A REPORT BY **JUSTICE**

Home-Made Wills

CHAIRMAN OF COMMITTEE

WILLIAM GOODHART

CHARLES KNIGHT & CO. LTD.
LONDON
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HOME-MADE WILLS

1. The most important legal documents that most people ever execute are their wills. Yet a surprisingly large number of people draft their own wills without legal advice – often to the great disadvantage of those whom they wish to benefit.

2. The Probate Registry provided us with statistics which they had obtained as a result of an inspection by them of all probate grants for the period of 13 weeks from the 13th June to 9th September, 1966. During this period, 28,830 of the wills admitted to probate (or 77 per cent) appeared to have been drafted by solicitors. Six thousand five hundred and fifty-one (18.5 per cent) were home-made on printed will forms, and 1,763 (4.5 per cent) were otherwise home-made. It appears, therefore, that nearly a quarter of all wills admitted to probate were home-made. During the year 1966, 20,648 grants of probate (13 per cent of the total) were made on personal application, and 138,654 grants (87 per cent) were made on application by solicitors (the proportions for 1967 were again 13 and 87 per cent). We were told, however, that a considerable proportion of the personal applications related to solicitor-drawn wills, and of course a personal application for probate does not mean that solicitors are not subsequently consulted in the administration of the estate. It seems clear therefore that, even in the case of home-made wills, the executors instruct solicitors at some point in the administration of most estates.

3. Solicitor-drawn wills are not free from problems, but the difficulties of home-made wills are far greater and far more common. We summarise the principal problems below:

(a) *Formal Invalidity*

The formal requirements are relatively simple. The testator must sign or acknowledge his signature in the simultaneous presence of *both* witnesses, who must then sign in the presence of the testator (but not necessarily of each other).

The requirement of two witnesses appears to be well known to the public, and the commonest cause of invalidity is that the testator has acknowledged his signature to the witnesses on different occasions. There are other causes, such as the failure

of the testator to put his signature in the right place, though these are rarer.

In fact, the number of wills which are formally invalid appears to be considerably smaller than we would have expected. We were told that, in the Principal Probate Registry, probate of a will is refused only an estimated 80 to 100 times a year, which amounts to only about one will in 500 presented. There must of course be a number of invalid wills which never reach the Probate Registry – for instance, wills which are taken to a solicitor who sees that they are void on their face because they are unwitnessed. There is also a certain amount of concealed invalidity (necessarily impossible to determine) because, if a will contains a proper attestation clause, the Probate Registry requires no further evidence of due execution. Consequently printed will forms (all of which include a printed attestation clause) are almost invariably accepted as valid if signed by two witnesses. We were told that, over a particular period of ten days selected for analysing, 107 grants of probate of home-made wills had been made by the Personal Applications Department of the Principal Probate Registry. Of these, 86 were on printed forms, and in none of these cases was further evidence of execution required. In nine cases out of the remaining 21, however, further evidence had to be obtained. It appears, therefore, that the problem of formal validity is largely confined to home-made wills *not* made on printed will forms; that in a large proportion of such wills the executors are put to the inconvenience of obtaining evidence from the witnesses of the execution of the will; and that a small proportion of such wills are rejected as invalid.

(b) *Validity of alterations*

A related problem concerns the validity of alterations in wills. If an alteration is made to a will after execution, that alteration is void unless itself properly witnessed. It may be said that solicitor-drawn wills can just as easily be altered by the testator, though probably most testators would be less willing to tamper with a solicitor's document than with their own. One aspect of the problem, however, is largely confined to home-made wills. This is that alterations to the will, in the absence of evidence to the contrary, are presumed to have been made *after* execution. Therefore, in home-made wills, alterations which are in fact valid may be excluded from probate because the testator did not get the witnesses to initial them and the witnesses cannot remember whether or not the

alterations were there when they witnessed the will. The Probate Registry do not keep statistics of the number of wills where part of the document is omitted from probate, but we do not believe the number to be large.

(c) *Gifts to witnesses*

Any gift in a will to an attesting witness, or to the husband or wife of an attesting witness, is void. This happens rarely, partly because the rule is likely to be explained in the notes to any printed will form, but where it does happen it can cause very severe hardship – for instance, where the witness is a close relative who was intended to take most of the estate.

(d) *Incomplete disposition of the estate*

This is probably the commonest defect of home-made wills. It is a common tendency for testators to try to dispose of their estate asset by asset and make no gift of general residue. Almost inevitably this results in a partial intestacy and the gifts are often made void by the testator's disposal of the asset concerned before his death.

(e) *Impracticable or ineffective disposition of the estate*

This head concerns a wide variety of problems. The truly irrational testator will probably not often be persuaded out of his prejudices by a solicitor. There are many testators, however, who want to do the best by their families but include unsatisfactory provisions in their will which they would have readily altered if the difficulties had been explained. One example is the testator who creates a series of successive life interests in a small estate. Another example is the testator who gives his widow a right to live in his house for her life, without realising that this will bring the house within the Settled Land Act and so vest all the powers of management in the widow and not the trustees.

(f) *Ambiguities and other problems of construction*

These are not by any means confined to home-made wills, but they are certainly much commoner in them. Sometimes the more or less obvious intention of the testator is defeated by a court-made rule of construction (for instance, until the recent Family Law Reform Act, the rule that the word "children" meant only legitimate children) but much more often the problem lies in the obscurity of the testator's own language. For instance, take a very simple case, in which the testator has said "I leave everything to be divided equally between my wife and my sons Tom and Dick". Does the widow take half the estate or a third of it?

(g) *Undue influence*

It is impossible to say how often a will is made as a result of undue influence, but we believe it to be a fairly serious problem, particularly among elderly people who are unable to look after themselves and so are dependent on members of their family or the staff of old people's homes. This problem, again, is not confined to home-made wills but is much commoner in such cases than where the will is drafted by a solicitor.

4. The only comprehensive solution to the problems of home-made wills is to forbid them. This would be politically unacceptable, and we think rightly so. A man is free to argue his own case in court or to do his own conveyancing, and we think he should be free to draft his own will even if he makes a mess of it. It has therefore been necessary for us to try to seek more limited solutions which will have the result of encouraging testators to take legal advice but will remove as many as possible of the pitfalls for testators who fail to do so.

5. It is our view that the relative lack of formality required for the making of an English will is in fact a serious disadvantage, because it conceals from the ordinary testator the difficulties inherent in disposing of his estate. The only property transaction of comparable importance which most people enter into is the purchase of a house. Because the procedure is more complex, usually involving applications to the Land Registry, negotiation of a mortgage, payment of stamp duty and so on, it is hardly ever handled without a solicitor. Yet far more thought is, or ought to be, involved in making a will than in buying a house, and in our view a procedure which supports the attitude that a will is something which can be botched up at home and witnessed by a couple of neighbours needs reform. In most countries with a legal system derived from civil law, wills have to be recorded or witnessed by a notary, though some systems allow holograph wills (with or without witnesses) in addition. We take the view that there is, on balance, much to be gained by substituting for the present system of attestation a rule that all wills which now require attestation should in future be witnessed by an English equivalent of a notary.

6. The principal advantage of the notarial system, in our view, is that the need to have a will formally executed in the presence of a Commissioner for Oaths or probate official would indirectly lead more testators to take proper legal advice before executing their wills. In addition, the problems of formal invalidity would be completely eliminated, and while a notary could not be expected to make any serious investigation of the state of mind or circumstances of the testator we think his presence would still form a more effective barrier against the more

blatant forms of undue influence than the present system provides. A notarial system would also make registration of wills much simpler if it were decided to introduce such a scheme, though we have not ourselves considered the merits of registration.

7. The notarial witnessing of wills could for the most part be conviently carried out by Commissioners for Oaths as part of their duties in that capacity. In addition to this it would be advisable to have, attached to the staff of each registry or sub-registry of births, marriages and deaths one or more officials ("Wills Officers") who would be qualified to act as witnesses of wills. We do not think that the class of qualified witnesses should be extended any further, except in the case of wills executed abroad, where they would be witnessed by local notaries or consular officials.

8. There will, no doubt, be the problem of the testator who brings a completed draft will to be witnessed and says "Would you just mind looking through this to see that it's all right". We think that in such cases the solicitor should explain that he can either simply witness the will, without commenting on it, for the standard attestation fee, or can inspect and advise on its contents on normal solicitor and client terms. To cover this situation, and to enable a solicitor who has drafted a will to witness it, we think that the rule that a solicitor must not act as a Commissioner for Oaths for his own clients should not apply to the witnessing of wills. Wills Officers would not be qualified to give formal legal advice, but we think that they should be authorised, as part of their duties, to show and explain to testators a simple list of *do's* and *dont's* - for example, *do* appoint a competent executor, *don't* try to dispose of your whole estate item by item, *do* include a gift of residue.

9. There are a number of arguments against our proposal, which we summarise as follows:

(a) *Increased Cost*

In most cases, the cost of notarial execution would be negligible – a few shillings, comparable to the present fee for swearing an affidavit. The cost would no doubt be higher where the testator is bed-ridden and the notary has to be paid for cost of travel and time. This hardship could, however, be reduced if Wills Officers were required, on production of a medical certificate, to attend the execution of wills of housebound testators. Where the testator obtains legal advice from the notary, the appropriate fee would of course be charged, but in our view this would be money well spent. We think that consideration should be given to the possibility of extending the legal advice scheme to advice on wills. If the proposal to

set up public legal centres in urban areas is implemented, advice on wills should be made available there.

(b) *Emergencies*

This is the problem of "deathbed" wills. Our proposals would make it more difficult to arrange for execution of wills at short notice. Since deathbed testators can hardly go to the notary's office, there would be a delay of anything from an hour or two to possibly two or three days in the case of testators in remote country districts. While deathbed wills would sometimes have been better left unmade, we would agree that the longer time required to make a will is a disadvantage of our proposals. We do not think it is a serious disadvantage. In practice the number of wills made within, say, two weeks of death is very small. We do not think, therefore, that the problem of deathbed wills invalidates our proposals or requires the retention of the present system to deal with emergencies only.

(c) *Public confusion*

It has been suggested to us that the present system is well understood by the public and that a new system would lead to confusion and, perhaps, an increase in the number of invalid wills made by testators ignorant of the new law.

10. These arguments, of course, only apply if notarial execution is made compulsory. On the other hand, the full benefits to be expected from a notarial system will not be achieved if it is introduced only as an alternative to the present system. A number of senior officers of the Probate Registry expressed strong opposition to compulsory notarial execution (mainly on the ground of public confusion), and it seems clear that there would in any event have to be a transitional period of several years during which both methods of execution were valid. We have concluded, therefore, that it would be premature at this time to recommend the complete replacement of the present system by a compulsory notarial system. We recommend that the notarial system should be introduced as an alternative alongside the present system for a trial period of ten years, and that at the end of that period the rules of attestation should be reconsidered in the light of the extent of public acceptance and approval of the notarial system and experience of its working. If at that time it was thought that compulsory notarial execution would not be acceptable or appeared to offer no substantial advantages, notarial execution could remain optional or, if it had proved unsatisfactory, be withdrawn from use.

11. We have considered some other proposals relating to attestation, on the footing that an exclusively notarial system will not be adopted at

any rate for a considerable time. We do not support the admission to probate of unwitnessed holograph wills or of wills with a single witness. The two-witness rule seems to cause few cases of invalidity and is at least a minimal barrier against forgery and undue influence. In addition, in cases where it is necessary to obtain the evidence of a witness there is a double chance if there are two witnesses. We have considered whether the rule that the will must be signed or acknowledged in the simultaneous presence of the witnesses ought to be relaxed. We have decided that, although the rule sometimes operates as a trap, a relaxation of the rule would cause more difficulties than it would solve, particularly if there was a long interval between the attestations.

12. It has been suggested to us that a number of the draft will forms currently available are unsatisfactory in one respect or another, and that an official will form should be prepared and made available for sale in post offices, as well as through stationers and other normal outlets. We agree with this suggestion.

13. We are all agreed that the rule that automatically invalidates gifts to a witness is unreasonable and requires alteration, but we think that it does give a limited degree of protection against undue influence and probably should not be abolished altogether. We think that the best solution would be to impose a rebuttable presumption of undue influence in the case of gifts to witnesses (with certain exceptions, such as, for example, gifts of not more than £100 or not exceeding a specified percentage of the net estate). A possible form of procedure would be:

(i) the executors would serve notice on the witness requiring him to claim the gift.

(ii) the witness would then take out a summons before a probate registrar claiming the gift and file affidavit evidence to rebut the presumption, the summons being served on the executors and interested parties.

(iii) the registrar would allow the gift, unless (a) it was opposed or (b) the persons interested included infants or unborn beneficiaries and the registrar thought the case required further investigation; in either of these cases he would refer it to the County Court or the High Court, depending on the amount of the gift.

14. We believe that there is a certain number of cases in which undue influence is brought to bear on elderly testators, acting without legal advice, by proprietors of old people's homes or other persons on whom the testators are physically dependent. We think that the presumption

of undue influence might well be extended to include persons (or employees of such persons) who at the date of the will were providing residential care for a testator over the age of (say) 60 under a contract – again excluding small gifts.

15. We do not feel that we can usefully say much about the rules relating to the construction of wills, particularly as this subject has recently been referred to the Lord Chancellor's Law Reform Committee. We think that – at any rate as regards home-made wills – it is the rules of evidence rather than the positive rules of construction which cause most hardship. We think that where a testator has clearly expressed himself in his will it should not be open to a disappointed relative to call evidence to try to prove that he meant something different; but where the will contains a plain ambiguity there is likely to be litigation in any event. Litigation which excludes all direct evidence about the point in issue can only reflect discredit on the legal system. It may be said that the admission of direct evidence is an invitation to fabricate it; this argument is no more valid now than when it was used to support the exclusion of the evidence of the parties in litigation generally.

16. Finally, we think that, apart from any change in the law, publicity could play a useful part in encouraging testators to consult solicitors in making their wills. We have in mind both publicity specifically directed at testators, and the more general problem of encouraging the use of legal services generally by those sections of the community which are now reluctant to approach solicitors at all.

17. *SUMMARY OF CONCLUSIONS*

A. *The adoption of a notarial system for attestation of wills*

In our opinion, such a system has distinct advantages over the present system. We therefore recommend that the notarial system should be introduced for a trial period as an alternative to the present system.

B. *Gifts to witnesses and others*

We recommend that gifts to witnesses should not be automatically void but that there should in cases of substantial gifts to witnesses be a rebuttable presumption of undue influence. We think that this presumption might well be extended to persons providing residential care for the elderly under contract.

C. *Will Forms*

We recommend the preparation of an official Will Form and instructions for using it, to be sold through Post Offices and elsewhere. A draft is contained in the Appendix to this Report.

D. *Construction*

We recommend that evidence of the testator's intentions should be admissible in any case of ambigiuty (whether patent or latent). In view of the forthcoming report of the Law Reform Committee, we have not though it appropriate to consider this question in detail – for example, whether statements of intention made *after* the date of the will should be admissible.

DRAFT FORM AND INSTRUCTIONS

READ THESE INSTRUCTIONS *CAREFULLY*

A. *Appointing Executors* (Clause 2 of the Will Form)

You should appoint one or two people to be your executors. Put their full names and their address in Clause 2 of the Will Form. After your death they will have to apply to a Probate Registry for a grant of probate, which is a document giving them power to deal with your property. They will pay your debts and distribute the rest of your property in the way you direct.

It is usually best to choose close members of your family or someone who benefits under your Will to be your executors, because there may be a lot of work for them to do. You should choose people over 18 who are capable of dealing with ordinary business matters. You should make sure that the people you choose will be willing to become your executors.

KEEP YOUR WILL AS SIMPLE AS POSSIBLE

B. *Giving your property*

You will probably want to do three things with your property. First, you will probably want to give some of your possessions, such as pieces of jewellery, to members of your family or old friends. Second, you may want to give sums of money to friends or family, or to charities. Finally, you will have to dispose of what is left (which is known as "residue").

C. *Particular possessions* (Clause 3 of the Will Form)

Do *not* try to dispose of all your property, item by item. Give a particular thing to someone only if you really want him or her to have it. You can give a single item (for instance, "my diamond ring"), or you can give all the items of the same type (for instance, "all my jewellery", which means all the jewellery you own when you die, whether or not you owned it when you made your Will).

D. *Gifts of money* (Clause 4 of the Will Form)

You do not have to limit the amount of your gifts of money to the amount of cash in your account at the Bank or Post Office. Your executors can sell other property in your estate to make up the amount

of the money gifts. But if you are planning to provide for your family out of "residue", don't make your money gifts so large that you leave little residue. Make separate money gifts to each person – for instance, give "£50 to Jane Jones", and "£50 to Robert Jones", not "£100 to Mr. and Mrs. Robert Jones", which leaves your executors to guess whether you meant Mr. and Mrs. Jones to have £100 each or £100 between them. If you want to give something to charity, choose a particular charity and put in its full name – don't just say, for instance, "£50 for cancer research".

E. *What is left* ("residue") (Clauses 6 and 7 of the Will Form)

This will consist of everything left after your executors have paid your debts, the expenses of dealing with your estate, and any money gifts and have handed over any particular things you have given away in your Will.

The Will Form is drawn up so that you can, if you wish, give your husband or wife only the income from the residue during his or her life, leaving the capital to be paid out to your children (or other people) on his or her death. You should not do this unless you are quite sure that your husband or wife will have enough to live on if he or she is only going to have the income from residue. If your estate is worth less than about £10,000 it may be best to leave residue to your husband or wife outright. It is not advisable, as a rule, to give anyone other than a husband or wife a right to income only.

You may leave residue to one person outright, or to be divided between several people. If you want it to be divided between your children equally, you do not need to name them: you can just put the words "my children" in Clause 7. If you do this, all your children who are living when you die will take a share, even if some of them are born after you made the Will. If you have young children and do not want them to take money outright at the age of 18, you may, instead of just writing "my children", write "such of my children as shall reach the age of 21" (or any other suitable age).

You may have good reasons for wanting to do something rather more complicated with your property; for instance, you may wish to benefit someone who is mentally backward and unable to look after his own property. If so, do not try to alter or add to the Will Form to suit your case; go to see a solicitor, and get him to draft your Will.

F. *Your House*

If you have a house, it is almost sure to be the most valuable thing you own. You may, if you want, treat it as one of the particular things which you give away by Clause 3 of the Will Form. You may prefer that it should be part of your residue. If you do, there is no need to refer to the house in your Will. If you give your husband or wife a right

to the income of residue, your executors can allow him or her to live in the house.

G. *Writing out the Will*

Make sure you have decided exactly what you want to do before you start writing on the Will Form. You may find it a help to write out a rough copy first. If you find that you have to alter the Will Form before you have signed it, make sure that when you sign the Form you and the witnesses put your initials against the alteration. Put in the full names of anyone you mention in the Will.

H. *Signing the Will*

YOU MUST SIGN AT THE BOTTOM OF THE WILL FORM IN FRONT OF TWO WITNESSES, WHO MUST THEN SIGN THEIR NAMES AS WITNESSES IN FRONT OF YOU. THE WITNESSES MUST BE PRESENT TOGETHER WHEN YOU SIGN. They must be told that they are witnessing your Will, but they need not know what is in it – you can, if you like, fold the form over so that they can only see your signature, or you can cover the rest of the form with a piece of paper when you sign (but remember that they, as well as you, should initial any alterations you have had to make). THE WITNESSES *MUST NOT* BE PEOPLE WHO ARE GIVEN ANYTHING IN YOUR WILL, OR BE MARRIED TO PEOPLE WHO ARE GIVEN ANYTHING IN YOUR WILL: OTHERWISE, THEY (OR THEIR HUSBANDS OR WIVES) WILL LOSE WHAT YOU HAVE GIVEN TO THEM.

I. *Altering your Will*

ONCE YOU HAVE SIGNED THE WILL FORM, YOU *MUST NOT* MAKE ALTERATIONS TO IT. If you want to change your Will, the best thing is to get a new form and make a new Will.

Read your Will occasionally to see if it is still what you want. If you have made a gift to someone who dies before you do, that gift is cancelled. If you get married, any Will you have made before marriage is cancelled.

J. *Seeing a Solicitor*

The Will Form and these instructions have been prepared to help you if you do not want to ask a solicitor to draw up your Will. But unless your estate is likely to be very small and your plans for it are very simple, you would be wiser to see a solicitor. It is easy to go wrong when you make your own Will and if you do go wrong it may cause trouble and hardship to your family.

K. KEEP YOUR WILL IN A SAFE PLACE AND TELL YOUR EXECUTORS WHERE IT IS. IF YOU MAKE A NEW WILL DESTROY THE OLD ONE.

RECOMMENDED WILL FORM

YOUR FULL NAME:

YOUR ADDRESS:

DATE:

1. I revoke all previous Wills.

2. I appoint the following to be my executors:

Name	*Address*

3. (i) I give the following things to the following people free of duty:

Thing	*Name*

(ii) Subject to the above, I give my clothes, jewellery, furniture household furnishings and other things (except money) usually kept or used in my home to

4. I give the following sums of money to the following people or charities free of duty:

Amount	*Name*

5. My executors shall sell all other assets of my estate not already in the form of cash (but they may delay the sale of any asset for as long as they wish) and shall pay all my debts, estate duty, funeral expenses, the cost of administering my estate and the sums of money given by Clause 4 out of the proceeds of sale.

6. My executors shall pay the income of what is left of my estate to for life.
(Cross this clause out or leave it blank if not required.)

7. Subject to the above, I give what is left of my estate to the following person or people (if to more than one person, to be divided equally between them).

Name

8. My executors may invest any money which needs to be invested in any way in which they could invest their own money.

(Signature of Testator)

Signed by the testator in the presence of both of us together, who then signed in his presence.

(Signature and address of witnesses)

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