‘THE FRUSTRATION OF GENUINE WILLS’: TIME FOR A DISPENSING POWER?

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On 23 February 1837 Lord Langdale MR told the House of Lords that –

> It is so important to the welfare of families, and to the general interests of the community, that men should be able to dispose of their property by will, and that their lawful intentions should be faithfully carried into execution after their deaths, and the laws under which these objects are to be effected are now attended with so much doubt and perplexity, that I am induced to hope that an attempt to introduce some improvement will not be considered to require any apology.[1]

He was introducing the Second Reading of what was to become the *Wills Act 1837* (‘the 1837 Act’) later that year. Despite these noble sentiments and the consequent amendment to probate law testators’ *‘lawful intentions’* continue to be frustrated. This is due not to doubt over the true wishes of a deceased but to administrative errors regarding the formality of his will. The provisions of the 1837 Act prevent the Court from looking behind the objective formalities of a will to realising the intention of the testator, even where clear from other evidence.

Nevertheless, attempts to remedy the evil have been made extensively throughout the Common Law jurisdictions. In this country the issue has been highlighted by the striking recent case of *Marley* v *Rawlings*,[2] where the Court of Appeal knew they were doing an injustice to the intended beneficiary but declined to set aside the formalities of the 1837 Act. To prevent the frustration of a testator’s wishes in future it is proposed that the 1837 Act be amended in line with other jurisdictions, permitting the Court to give weight to external evidence of the testator’s wishes.

[1] Hansard (House of Lords), 1837, Vol. 36, col. 963
[2] [2012] EWCA Civ 61

The existing law will be explained, followed by an overview of reforms undertaken in foreign jurisdictions, then by an analysis of the recent problem case of *Marley*. The proposed reform will then be set out as desirable, practical, and useful.

The Wills Act 1837

Lord Langdale explained that '*one would wish it to be practicable to direct the observation of certain forms for security without absolutely excluding the validity of wills in which those forms had not been observed, in cases where in the absence of the forms full and satisfactory evidence of the genuineness of the wills could be produced'*. Nonetheless, he felt that '*at present, all that can be done to avoid the frustration of genuine wills, whilst you are imposing forms to prevent the imposition of spurious wills, is to make the directions for those forms as clear, uniform, and simple, as the nature of the case admits of*'.[3] These formalities would be that the testator's wishes should be in writing, signed by him and by two witnesses, to ensure that he was of sound mind and not under duress when making that will.

Section 9 of the 1837 Act (as amended by section 17 of the *Administration of Justice Act* 1982) provides that –

> *No will shall be valid unless—*
>
> *(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and*
>
> *(b) it appears that the testator intended by his signature to give effect to the will; and*
>
> *(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and*
>
> *(d) each witness either—*
>
> *(i) attests and signs the will; or*

[3] Hansard (House of Lords), 1837, Vol. 36, col. 969

(ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),

but no form of attestation shall be necessary.

The *Administration of Justice Act* 1982 also gave powers to the Court to rectify a will where the testator's wishes are unclear on a literal construction (s. 20) and extrinsic evidence may be adduced to ascertain the testator's wishes (s. 21). No power was given to rectify deficiencies in execution.

Reforms in other jurisdictions

Notwithstanding this, there have been developments in countries that initially adopted the principles of the 1837 Act in their own domestic legislation. The first movement came in November 1975 when South Australia amended its probate law ('the 1975 Act').[4] This introduced a 'dispensing power' where a court would have the discretion to admit to probate a document claiming to be will, even if the 1837 Act formalities had not been complied with.

Shortly before this (January 1975), the American law professor John H. Langbein advocated an alternative approach to remedying defective wills: 'substantial compliance'.[5] This principle, taken from contract law, states that if a document appears to all intents and purposes to be a will but there has been some defect in the signing or witnessing of it the Court may consider it a valid will. Following Langbein's article, Queensland introduced substantial compliance in 1981 (still in force).[6] Critics of substantial compliance argue that

[4] Wills Amendment Act (No. 2) of 1975, 8 S Austl Stat 665
[5] 'Substantial Compliance with the Wills Act', 88 Harv. L. Rev. 489; 'Excusing Harmless Errors in the Execution of Wills', 87 Colum L Rev 1
[6] Queensland Succession Act of 1981, s. 9(a), 1981 Queensl. Stat. No. 69

while intended to implement a testator's wishes, it may inadvertently admit fraudulent or draft wills.[7]

The Queensland experiment was generally held to be a failure: the evidential benchmark was so high the legislation let in very few wills that would otherwise fail, in comparison to a dispensing power provision.[8] Even Langbein later came to favour the dispensing power approach.[9]

The South Australian model was soon emulated elsewhere. All the other Australian states have now adopted dispensing power legislation: Western Australia (1987), New South Wales (1989), Northern Territory (1990), Australian Capital Territory (1991), Tasmania (1992), and Victoria (1997).

Canada was also quick to create a dispensing power. Manitoba led the way in 1983, followed by Prince Edward Island (1988), Nova Scotia (1989), Saskatchewan (1990), Quebec (1993 – substantial compliance), New Brunswick (1997), and Alberta (2010). In 2000 the Uniform Law Conference of Canada, a body recommending harmonized legislation to be enacted by the provinces, included a dispensing power in its *Wills Amendment Act*.

Reform in West Indian and African states that adopted the provisions of the 1837 Act have been somewhat slower. Although South Africa moved to a dispensing power in 1992 and Zimbabwe in 1998, many other jurisdictions, such as Kenya and Nigeria have retained their formalities requirements.

Most recently, the USA amended its *Uniform Probate Code* – intended to provide a model for individual states to enact much as in the Canadian system – in 2006 to include a

[7] Lloyd Bonfield, 'Reforming the Requirements for due execution of wills', 70 Tul L Rev 1893 at 1896
[8] Law Reform Commission, New South Wales, Issues Paper 10: 'Uniform Succession Laws: The Law of Wills' (1996), 3.7
[9] 'Excusing Harmless Errors', 87 Colum L Rev 1, 41

dispensing power in its latest revision (section 2-503). In 2007 New Zealand introduced a new *Wills Act* allowing its High Court to admit a document to probate that clearly expressed the intentions of the deceased (s. 14).

Thus, several common law jurisdictions that previously upheld the 1837 Act formalities have amended their probate laws to allow their courts to apply a dispensing power. Given that these countries have highly developed and sophisticated legal systems this leaves the UK lagging behind in good probate practice.

Recent caselaw: Marley *v* Rawlings

The English courts have recently considered errors of testamentary execution. Here one of the most distressing examples will be discussed to illuminate the problems of the current law's reliance on a will's strict compliance with the formalities.

In 1999 Mr and Mrs Rawlings saw their solicitor to execute mutual wills. The entire estate was to pass to the surviving spouse. When the survivor died the property was to be inherited not by the couple's natural and legitimate sons, but by Terry Marley, who was unrelated to them but had been informally adopted. Mr and Mrs Rawlings regarded Mr Marley as their son. Unfortunately, the Rawlings' signed each other's wills by mistake; the respective signatures were attested by the solicitor and secretary but the error was not noticed. When Mrs Rawlings died in 2003 the mistake went unseen and the will was proved. Mr Rawlings then died in August 2006. A dispute arose between Mr Marley and Mr Rawlings' two sons. The validity of the will was contested as Mr Rawlings' will did not comply with the necessary formalities under the 1837 Act.

If the will was thus invalid Mr Rawlings would have died intestate. The statutory rules of intestacy would apply, allowing the sons to inherit but not Mr Marley, never having formally been adopted. The High Court rejected Mr Marley's claim: the will did not comply with the requirements of the 1837 Act as it was not *his* will.

The Court of Appeal considered the case. Their Lordships were satisfied that Mr Rawlings had genuinely intended Mr Marley to be the sole beneficiary of his estate. Black LJ made clear the Court's position: *'There can be no doubt as to what Mr and Mrs Rawlings wanted to achieve when they made their wills and that was that Mr Marley should have the entirety of their estate and their sons should have nothing'*. However, this *'certain knowledge is not what determines the outcome of this appeal. The answer is contained in the law relating to the making and rectification of wills'* (para. 7).

Although there had been few decided cases on this point it was not an entirely new issue. The Court of Appeal approved the decision in *Re Meyer*.[10] This concerned valid mutual wills made by two sisters which later had codicils attached. Each codicil was signed by the wrong sister. The wills were recognised but not the codicils.

The Court of Appeal was also not persuaded by a number of foreign authorities – that advocated rectification of formalities – from jurisdictions as diverse as Canada, South Africa, New Zealand, and Jersey. It was noted that many of these cases relied on the relevant domestic legislation having been changed to allow for 'substantial compliance' or 'dispensing power' and were irrelevant since English statutes did not embrace those principles.

Ultimately, the Court felt strictly bound by the 1837 and 1982 legislation and that its powers of interpretation could not render Mr Rawlings' will valid. On giving his judgment, Kitchin

[10] [1908] P 353

LJ stated that *'this is a conclusion I have reached with great regret, but Parliament made very limited changes to the law in 1982 and it would not be right for a court to go beyond what Parliament then decided'* (para. 109). Their Lordships could not give effect to Mr Rawlings' intentions and set a clear precedent until such time as a change was enacted in statute.

If there is a question about the manner in which a will has been witnessed, the courts have shown some willingness to give the testator the benefit of the doubt. While in *Ahluwalia* v *Singh*[11] a will signed in the presence of only one witness was declared invalid, the earlier judgment of *Kentfield* v *Wright*[12] found a will apparently signed in the presence of only one witness was valid; the Court felt that only the *'strongest evidence'* could rebut a presumption of due execution.

The Need for Reform

Following the 1975 Act in South Australia, the Law Reform Commission of England and Wales considered the formalities of wills in a 1980 report. It received sharply divided evidence on the question of whether to introduce a dispensing power, but rejected the possibility since such a power *'could lead to litigation, expense and delay, often in cases where it could be least afforded'*, such as with home-made wills.[13] Since cases were only beginning to be brought under the South Australian provisions the Commission had reservations about trying to cure a *'tiny minority of cases'* while creating more problems than a reform would solve. A dispensing power has not been reconsidered in the past 30 years;

[11] [2011] EWHC 2907 (Ch)
[12] [2010] EWHC 1607 (Ch)
[13] 'The Making and Revocation of Wills', Cmnd 7902, para. 2.5

meanwhile, the Common Law world has largely moved in this direction without creating onerous unintended consequences. The time is ripe for probate reform to be revisited.

Statistics are lacking for the number or proportion of invalid wills in the UK, though a recent survey undertaken by the Legal Services Consumer Panel (on behalf of the Legal Services Board) discovered a number of defective wills. A mystery shopping survey discovered that of 101 wills, 8 were improperly executed, a total of 8 per cent.[14] Meanwhile, the Probate Service reported in 2011 only 135 wills were contested in a year where 261,352 grants of representation were made (0.05 per cent).[15] These figures are low but significant. It would be right to assume that most wills are duly executed and unambiguous, so only a minority would be contested. Also, after *Marley*, clients may have been discouraged from contesting imperfectly executed wills. While a will may distribute an estate of a few hundred pounds, it may equally involve millions: either way the formalities must be the same. If the testator's estate is not distributed according to his wishes that represents a substantial injustice to his wishes and to the intended beneficiaries. There is, therefore, an important evil to be reformed.

The Proposed Reform

In adopting a reform to excuse a mistake in the execution of will, consideration must first be given to the nature of the power the Court is to have: a 'substantial compliance' discretion, or a 'dispensing power'. The example of Queensland in using substantial compliance was unsuccessful and has subsequently been adopted in Quebec only. Having first been used in South Australia in 1975 the dispensing power has been adopted throughout Australia, New Zealand, Canada, and parts of Africa. The feared risks of increased fraud and undue influence have proved unfounded.

[14] Legal Services Consumer Panel, 'Regulating Will Writing', July 2011, p. 22
[15] Ministry of Justice, *Judicial and Court Statistics 2011*, Table 2.12

Next, the form of the dispensing power must be determined. Going back to South Australia, the dispensing clause of the 1975 Act was as follows –

> A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for the admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will (s. 12(2))

This provides a sound basis for similar UK legislation, with such a subsection being added to section 9 of the 1837 Act. A recommended change would be the substitution of there being '*no reasonable doubt*' of the testator's intentions to an assessment 'on the balance of probabilities'. Here the civil standard of proof is 'more likely than not', save in cases which impinge upon criminal conduct (*e.g.* fraud, contempt of court); there should be a reluctance to disturb this.[16] If the Court is satisfied that the document was intended to be a will but fell short of the strict formalities that standard, having heard whatever available admissible evidence as to intention, should be sufficient to determine the matter.

While the most direct reform would be a bill amending section 9, Parliament may wish to consider a more fundamental consolidation act. The structure and most of the content of the 1837 Act may be retained, whilst incorporating the rectification powers conferred in 1982, and the provisions of the *Inheritance (Provision for Family and Dependents) Act 1975* (allowing the Court to make distribution out of a deceased's estate for spouses, dependents and relatives not provided for by will). This would mean the English probate code would be reduced to a single statute, helping reduce confusion over this complicated but frequently litigated area of law.

[16] *Miller* v *Minister of Pensions* [1947] 2 All ER 372 at 374

A dispensing power would have enabled *Marley* to have been decided quite differently. In South Australia a case of mirror wills of spouses whose facts were remarkably similar to *Marley* was considered. In *Re Blakely*[17] White J judged *'the circumstances of intention to constitute this document his will are here so convincing'* the will could be accepted as valid. Thenceforth defective mirror wills in that jurisdiction were admitted to probate without litigation. It is likely that the High Court or the Court of Appeal would have given effect to Mr Rawlings' wishes had they the power it is now proposed to confer.

Conclusion

There is evidence that the formalities for wills required by current UK legislation mean that in some cases testators' wishes have been ignored. The smallest deficiency renders a will invalid. While the rules of intestate succession ensure the core dependents of the deceased are provided for, this is of no assistance in cases such as *Marley*, where the testator clearly intended his estate to pass to a person outside his kinship group.

It is therefore proposed to introduce a statutory 'dispensing power' allowing the Court to admit a will to probate if it is satisfied on the balance of probabilities that the putative will, while not complying with the formalities, represents the deceased's true intentions. The South Australian act of 1975 provides the oldest reliable model for this.

While it is important to retain formalities in wills to guard against fraud, a dispensing power would allow justice to be done to testators and beneficiaries in the few, but nonetheless important, cases where wills are formally defective. The leading Commonwealth jurisdictions have walked this path and it is now time for English law to follow.

2,989 words

[17] 32 SA St R 473 (1983)