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Article

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Why Video Witnessing of Wills Could Sound the Death-Knell for Formalities as an End in Themselves

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Prior to the Coronavirus pandemic, few practitioners or academics saw the formalities for witnessing a will in England or Wales (set out in section 9 of the Wills Act 1837) as being unduly arduous. They require attention to detail, to ensure that the testator signs or acknowledges his/her signature in the presence of two or more witnesses, each of whom must then sign or acknowledge their signature in the presence of the testator. However, the more anachronistic problems that had been caused by the original wording of section 9 were removed in 1983,[1] with the revised section 9 enabling all parties to acknowledge previously-made signatures. The resultant relatively simple requirement, that at least three people should be 'together simultaneously',[2] seemed a proportionate and easily achievable mechanism to facilitate will-making whilst also preventing fraud.

The dual problems of Coronavirus lockdown and hospital / care home isolation policies altered this perception; most family members would be inappropriate witnesses due to section 15 of the Wills Act 1837, which renders void any legacy to an attesting witness, or their spouse or civil partner. Amidst a rise in demand for wills, practitioners were required to recall their black letter law and the principle of the 'line of sight' set out in *Casson v Dade.*[3] Indeed, it was fortuitous that there was such a clear precedent to confirm that presence on the other side of a window was effective; without this, there would surely have been far more discussion and debate at the start of lockdown as to how a will could be validly executed (although this might also have prompted a faster response from the government).

There was no such clarity on the status of video witnessing. The Law Commission's 2017 Consultation Paper 'Making a Will' had opined that 'it is unlikely that the current law governing witnessing extends to witnessing via videoconferencing because "presence" has been held to involve physical presence,' but also noted that there has been no case on this point.[4] In fact, the case cited by the Law Commission (*In the Goods of Chalcraft*[5]) does not support this assertion. Although the meaning of 'presence' was considered in this case, it was to confirm the requirement for both physical and mental presence; the issue for the court was whether a testator who had taken morphine and was losing her faculties was mentally, as well as physically, present when the witnesses attested the will. Indeed, Willmer J cited

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[1] Administration of Justice Act 1982, s 17; see *Re Colling* [1972] 1 WLR 1440 for the problems that had previously been caused if the testator only signed or acknowledged his or her signature *after* the witnesses had signed.

[2] *Couser v Couser* [1996] 1 WLR 1301, 1304

[3] *Casson v Dade* (1781) 1 Bro CC 99. See also https://abarbararich.medium.com/honora-jenkins-and-her-legacy-ac796c49a741 and http://equitysdarling.co.uk/2020/03/27/will-making-and-coronavirus-can-wills-be-remotely-witnessed/

[4] Law Commission, *Making a Will* (Law Com No 231, 2017) [6.32]

[5] *In the goods of Chalcraft* [1948] P 222

with approval various comments by Sir JP Wilde on the need to give 'reasonable latitude to the exigencies of the statute,[6] before continuing:

> [O]nce the court is satisfied…that the document was intended to be a testamentary document, and was properly signed by the deceased, it will allow a certain degree of latitude with regard to the attestation by the witnesses. That involves some latitude in the interpretation of what is meant by "in the presence of witnesses".[7]

Although it remains arguable that remote witnessing would meet the section 9 requirements,[8] if a court were required to consider the validity of a will that had been witnessed by video link then the Law Commission's contrary opinion would, surely, be raised, and may prove persuasive. At the height of the first wave of the pandemic, the lack of clarity on whether a will witnessed by video link would be valid led to calls for a test case,[9] and the suggestion that the courts should be able to make a declaration as to a will's validity prior to the testator's death.[10]

Over the summer of 2020, the Ministry of Justice convened meetings with representatives from the Law Society and STEP to examine how the formalities for witnessing wills could be relaxed. Unfortunately, an absence of parliamentary time dictated that any relaxation had to be under the auspices of secondary legislation, and therefore the enabling powers in Electronic Communications Act 2000[11] were used to make The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020. The temporary introduction of video witnessing was announced on 25th July 2020,[12] the statutory instrument was laid before Parliament on 7th September 2020 and it came into force on 28th September 2020. This statutory instrument amended section 9 of the Wills Act 1837 to add a new sub-section (2). The full version of the amended section reads as follows:

(1) 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—

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[6] *In the Goods of Killick* (1864) 3 Sw & Tr 578, 579

[7] *In the goods of Chalcraft* [1948] P 222, 235

[8] R. Hedlund, 'Digital Wills as the Future of Anglo-American Succession Law' (2020) 3 Conv 230, 235

[9] https://www.roydswithyking.com/finding-tech-solutions-for-making-a-will-in-isolation/

[10] http://equitysdarling.co.uk/2020/06/01/i-do-declare-could-a-test-case-on-remote-witnessing-wills-be-brought-before-death/

[11] S 8 and 9 Electronic Communications Act 2000.

[12] https://www.gov.uk/government/news/video-witnessed-wills-to-be-made-legal-during-coronavirus-pandemic

(i) attests and signs the will; or

(ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary.

(2) For the purposes of paragraphs (c) and (d) of subsection (1), in relation to wills made on or after 31 January 2020 and on or before 31 January 2022, "presence" includes presence by means of videoconference or other visual transmission.

As can be seen from this timescale, there was in excess of four months between the start of lockdown in England, and the announcement by the Ministry of Justice of video witnessing. To counteract this delay, the provision was backdated to 31st January 2020 (the date of the first confirmed Coronavirus case in the UK). Despite appearances, it was asserted by the Ministry of Justice that its effect was not retrospective 'because the validity of any will is not considered until it is submitted for probate or tested in a UK court, which is the point at which any rights become crystallised.'[13] Whilst that point is, itself, debatable,[14] what is certain is that, during the period when the strictest lockdown measures were in force, video witnessing was not expressly permitted, but there were suggestions that it could be introduced soon.[15] Any lay person making their own will could therefore either read up on, and work with, the 'line of sight' rule, or take a leap of faith as to the efficacy of video witnessing.

This article will consider the potential future unintended consequences of the amendment to section 9 on the formalities for making a will. It will argue that one effect of such a specific, time-limited relaxation, the details of which were announced retrospectively, will be a short-term increased focus on compliance with the section 9 formalities. This could curtail the current pragmatic approach to proving compliance with formalities, and it is argued that the resultant publicity will increase demand for, and hasten the introduction of, a statutory dispensing power.

No Light Touch to the Formalities of Witnessing?

If a will contains an attestation clause and looks to have been validly executed on the face of it, there is a presumption of due execution.[16] Strong evidence is required to displace this presumption, to avoid introducing 'unnecessary and undesirable uncertainty into the proving of wills'.[17] This presumption has often enabled the court to uphold a will despite allegations of non-compliance with section 9; in *Weatherhill v Pearce* a will was upheld in the absence of 'any cogent evidence before the court tending to show that the attestation was defective in a material aspect'.[18] However, notwithstanding the court's willingness to adopt a lenient or

[13] Secondary Legislation Scrutiny Committee Twenty Seventh Report 27th Report of Session 2019-21 - published 24 September 2020 - HL Paper 131 [29] https://publications.parliament.uk/pa/ld5801/ldselect/ldsecleg/131/13105.htm#_idTextAnchor026

[14] https://twitter.com/BarbaraRich_law/status/1310509519429087232

[15] See, for example, https://www.lawgazette.co.uk/news/coronavirus-talks-ongoing-over-wills-witness-requirements/5103625.article

[16] See, for example, *Channon v Perkins* [2005] EWCA Civ 1808; *Payne v Payne* [2018] EWCA Civ 985.

[17] *Channon v Perkins* [2005] EWCA Civ 1808 [54] (Mummery LJ)

[18] See, for example, *Weatherhill v Pearce* [1995] 1 WLR 592, 598 (Kolbert HHJ)

pragmatic approach to compliance with section 9, proven non-compliance will invalidate a will.[19] The approach to be taken was summed up in *Couser v Couser* as follows:

> [T]hough one is entitled significantly to rely upon the presumption that all formalities have duly been complied with, nevertheless where there is a clear statutory provision, then if there is clear evidence showing that the statute has not been complied with, I must, if I am so satisfied, pronounce against this will.[20]

The temporary amendment to section 9 is minimal in scope, with no alteration to the central requirements. Therefore, unlike some of the methods of video witnessing introduced in other common law jurisdictions,[21] the testator and witnesses must all sign the same document; there is no possibility of arranging for two documents to be executed as original and counterpart, even though this would speed up the will-making process. Amending section 9 was always going to require a careful balancing act between facilitating will-making during a pandemic, and protecting testators against fraud and undue influence. However, the limited nature of the amendments increases the potential for error and non-compliance. For example, the video-presence exception only applies to paragraphs (c) and (d) of section 9, so if the testator is unable to sign personally, then the person signing on his or her behalf must be in the physical (not video) presence of the testator. This requirement is sensible; given the comments in *Barrett v Bem*[22] about the potential for fraud with this manner of execution, there are cogent arguments against extending paragraph (a) through secondary legislation.

Nevertheless, it is exactly these sorts of distinctions that increase the potential for errors and misunderstandings in the law, resulting in non-compliance with the revised formalities. This situation has been exacerbated by the lengthy period between the commencement of discussions at the Ministry of Justice and the subsequent announcement in July, which enabled numerous rumours and misunderstandings as to what relaxations could, or would, be introduced. In addition to calls for the 'Privileged Wills' exception in Section 11 Wills Act 1837 to be widened,[23] some mainstream press reports went as far as suggesting that 'video wills' would soon be permitted,[24] without distinguishing between video witnessing and the creation of a will entirely by video recording. It was only when the Ministry of Justice's announcement was finally made, in the early hours of 25th July 2020, that practitioners and the public were informed that a distinction would be made between the meaning of 'presence' for the purposes of paragraph (a) and paragraphs (c) and (d).

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[19] Ibid; see also *Re Groffman* [1969] 1 WLR 733 and *Ahluwalia v Singh* [2011] EWHC 2907 (Ch)

[20] *Couser v Couser* [1996] 1 WLR 1301, 1306 (Collyer J, QC)

[21] See, for example, the New Zealand Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020

[22] *Barrett v Bem* [2011] EWHC 1247 (Ch); see also Law Commission, *Making a Will* (Law Com No 231, 2017) [5.51]-[5.55]

[23] https://www.theguardian.com/world/2020/may/02/make-bedside-oral-wills-legal-during-pandemic-uk-campaigners-urge?CMP=Share_iOSApp_Other

[24] https://www.dailymail.co.uk/news/article-8490555/Thousands-family-wills-Zoom-lockdown-not-legal.html?ito=amp_twitter_share-top; https://www.todayswillsandprobate.co.uk/main-news/retrospective-law-to-legalise-video-wills/

Following this announcement, the Society of Trusts and Estates Practitioners was quick to release detailed guidance on video witnessing.[25] Further guidance from the Law Society followed in November 2020,[26] but the legislative lag meant that no one knew what would amount to effective video-witnessing at the height of the first wave of the pandemic in Spring 2020. Wills made during this time of initial panic, when hospitals were prohibiting all visits to Coronavirus wards, were therefore made without any certainty of what might be acceptable.

Indeed, there was a reported execution of a will at the direction of the testator,[27] with the signatory apparently not being in the physical presence of the testator, but only present by video link. Despite the involvement of solicitors, this manner of execution would not comply with the amended section 9 provisions, unless a successful argument was made that presence via video link would satisfy the requirement of paragraph (a). The references to 'latitude' in cases such as *In the Goods of Chalcraft* might, previously, have supported such an argument. Unfortunately, the opinion of the Law Commission, together with the fact that the Ministry of Justice decided that an amendment to the Wills Act 1837 was required in order to permit video witnessing, significantly reduces the likelihood of such an argument being successful. After all, why would the definition of 'presence' be extended to include video witnessing for paragraphs (c) and (d), but not paragraph (a), if it were not to distinguish between the requirements under each paragraph?

The extremely limited and specific amendments to the formalities introduced by the Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 have therefore re-focused attention on strict compliance with the formalities. Notwithstanding the best endeavours of the testator and witnesses to comply with section 9, there may have been many inadvertent errors or omissions. Disappointed potential beneficiaries may be more willing to scrutinise the technicalities around the execution when a will has been witnessed by video link. Furthermore, the guidance issued by both STEP and the Law Society advises that a recording be made and retained of the act of execution. Ironically, although that recording is designed to prove due execution, it could also provide the requisite strong evidence to rebut the presumption of due execution, thereby invalidating the will.

The potential inequities arising from any challenge made to a document that was brought into existence in lockdown (especially during the first wave of infections, when compliance with both the Wills Act 1837 formalities and the Coronavirus restrictions on movement was at its most difficult) will throw into sharp relief the difference between the testator's belief and reality. One need only consider *Re Groffman*[28] to appreciate how this litigation might play out. In *Re Groffman* the will appeared, on the face of it, to be validly executed. However, the testator had not complied fully with the (old) section 9 requirements because he had neither signed nor acknowledged his signature in the presence of both witnesses at the same

[25] https://www.step.org/sites/default/files/inline-files/Briefing%20note%20on%20execution%20of%20wills%20%28E%26W%29.pdf
[26] https://www.lawsociety.org.uk/en/topics/private-client/video-witnessing-wills
[27] https://www.thetimes.co.uk/article/wills-act-is-second-best-say-experts-vn939r66r; See also the open letter from Nicholas Bevan to Alex Chalk MP which suggests a similar means of execution: https://solicitorstitle.co.uk/moj-letter.pdf
[28] *Re Groffman* [1969] 1 WLR 733

time. The reluctance of the court to rule against the will in *Re Groffman* is clear; Sir Jocelyn Simon P noted that he was 'perfectly satisfied that the document was intended by the deceased to be executed as his will and that its contents represent his testamentary intentions'[29] and that he 'would very gladly find in its favour'[30] but he was bound to apply the statute and pronounce against the will. Given the propensity of video calls to cut out at inopportune moments, it is all too easy to envisage a video-witnessing version of *Re Groffman* being brought before the court, with the same inevitable outcome. There may be both judicial reluctance to rule against a failed attempt at video witnessing, and familial pressure not to challenge such a will, but neither of these will resolve the problem that there is no judicial discretion to admit a will to probate if there is clear evidence that section 9 has not been complied with.

If an attempted will is not valid, a disappointed potential beneficiary would be left to claim under the Inheritance (Provision for Family and Dependants) Act 1975 – a claim that is only possible for certain prescribed categories of applicant, and that only enables the court to make 'reasonable financial provision' for the claimant.[31] Alternatively, it may be possible to make a claim under the doctrine of proprietary estoppel or for a *donatio mortis causa,* although the outcome of claims under the former are 'highly unpredictable'[32] and claims under the latter have been much constrained following the ruling in *King v Chiltern Dog Rescue*.[33] For many, there would be no recourse if the attempted will made by a loved one proves to be invalid. The longer-term impact of the inequity arising from discovering that a document that reflects the testator's testamentary intentions, and that the testator also believed to be a valid will, has no legal effect will, inevitably, be a renewed interest in the introduction of a judicial dispensing power.

The introduction of an intention-based dispensing power, that would enable the court to focus on the intention of the deceased instead of the formalities, was proposed by the Law Commission in their 2017 Consultation Paper 'Making a Will'.[34] A dispensing power would re-categorise formalities as merely a means to an end, instead of being an end in themselves.[35] Unfortunately, the wills reform project was put on hold to enable the Law Commission to prioritise a review of the law concerning weddings.[36] However, when this project is restarted, the increased focus on will-making that has occurred during the pandemic, together with the publicity that inadvertent non-compliance with the revised section 9 formalities will generate, will doubtless bolster both demand and support for the introduction of an intention-based dispensing power.

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[29] *Re Groffman* [1969] 1 WLR 733, 735
[30] *Re Groffman* [1969] 1 WLR 733, 737
[31] Inheritance (Provision for Family and Dependants) Act 1975, s 1
[32] B. Rich, 'Succession: Honora Jenkins and her legacy: coronavirus and the validity of wills in England and Wales' (2020) 4 Private Client Business 182, 187
[33] *King v Chiltern Dog Rescue* [2015] EWCA Civ 581; see, for example *Davey v Bailey* [2021] EWHC 445 (Ch)
[34] Law Commission, *Making a Will* (Law Com No 231, 2017)
[35] G. Miller, 'Substantial Compliance and the Execution of Wills' (1987) 36 International & Comparative Law Quarterly 559, 587
[36] https://www.lawcom.gov.uk/project/wills/

Using Dispensing Powers to Align Intention, Belief and Validity

There has been a steady growth in intention-based dispensing powers since their first introduction in South Australia in 1975,[37] assisted by Professor Langbein's detailed analysis of what he called 'harmless error' provisions in two articles published in 1975 and 1987.[38] There is not scope within this article to discuss their growth since then, but intention-based dispensing powers are now widely adopted and used across many common law jurisdictions. The exact form of dispensing powers / harmless error provisions varies widely,[39] but for present purposes it is sufficient to say that, at the start of the pandemic, the potential 'cruelty'[40] that can be caused by the strict application of formality requirements was mitigated in these other jurisdictions. Although video witnessing provisions were also hurriedly enacted elsewhere to facilitate the making of a valid will during lockdown,[41] if a dispensing power was already in force it meant that non-compliance with the statutory formalities (either in their original format, or their relaxed 'Coronavirus version') would not necessarily thwart a testator's wishes.

For example, under the dispensing powers in operation across the Australian states, a 'document' can be admitted to probate if sufficient evidence is presented to the court that the document contains the testamentary intentions of the deceased and the deceased intended the document to operate as his or her will.[42] The following three questions, set out in *Hatsatouris v Hatsatouris,* summarise the requirements for operation of the Australian dispensing powers:

a. was there a document?

b. did that document purport to embody the testamentary intentions of the relevant Deceased?

c. did the evidence satisfy the Court that, either, at the time of the subject document being brought into being, or, at some later time, the relevant Deceased, by some act

[37] Wills Act 1936 (SA), s 12(2)

[38] Langbein, 'Substantial Compliance with the Wills Act' (1975) 88(3) Harvard Law Review 489; Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (1987) 1 Columbia Law Review 1

[39] See J Brook, 'To Dispense or Not to Dispense? A Comparison of Dispensing Powers and their Judicial Application' (2018) 6 Private Client Business, 205; (2019) 1 Private Client Business 9; (2019) 2 Private Client Business 50

[40] Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (1987) 1 Columbia Law Review 1, 1

[41] See, for example the Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020 introduced in New Zealand. Similar provisions were introduced in the Australian states of Victoria, Queensland and New South Wales, the Canadian province of Ontario, and in the state of New York. The Law Society of Scotland advised that video witnessing was acceptable in March 2020: https://www.lawscot.org.uk/news-and-events/law-society-news/coronavirus-updates

[42] Wills Act 1968 (ACT) s 11A; Succession Act 2006 (NSW) s 8; Wills Act 2000 (NT) s 10; Succession Act 1981 (Qld) s 18; Wills Act 2008 (Tas) s 10; Wills Act 1997 (Vic) s 9; Wills Act 1970 (WA) s 32; Wills Act 1936 (SA) s 12(2)

> or words, demonstrated that it was her, or his, *then* intention that the subject document should, *without more on her, or his, part* operate as her, or his, Will?[43]

Whilst it might be presumed that most of the attempted wills that are admitted to probate under such a power would be recognisable as wills (and, indeed, the early Australian cases did concern such documents), the wide meaning now given to 'document' has enabled courts to admit electronic documents saved on a computer[44] and an iPhone;[45] a DVD recording;[46] a suicide note;[47] a draft will;[48] and even an unsent text message.[49] The most significant question is whether there is sufficient evidence that the testator intended the document to be his / her will? Often, this evidence comes from how the testator spoke about the document after its creation; the testator's belief about the status of the document therefore implicitly forms part of the Australian dispensing powers. Evidence that the testator believed the document had legal effect will support the assertion that the testator intended that document to be their will.[50]

However, whilst the testator's belief is evidentially important, it is not determinative; intention-based dispensing powers are directed towards intention, not belief. The fact patterns of dispensing power cases can, broadly, be divided into two categories:

- those where the deceased intended that the document be their will and believed it would be effective as such, but had failed to comply with the formal requirements, and
- those in which the deceased knew that the document was not, itself, a valid will and knew that further acts were needed to give the document legal effect, but where the deceased did not complete those acts.

In the first of these two categories, the deceased's intentions and beliefs are clear, yet the document lacks formal legal status. It is the ability of a dispensing power to re-align the testator's intentions and beliefs with the legal status of the document that convinces many of their benefits.[51] Whilst formalities serve important functions,[52] the deceased's misunderstanding of the law will usually only be discovered once it is too late to be remedied. There are many advantages in being able to rectify this situation, to avoid the uncomfortable result of the deceased's estate being distributed in a way that goes against his or her clearly expressed wishes.

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[43] *Hatsatouris v Hatsatouris* [2001] NSWCA 408 [56] (Powell JA) (emphasis in original). This case was applying s 18A of the Wills Probate and Administration Act 1898 (NSW) and has since been followed in the other states.
[44] *Yazbek v Yazbek* [2012] NSWSC 594
[45] *Re Yu* [2013] QSC 322
[46] *Mellino v Wnuk* [2013] QSC 336
[47] *Re Gew* [2020] QSC 119
[48] *Deeks v Greenwood* [2011] WASC 359
[49] *Nichol v Nichol* [2017] QSC 220
[50] See, for example, *Yazbek v Yazbek* [2012] NSWSC 594. The converse happened in *Mahlo v Hehir* [2011] QSC 243, in which the deceased had spoken of the need to print the document from her computer and sign it.
[51] See, for example, Law Commission, *Making a Will* (Law Com No 231, 2017) [5.84]
[52] Law Commission, *Making a Will* (Law Com No 231, 2017) [5.6]

Of course, misunderstandings about the formal requirements for making or amending a will have always existed, and the usual response is that these are resolved by better-educating the populace as to the legal requirements, and by encouraging people to seek professional advice. Unfortunately, this refrain does not hold sway where the precise legislative formalities had not been published at the time of the attempted execution of the will. The limited scope of the retrospective amendment to section 9 does not reflect many of the rumours circulating in the press in the spring and early summer of 2020. This creates the unpalatable scenario that a document that the deceased intended to be his or her will, and believed to be validly executed in a time of great stress, is found not to comply with a statutory provision that had not yet been published. It is this sort of scenario that could lead to increasing demand for dispensing powers to be introduced in the wake of the pandemic, and it would be foolhardy to suggest that this would not act as an incentive to hasten their introduction.

However, the second of these categories illustrates some of the less attractive paradoxes that can arise with dispensing powers. Although the deceased might have intended to make a will in those terms, if the deceased knew that further steps were still needed in order to create a valid will, the deceased's belief about the status of the document is correct. There is therefore no mis-alignment between belief and validity. Many of the successful dispensing power cases that fall into the second category are ones in which very little time has elapsed between the creation of the document and the death of the deceased.[53] The application of the dispensing power in such circumstances is understandable, but the longer the period of time that has elapsed, the greater the potential that the deceased had changed his or her mind about making a will on the terms set out in the document. In such cases, although the document may have represented the deceased's testamentary intentions at the time of its creation, it would not necessarily represent them at the time of his or her death.

Professor Langbein admitted to being unsettled by the paradox of admitting to probate a document that the deceased believed to be invalid, noting that '[i]f the testator knew that he was not complying with the Wills Act, the likely inference is that he did not want to comply. Intentional noncompliance belies testamentary intent.'[54] Indeed, in the Queensland case of *Mahlo v Hehir*,[55] the fact that the deceased knew that she needed to print and sign a document in order for it to be her will was the reason the application to admit the stored computer document setting out her testamentary intentions to probate failed; it could not be said that she had intended the stored computer document to operate as her will 'without more on her, or his, part' (as required under the *Hatsatouris* test).[56]

The decisions in some of these difficult cases can be easier to understand and accept if one focuses on the testator's intention at the time of creation of the document, as is the case when considering the validity of a formally attested will. It may only have been after the initial creation of the document that the testator was informed that their document had no

[53] See, for example, *Mitchell v Mitchell* [2010] WASC 174; *Deeks v Greenwood* [2011] WASC 359. A number of recent Australian cases concern documents made by the deceased shortly before he or she committed suicide.
[54] Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (1987) 87 Columbia Law Review 1, 32-33.
[55] *Mahlo v Hehir* [2011] QSC 243
[56] Ibid [41]-[44]

testamentary effect.[57] Therefore, at the moment of creation the testator can be said to have intended that the document take effect as his or her will. However, the bigger conundrum is that the testator's belief about the status of the document will affect what they do with it following its creation. If a testator who understands the formality requirements does not comply with them, perhaps due to a medical emergency, it could be expected that he or she would enter into a formal will as soon as events allow. As Langbein noted, 'his subsequent failure to procure attestation once events allowed is consistent with the view that it was intended at the time of its making to be provisional.'[58]

Furthermore, if someone knows that a document does not form a valid will, and believes it to be of no legal effect, then he or she will not recognise the need to destroy it, or otherwise revoke it, if his or her testamentary intentions alter. It would be contrary to the ideals of an intention-based dispensing power if, in such a scenario, a document that the testator no longer intended to be his or her will and believed to be irrelevant were given legal effect. The author has, therefore, suggested previously that any English and Welsh dispensing power should stipulate that the deceased should have the requisite testamentary intention that the document be his or her will at the time of death.[59] This would enable the court to consider not just the evidence from the time of the creation of the document, but also subsequent events that demonstrate whether that intention had continued, or altered over time.

Conclusions

The limited nature of the amendments to section 9 Wills Act 1837 that were introduced by the Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 will serve to re-focus attention on strict compliance with the formalities for executing a will. Furthermore, the potential for incontrovertible proof of non-compliance will prevent the courts from taking a pragmatic approach to proof of due execution, potentially resulting in more wills being successfully challenged. In turn, this will enhance support for the introduction of a dispensing power; it is the curative ability of dispensing powers to re-align intention and validity that is their greatest strength, and this will be brought to the fore as soon as any video-witnessed wills are ruled to be invalid.

However, the operation of dispensing powers can also produce uncomfortable results. These can be reduced with sufficient clarity about what the testator must have intended, and when, but it is also suggested that detailed analysis of the testator's belief in the status of the document can play a much more significant role in ensuring that only the documents that genuinely set out the deceased's testamentary intentions at the appropriate time are admitted to probate. This is not to suggest that the testator's belief in the validity of the document should be a precursor to the operation of a dispensing power, but that evidence of

[57] See, for example, *Re Hodge* (1986) 40 SASR 398 and the South Australian case of *Re Sierp* (unreported), discussed in Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (1987) 87 *Columbia Law Review* 1, 32

[58] Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (1987) 87 Columbia Law Review 1, 21

[59] J Brook, 'To Dispense or Not to Dispense? A Comparison of Dispensing Powers and their Judicial Application' (2019) 2 Private Client Business 50, 54

that belief is indicative of the deceased's intentions. Therefore when, as seems inevitable, such a power is introduced, it is argued that the testator's belief in the efficacy of the document should be given apposite weight. This will ensure that the document that is admitted to probate genuinely reflects the deceased's testamentary wishes at the date of his or her death and will enable the public to have confidence that a dispensing power provides the appropriate degree of leniency, and does not create more problems than it solves.

There is an irony that, had the latitude espoused in *In the Goods of Chalcraft* been permitted to flourish, (what has been described as 'flexible strict compliance'[60]) there may have been no need to amend section 9 to permit video witnessing, and subsequently less need to consider introducing a dispensing power. In his support of this latitude, Willmer J's focus was on the testator's intentions,[61] hinting at the operation of an informal quasi-dispensing power where strict enforcement of the formalities would thwart the testator's intention. Had the Law Commission been less dogmatic in their interpretation of this case, it may have been easier to develop an informal acceptance of video witnessing during the course of 2020, lessening the need for the seismic shift that a statutory dispensing power will, eventually, bring.

[60] Peter T. Wendel, 'Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?' (2017) 95 Oregon Law Review 337

[61] *In the goods of Chalcraft* [1948] P 222, 235 'There is a natural tendency in the mind of the court to uphold a testamentary document when it is clear that it was signed by the deceased with the intention of giving it validity'