

Client Guide

Applying old Laws to the execution of your Last Will and Testament



It goes without saying that our thoughts are with everyone affected by the global outbreak of COVID-19. We want to emphasize the importance of the global issue, but also offer a sense of unwavering optimism for the future. At Alsters Kelley we will continue to put our clients first.

In the Private Client Team, we are dealing with lots of clients who we had already prepared Wills for, but which had not been executed prior the outbreak and lockdown in the UK. These clients had all been seen in person at our offices and were expecting to visit us again so that we could oversee the execution formalities. We have since been taking many new instructions for Wills remotely by telephone and Skype.

However, when the Wills are finalised, we then face the problems and challenges of our clients wanting to execute their Wills, particularly now that all our offices are closed, and people are staying at home or self-isolating as the Government has instructed.

So we turn to our Law books and look at two very old pieces of Law to help us!

The Wills Act 1837

We are all aware of the Wills Act as it tells us what the formal requirements are for making a valid Will. We dust off our Law books and look at section 9 of the Wills Act 1837. A will which fails to comply with these formalities is invalid.

Section 9 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 attests and signs the will or 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 Wills Act requires that the testator (or some other person at the testator's direction and in his presence) signs the Will in the presence of the witnesses and that the witnesses sign in the presence of the testator.

The issue we face at present when all parties are not in the same room due to social distancing is what is meant by "presence". Must the testator and the witnesses be physically present in the same room, or is it possible for the execution of the Will to be witnessed remotely by the use of video conferencing technology such as Skype? Not likely at this time, and we don't want to be the test case!

As Keyworkers, we have been seeing clients at their home to help them with the execution of their Wills. Some are done in a porch, near a back door in the garden, or even over a fence, whilst at all times adhering to the Government's social distancing and hygiene rules.

However, some more vulnerable clients do not want to leave their home at all, and we have had to deal with the execution of the Wills through a kitchen window! Are these Wills valid? Does the window mean we are not all in each other's presence? To get the answer, we need to go further back in time to rely on a very, very old case.

Casson v. Dade (1781)

This key case from 1781 was in an age where judgments were written by hand, the law report for this case notes as follows:

"Honora Jenkins having a power, though covert, to make a writing in the nature of a will, ordered the will to be prepared, and went to her attorney's office to execute it. Being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her: after having seen the execution, they returned into the office to attest it, and the carriage was ... put back to the window of the office, through which, it was sworn by a person in the carriage, the testatrix might see what passed; immediately after the attestation, the witnesses took the will to her, and one of them delivered it to her, telling her they had attested it; upon which she folded it up and put it into her pocket. The Lord Chancellor inclined very strongly to think the will well executed ..."

Honora's maid gave evidence in the case that at the moment the witnesses were signing, the carriage horses reared up, causing the carriage to move into a line of sight with the office window. The maid stated that, had Honora looked through the window she could have seen the witnesses sign. This was considered to be sufficient by the court.

So the execution of your Will is taking place at a truly historic time in modern history, relying on the application of Laws from the early 1800's and late 1700's.

We hope you have found our help and assistance at this time invaluable and delivered in a kind, helpful and excellent manner.

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