course means that the new law in Florida allows the signing of Wills to be completed utilising remote notarisation and remote witnesses via video services. It makes it clear that the testator, witnesses and notaries do not require to be in the same physical location. The other formalities of execution (other than everyone being in the actual presence of each other) are in Florida the same for standard Wills. Although they do not require to be in each other's physical presence, the witnesses to the electronic signature must hear the testator acknowledge his or her signature. Failure to comply with that particular provision can render the Will invalid.

I think that it is unlikely for it to be too long for other states to follow that type of lead.

Arguably, Nevada has been a leader in the field of digital Wills.

Historically, to be valid in Nevada a Will had to be dated and signed by the testator in the presence of two witnesses. Those witnesses could not be related to the testator nor could they be beneficiaries under the Will. In so far as the creation of a valid Trust was concerned, the Settlor had to appear personally before a Notary Public to acknowledge that he or she was the granter of the Trust Deed in question.

However, these laws in Nevada were changed under NRS 133.085 and 163.0095, it is provided in Nevada that a Will and/or Trust can be drafted, signed and even witnessed and notarised electronically or virtually and still be valid.

In so far as an electronic Will is concerned, to meet the required provisions of the statute, the Will must be:-

1. Created and maintained in an electronic record.
2. Contain the date of signature and include at least one of the following:-

(a) An authentication characteristic of the testator.

(b) Being a characteristic of a certain person that is unique to that person, capable of measurement and also recognition in an electronic record as a biological aspect or physical act performed by that person such as:-

(i) A fingerprint.
(ii) A retinal scan.
(iii) Voice recognition.
(iv) Facial recognition.
(v) Video recording.
(vi) A digitised signature or other commercially reasonable authentication using a unique characteristic of the individual in question.

There should also be an electronic signature and electronic seal of an electronic Notary Public placed on the document in the presence of the testator and in whose presence the testator has placed his or her electronic signature, or electronic signatures of two or more attesting witnesses placed on the document in the presence of the testator and in whose presence the testator also placed his or her own electronic signature to the document.

Whether or not a Will, is “electronic” in Nevada the testator must be over the age of 18.

For an electronic Will to be submitted for Probate in Nevada it requires to be “self-proving”. The Probate Court will require certain conditions to admit the Will to Probate without requiring the witnesses to attend to personally testify.

In order to be self-proving, an electronic Will must:-

1. Contain Declarations or Affidavits of the attesting witnesses which are incorporated as part of, attached to or logically associated with the electronic Will.

2. The electronic Will must designate a qualified Custodian to maintain custody of the electronic record of the electronic Will.

3. Be at all times prior to being offered for Probate or being reduced to a certified paper original, that is put up for Probate, under the custody of a qualified Custodian.

Under the changed Nevada law in respect of Trusts, an online Trust is a valid Trust Deed when it:-

1. Is written, created and stored in an electronic record.

2. Contains the electronic signature of the Settlor.

3. Otherwise conforms to Nevada statutory requirements for a valid Trust.

The electronic Trust will be deemed to have been validly executed in Nevada if it is:-

(a) transmitted to and maintained by a Custodian designated in the Trust instrument at the Custodian's place of business in Nevada or at the Custodian's place of residence in Nevada.

(b) maintained by the Settlor at the Settlor's place of business in Nevada or the Settlor's residence there, or by the Trustee at the Trustee's place of business or Trustee's place of residence again in Nevada.

In respect of both Wills and Trusts, the documents must name and make use of the services of a "Custodian". This means that the Attorney with whom the testator/Settlor agrees to execute an electronic Will or Trust must be a qualified Custodian who has the ability to store, maintain and produce that public record virtually.

What about South Africa?

On the face of it, it would appear that South African legislation does not permit electronic Wills. South Africa does have legislation which allows for electronic data transmissions called the Electronic Communication Transaction Act. However, using electronic data messages as a method of executing a valid Will is prohibited by Section 4(4) of the Act. The South African Wills Act prescribes in Section 2(1)(a) that to be valid in South Africa a Will must be:-

(i) In writing.

(ii) Signed.

(iii) Attested by two competent witnesses.

(iv) Every page must be initialled by the testator.

However, in that connection, I would refer you to the case of **Macdonald v. The Master 2002 (5) SA 64 (O)**.

In the Macdonald case, the South African Court held that a draft Will in the form of an electronically stored document, stored on a computer hard disc could be "condoned" in terms of Section 2(3) of the Wills Act, even if all of the relevant statutory requirements had not been satisfied. It was possible to admit such a draft Will as valid proof of an existing Will.

The deceased had committed suicide on or about 14 December 2000 and left in his own handwriting four notes dated 13 December 2000 on a bedside table next to the bed in which he was lying.

One of the notes was in the following terms:-

> "I, Malcolm Scott Macdonald, ID 5609065240106, do hereby declare that my Last Will & Testament can be found on my PC at IBM under directory C:/windows/mystuff/mywill/personal."

The following day, the notes containing the passwords to the electronic files referred to were handed to IBM employees who obtained access to the valid contents and printed the contents onto paper. The print out purporting to be the deceased's last Will was handed to his widow. The file was then deleted. The Master of the Probate Court refused to accept it because it did not comply with the formalities set out in Section 2(1)(a) of the Wills Act. Two witnesses from IBM testified in Court that the deceased had been a Senior IT specialist employed by IBM and that only he had access to the particular computer which contained the provisions of the document which the deceased had intended should form his Will.

The Court set out its requirements to establish the elements that the Applicants had to prove for the Will to be accepted:-

(a) That the document and the annexations thereto were drafted by the deceased.

(b) That the deceased had died since the drafting of the documents.

(c) The documents were intended by the deceased to be his Last Will & Testament.

While the Court was satisfied that the second requirement had been proved, it still had to consider whether the two other requirements of Section 2(3) had been satisfied. It had to determine whether the data message constituted a draft Will that had been intended by the deceased to be his Last Will & Testament and whether the document had in fact been drafted by the deceased. The Court had to distinguish between the strict approach which requires that the document be drafted in the deceased's handwriting and the liberal approach which states that the document need not be in the deceased's handwriting and might be typed by the deceased or even be dictated by the deceased.

In deciding in favour of the liberal approach, stated:-

> "The retention of the formal requirements of Section 2(1) and the peremptory nature of Section 2(3) do not justify a strict interpretation of Section 2(3). Not only is this inconsistent with the very purpose of Section 2(3), namely to prevent the last wishes of the testator from being nullified by non-compliance with technical formalities, but it also does not take cognisance of the realities of the technical world we live in."

The Court had to establish whether the draft Will was the testator's Last Will & Testament. The Court stated:-

> "The principal requirement on which the Court should be satisfied, on a balance of probabilities, is that the person who executed the document intended the document to be his Will. All the evidence, as well as the nature and contents of the documents themselves, clearly indicate that the documents were intended to be the Last Will & Testament of the deceased. Of importance is that these documents are not a preliminary sketch or notes or discussion of a Will still to be drafted but are clearly a finally drafted Will & Testament."

The Court held on the balance of probabilities that the Applicant had proved that the data message contained her husband's Last Will & Testament based on the three part test embodied in Section 2(3) of the Wills Act.

The Court did warn that the discretionary power contained in Section 2(3) of the Wills Act should be used sparingly and that their decision on the Macdonald case should not be seen as a legal precedent as a means of validating electronic Wills.

In the Macdonald case, the Court held the following factors to be of importance:-

(1) The documents gave a clear indication of the deceased's intention that they should be regarded as his Last Will & Testament.

(2) The documents were not preliminary sketches or notes for discussion with an Attorney or anyone else to draft the Will but his final wishes.

(3) There was no element of suspicion of fraud attached to the documents and their reproduction.

(4) There was no suspicion that there could have been any tampering with the computer or the documents.

(5) Not only did the documents exist on the computer but there was indeed clear reference by the testator to these specific documents in his notes.

(6) There was a clear indication by the deceased where the document could be found on his computer.

(7) Only the deceased had access, by way of a secret password, to put the documents on the computer.

(8) Only the deceased could have typed the documents.

(9) They could only be extracted upon the instructions of the deceased in his own handwriting and only with the deceased's own secret code.

The case of **Van der Merwe v. The Master & Another 2010 (6) SA 544 (SCA)** obviously post-dated the enactment of the 2002 Act. In that case the Applicant, Van der Merwe was a very close friend of the deceased. They had agreed that they would each execute a Will making the other the sole beneficiary of their respective estates. The deceased sent Van der Merwe an email on 26 July, containing his contested Will with Van der Merwe being named as sole beneficiary. Van der Merwe in his turn drafted his Will naming the deceased as sole beneficiary. The deceased did not execute the document which he had emailed to Van der Merwe nor did he meet any of the other formalities required under Section 2 of the Wills Act. An earlier completely valid Will signed by the deceased in September 2004 had left his whole estate to The Society for the Prevention of Cruelty to Animals. After his friend's death, Van der Merwe applied to have the email document declared the deceased's Last Will and Testament under Section 2(3) of the Wills Act. His application at first instance was dismissed by the Court. The judge stated that he could not hold that the email document was a valid Will as in the absence of a signature it would be "impossible to link a document alleged to be a Will, to the testator. In this instance, one cannot speak of a Will, otherwise any document as long as it contains the particulars of the testator, may be characterised as a Will." However, Van der Merwe appealed to the Supreme Court. The Supreme Court took the view that there were two questions to be asked – did the deceased draft or execute the document; and if he did, did he intend it to be his Last Will and Testament. The Supreme Court unanimously held that the lack of signature had never been a complete bar to a document being declared a valid Will in terms of Section 2 of the Wills Act. Applying the provisions of Section 2, sub-section 3 of the Act, the Court said that the very object of that section was "…. to ameliorate the situation where the formalities have not been complied with but were the true intention of the drafter of a document is self-evident."

The Court found in favour of Van der Merwe.

I think it fair to say that in both Queensland and in South Africa the relevant provisions enabling an unsigned Will to be given effect to are intended to ensure that where the Court is satisfied that an unsigned document does truly represent the last testamentary wishes of an individual, the Court should endeavour to give effect to the same. That is not, however, presently the law in either Scotland or England where absence of a signature in both jurisdictions would be fatal to the validity of the document

Should we consider adopting the same approach as the Supreme Court in South Africa?.

There have already been cases from Australia where an unsigned Will was accepted as valid.

Under Section 18 of the Succession Act 1981 (Queensland) as amended (Succession Amendment Act 2006 Division 4 Section 18) it was provided that the courts could "dispense with execution requirements" of Wills where a document "purports to state the testamentary intentions of a deceased person". "Document" under the Acts Interpretation Act 1954 Schedule 1 is defined as "any disc, tape, or other article or material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device)" – thus, if a draft Will had not been signed prior to the prospective Will maker's death, then certain individuals could make an application to the Supreme Court of Queensland under Section 18 of the Act, requesting that the Court issue a Grant of Administration in relation to the unsigned Will. The Act provides that if the Court accepts the application and makes the grant, the unsigned document will fall to be treated as the deceased's Will for the purposes of administering his or her Estate.

The provisions of the Act were considered in the case of **Smith -v- Christianson & Others (April 2016**).

> In that case, on a Friday afternoon the deceased had given verbal instructions to his lawyer regarding a new Will he wished to grant. The lawyer recorded Mr. Williams' instructions on a copy of the client's current Will and on an Instruction Sheet. He read the instructions back to Mr. Williams. Mr. Williams then read the lawyer's record of his instructions himself and agreed that the lawyer's record was accurate. An appointment was then made with the lawyer to sign the new Will the following Monday. The lawyer prepared the new Will after returning to her office on the Friday afternoon. Unfortunately, however, Mr. Williams died over the weekend prior to signing his new Will.
>
> The Executor named under the unsigned Will applied to the Supreme Court of Queensland under Section 18 of the 1981 Act, requesting that Letters of Administration with the unsigned Will be granted to her, even although it did not meet the formal requirements of a valid Will.

However, the application was dismissed on the basis that the unsigned Will did not satisfy the criteria of Section 18 of the Act – as Mr. Williams had not reviewed by accepted the contents of the unsigned Will prior to his death. The judge found that there was not enough that Mr. Williams had confirmed that the lawyer had recorded his instructions accurately. Mr. Williams had not seen the unsigned Will before he died and it could not therefore be determined if Mr. Williams was satisfied that the Will as prepared accurately reflected his testamentary wishes and instructions. This was not withstanding the fact that the Will as drawn up may well have reflected his instructions. The judge took the view that the crucial issue for the Court was that the Court could not be satisfied that Mr. Williams did indeed intend to sign the unsigned Will in order that it would become his final Will.

In that particular case, the Court indicated that it was not prepared to follow decisions in previous cases where applications under Section 18 of the Act had been successful. For example, in **Mitchell -v- Mitchell 2010 WASC 174,** the testator had reviewed the draft Will and had indicated that he wished to sign it. However, the testator went for a shower and died during the shower. Owing to the fact that the testator had seen the draft Will and had confirmed that he wished to sign it prior to his death the Court in that case granted administration in respect of the draft Will.

I turn now to the Queensland case of **Nichol -v- Nichol 2017 QSC 220.**

In that case, the deceased had been with his spouse for over three years but they had been married for only one year. There was evidence that the couple had encountered problems with the spouse leaving the deceased on a number of occasions one of which was two days prior to his death. The deceased had committed suicide and his body was in fact found by his spouse next to his mobile phone.

On the mobile phone a draft message was found stating the date headed "My Will" and indicating that he would make no provision to his wife and that his superannuation and house were to go to his brother and nephew. The text stated that his ashes were to be placed "in the back garden" and he provided the pin to the Bank account where his funds were held.

The actual message was as follows:-

> "Dave, Nic, you and Jack keep all that I have house and superannuation, put my ashes in the back garden… Julie will take her stuff only. She is ok gone back to her ex again. I'm beaten. A bit of cash behind TV and a bit in the Bank, cash card pin … 10/10/2016 My Will."

The brother and nephew made an application to the Court to have the text message recognised as the deceased's Last Will & Testament under Section 18 of the Queensland Succession Act 1981.

The spouse claimed that the text message could not be considered to be a Will. Further, as the deceased had no prior Wills she made an Application for Grant of Letters of Administration on intestacy.

If granted, this would give her priority in the Estate.

The Court decided that in determining whether a document could be considered under the 1981 Act to be a Will three conditions had to be taken into account:-

1. Whether there was a document.

2. Whether the document purported to embody the testamentary intentions of the relevant deceased.

3. Whether the evidence satisfied the Court that it was the deceased's intention for the document to operate as his Will

.

Court took the decision that in each case the relevant conditions had been met. The Court ordered the text message to be admitted to Probate in solemn form in favour of the brother and nephew and that they should be granted Letters of Administration to be the administrators of the Will.

I have to say that these cases from Australia do cause me some considerable difficulty – perhaps I am a dinosaur who feels that a signature to a Will – even if only on the final page – is a minimum requirement – it always has been in both Scotland and England. I would very be concerned about the possibility of fraud etc arising in such cases. I appreciate that there may be some justification if the deceased had had a Will drawn up with his lawyer and had approved the same (the lawyer confirming this following the death of the individual in question) but the Nichol case does send a shiver down my spine.

4. Activation of the Relevant Provisions of the Succession (Scotland) Act 2016

I have already touched on this.

There are provisions of the 2016 Act which have not yet been brought into force. In that connection, first of all, I would refer to Section 19(2) of the Act. This provides:-

"The Scottish Ministers may by regulations make provision modifying Section 2 of the Confirmation of Executors (Scotland) Act 1823 to the effect that cases additional to those for the time being set out there are cases in which caution is not required to be found."

Section 20 of the 2016 Act states:-

"The Scottish Ministers may by regulations make provision to the effect that persons appointed as Executors Dative are not in any circumstances to be required to find caution before Confirmation is granted."

Section 21 is perhaps even more important. There have been arguments over the years as to why caution should be required in normal intestate Estates. However, I am sure that some of you have had to deal with family disputes where a parent or other relative has died intestate. Quite apart from the race to be appointed Executor Dative, there may be concerns about the character of the person who has won that race.

Section 21 allows Scottish Ministers by regulations to make "provision to the effect that Courts are not to appoint persons as Executors Dative unless particular conditions are met."

Section 21(2) states:-

> "Such conditions may, in particular, include:-
>
> (a) The Court being satisfied that the person is suitable for appointment.
>
> (b) The Court being provided with particular information about:-
>
> (i) The person seeking appointment;
> (ii) The Estate in respect of which the appointment is to be made."

The section is designed to allow a Sheriff to decline to appoint a particular individual as Executor Dative in particular circumstances – even although that person may well be able to demonstrate that he or she is in fact a beneficiary on intestacy.

I suspect that the Scottish Government may consider accelerating bringing the foregoing provisions into effect once we are clear of the current crisis. The provisions of those sections (and of Section 22) are of importance and I think are likely to be considered to reflect the current view of Scottish Society – a matter which is of obvious importance to the current Scottish Government.

5 **Powers of Attorney**

A very quick prediction – I think that we will see an even greater interest on the part of our clients re Powers of Attorney – and also in making appropriate wills.

6 Other Possible Changes

Perhaps this is wishful thinking in my part. However, I think it is reasonably well known that I have always opposed the time limit set out in Section 29 of the Family Law (Scotland) Act for raising of an application by a cohabitant where their partner has died intestate. Under Section 29 the time limit is very strict – six months from the date of death and if not raised within that time then the right to apply to the Court is lost forever.

That time limit has always appeared to me to be completely unjust. It is peremptory and it does not take into account the possible effect of grief on the surviving cohabitant before they can gather their wits to take advice on what they must do to protect their own financial position after what may well have been a long and loving relationship with their deceased partner. I have to say that I have no doubt whatsoever that Section 29 was introduced by the Scottish Government as a matter of fairness – although the comments of Lady Smith in the case of **Kerr -v- Mangan 2014** indicate that in her view no question of fairness was/is engaged in relation to Section 29 of the 2006 Act.

Nonetheless, and although the Scottish Government has indicated that it is now minded to increase the time limit to twelve months from the date of death, I think this is still not correct. The time limit should be twelve months from the date of grant of Confirmation. Why do I say this?

I know of cases where a deserving cohabitant has lost out because the family (otherwise the beneficiaries on intestacy under Section 2 of the Succession (Scotland) Act 1964) have decided quite deliberately to do nothing about the administration of the deceased's Estate so as not to provide the cohabitant with a target against whom an application might be raised. This in my view frustrates the whole purpose of Section 29. However, that is not the point I wish to make here. Let us assume that the Coronavirus or a variant of the same comes back with a vengeance at some point in the future. Even if the Government changes the time limit for raising an application under Section 29 to twelve months, should there not be a provision built into the law that that twelve month period should not

include any time when the Courts were not open and during which a cohabitant might have been prevented from raising an application. Surely this is fair?

I rest my case.

And Now for Something Completely Different…

This has nothing to do whatsoever with the question of Willmaking in the Covid era. However, over the last year I have been consulted on cases where the facts are remarkably similar – and cause me great concern. Thus:-

- The allegation of the deceased's family was that the deceased had made a homemade Will which he or she kept at home. In one case, the family had a copy of the Will. In the others, they did not have a copy but stated that their mother/father had told them that the Will had left their parent's Estate to them.

- After the death of the individual in question the Will could not be found.

- The deceased was survived by a "second" spouse who was not the father or mother of the children who claimed that the Will benefited them – or alternatively, the deceased was cohabiting with another person.

- After the death, the principal Will could not be found with the "second" spouse or cohabitant disclaiming any knowledge of a Will. In one case, the cohabitant, immediately after the funeral, disappeared taking items of value from the deceased's home (which the deceased had owned herself) to which he was not entitled. A few weeks after the death in question the family discovered that it appeared that the now missing cohabitant had been siphoning off the deceased's funds from her prior to her death.

I am all in favour of people making Wills. I have no objections to people having a go at making their own Wills – many people do. However, the dangers of an individual making their own Will and keeping it at home in certain circumstances I think are clearly demonstrated by the four cases to which I refer. Many years ago, my parents-in-law moved into a new Council house which they subsequently purchased under the Tenant's Right to Buy regime. Their next door neighbour was an individual (whom I shall call "Bob") who was a widower with two daughters. My parents-in-law became close to Bob. He indicated to them that his daughters had become estranged from him. However, he had a long standing relationship with a woman – but Bob and the woman in question did not live together. They were happy to go on holiday together, spend the odd weekends in each other's houses but still both wished to live separately. They could therefore probably not have qualified as "cohabitants" in terms of Section 25 of the Family Law (Scotland) Act 2006. However, my parents-in-law were satisfied that their relationship was a close and loving one.

Leaning over the fence one day, Bob told my father-in-law that he had made a new Will. He had a previous Will in terms of which he had left his whole Estate equally between his two daughters. He had replaced it with a new Will in terms of which he had left one third of his Estate to his female companion and the remaining two thirds equally between his two daughters. He indicated to my father-in-law that both Wills were homemade and were retained in his "document file".

Bob died unexpectedly. Almost immediately, his two daughters turned up at his house and were seen by my parents-in-law to be removing papers etc from Bob's house.

A year after Bob's death, my father-in-law met Bob's female companion. She indicated to him that she very much missed Bob but that his two daughters had been unkind to her. In particular, they sent her a copy of the Will which left Bob's whole Estate equally between them – and yet Bob had told my father-in-law that he had made a later Will, revoking the earlier Will, in terms of which he had left a third of his Estate to his female companion.

My father-in-law asked me if he should do anything about it – but I advised him that there was nothing he could do. The only evidence that there was a later Will in the terms described was the over the fence conversation which my father-in-law had had with Bob. It was not my father-in-law's fight.

The message I am trying to get across is this. Clients are of course entitled to keep their valuable documents at home if they so wish. However, my experience over the years is that the outcome after the death of particular individuals may not be what they had wanted. Clients should be encouraged, even if they make a homemade Will, to lodge it with their Solicitors or their Bank. It is surely a fundamental principle of Scots law that where there is a valid Will, its terms, reflecting the final testamentary instructions of an individual who had capacity at the relevant time of granting the Will, should be given effect to. You may not agree with the terms of the Will – you may even think that it is unfair – but that is surely irrelevant.

I am not sure what we can do about the situation – other than advising clients that they should not keep their Wills at home – but no one can be forced to accede to such advice.

But perhaps it should still be offered….

Keep safe and well.

John Kerrigan
Blackadders LLP
john.kerrigan@blackadders.co.uk
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