

**THEOBALD ON
WILLS**

**150th ANNIVERSARY
EDITION**

Sweet & Maxwell

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1. INTRODUCTION

3-001

This chapter concerns the formal validity of a will under English law, which depends upon compliance with statutory requirements. The chapter also considers the circumstances in which wills are privileged, in that they need not comply with the same formalities, and can be made by those under the age of majority.¹

Substantial validity will be dealt with in Ch.4, and depends upon matters such as mental capacity, knowledge and approval, undue influence, and fraud. The forgery of a will affects both formal and substantial validity, and is dealt with in this chapter.²

No form needed for a will provided there is a testamentary intention

3-002

A will need not be in legal language or in any particular form. As noted in Ch.1, any duly executed document operates as a will and is entitled to probate, provided that it should not take effect until after their death, and that it is dependent on death for its vigour and effect.⁴

It has also been noted that even a will in proper form requires *animus testandi* on the part of the testator. This requirement is additional to the formal requirements set out below.

Minimum age

3-003

Although the legal capacity to make a will according to one's age is more properly an aspect of the law on substantial validity, that rule is relaxed in relation to privileged testators, which are considered in this chapter.⁵ The position for non-privileged testators may be shortly stated. By s.7 of the Wills Act 1837, only those over the age of 18 may make a will. For wills made prior to 1 January 1970, the minimum age was 21.⁶ Thus a will made on the day before a testator's eighteenth birthday is void, unless entitled to make a privileged will. However, in one case, the court was prepared to make an order prospectively appointing the mother of a terminally ill 14-year-old girl as administrator of her estate, in order to prevent a

¹ See para.3-041.

² See para.3-041. See *Ball v Sisson* unreported 17 January 2020 at [19(b)] and *Face v Cunningham* [2020] EWHC 3119 (Ch) at [46].

³ See para.1-001.

⁴ *Cock v Cooke* (1866) L.R. 1 P. & D. 241; *Robertson v Smith* (1870) L.R. 2 P. & D. 43 at 45; *Re Cales* (1871) L.R. 2 P. & D. 362.

⁵ See paras 3-041 and following.

⁶ Family Law Reform Act 1969 s.3. At common law a person attained a particular age on the day preceding the anniversary of the birthday: *Re Shurey* [1918] 1 Ch. 263. But in the case of anniversaries occurring after 1 January 1970 a person attains an age at the commencement of their birthday: Family Law Reform Act 1969 s.9. (No one attained an age on 1 January 1970: persons whose birthday was on that date would have attained the relevant age under the common law on 31 December; persons whose birthday fell on 2 January would be affected by the new rule, and not attain the age until that date.) As a result of this rule a person born on 29 February in a leap year will attain an age on 1 March in non-leap years: see *R. v Worminghall (Inhabitants)* (1817) 6 M. & S. 350.

disagreement after her death with the girl's father, as to how her body should be disposed of.⁷

Proposals for reform

Under the Law Commission's proposals in 2025,⁸ it has been proposed to reduce the minimum age at which someone can make a valid will from 18 to 16. In addition, it is proposed to confer on the Family Court a power to authorise a child under the age of 16 to make a will, if the court is satisfied that the child is competent⁹ to make the will, and would allow the court to impose conditions on that authority.

3-004

Wills valid under foreign law

This chapter considers only the formal requirements for wills under the internal laws of England and Wales. However, as is explained elsewhere,¹⁰ by virtue of the Wills Act 1963, English law also recognises the validity of wills duly executed in accordance with the internal law of the country in which the will was executed, or with which the testator is connected, either at the time of the will or of their death, by residence, domicile or nationality. In today's global society, it is important not to overlook the potential validity of an apparently invalid will under other applicable foreign laws.

3-005

2. FORMAL VALIDITY UNDER THE WILLS ACT 1837

Section 9 of the Wills Act 1837

Formal validity under English law depends upon compliance with s.9 of the Wills Act 1837.¹¹ This section was amended by the Wills Act Amendment Act 1852 and the Administration of Justice Act 1982.¹²

3-006

For deaths on or after 1 January 1983 the provisions are as follows:

"Signing and attestation of wills.

9.— No will¹³ 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

⁷ *Re JS (A Child) (Disposal of Body: Prospective Orders)* [2016] EWHC 2859 (Fam); [2017] 4 W.L.R.

1. The child wished to have her body cryonically preserved in the hope that a cure for her cancer would be found in the future, and her mother wished to honour those wishes.

⁸ Law Com. No.419, Ch.10.

⁹ The word "competent" is used in the proposal to adopt the test in *Gillick v West Norfolk and Wisbech AHA* [1986] A.C. 112.

¹⁰ See para.2-035.

¹¹ Practitioners should refer to the Law Society's note on Disputed Wills, updated on 5 September 2023: <https://www.lawsociety.org.uk/topics/private-client/disputed-wills>. This provides guidance for solicitors who are asked for information regarding a will which is the subject of a dispute, especially in respect of *Larke v Nugus* requests. The Note also gives advice as to preservation of estate assets pending the resolution of a dispute.

¹² Administration of Justice Act 1982 s.17. See also para.3-031 for temporary amendments made during the Covid-19 pandemic.

¹³ "Will" includes testament, codicil, an appointment by will in exercise of a power and any other testamentary disposition: Wills Act 1837 s.1. Although it is unlikely that the will of a person who

- (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
 - (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.”

For deaths before 1 January 1983 the provisions under the Wills Act 1837 as amended by the Wills Act Amendment Act 1852 were as follows:

“9.— No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.”¹⁴

By s.13 of the Wills Act 1837: “Every will executed in manner hereinbefore required shall be valid without any other publication thereof”.

These statutory requirements are now examined in detail.

A will must be in writing

Under s.9(a) of the Wills Act 1837: “No will shall be valid unless it shall be in writing”.¹⁵ This has been the case since the Statute of Frauds 1677, at least in relation to wills of personalty.

This is construed, unless the contrary intention appears, as including references to typing, printing, lithography, photography, and other modes of representing or reproducing words in a visible form.¹⁶

A will may be written wholly or partly in pencil¹⁷ or in shorthand.¹⁸ However, there is a presumption that where a will is written in a combination of both ink and pencil, the pencil writing is merely deliberative and will thus be excluded from probate unless the court decides it represents the testator’s final intention.¹⁹ It is immaterial that the will contains blank spaces or even a blank page.²⁰

It may be written in any language.²¹

died before 1983 will be submitted for probate, the possibility remains because no statutory limitation period applies in probate: para.11-004.

¹⁴ See *Whyte v Pollok* (1882) 7 App. Cas. 400.

¹⁵ See, however, para.3-041 onwards and privileged testators, who are not required to comply with these statutory formalities.

¹⁶ Interpretation Act 1978 s.5 and Sch.1.

¹⁷ *Rymes v Clarkson* (1809) 1 Phill. 22 at 35.

¹⁸ *Orin v Orin*, *The Times* 20 December 1921.

¹⁹ *In the Goods of Adam* (1872) L.R. 2 P.& D. 367.

²⁰ *Comeby v Gibbons* (1849) 1 Rob. Ecc. 705; *Wotton, In the Goods of* (1874) 3 P. & D. 159.

²¹ *Whiting v Turner* (1903) 89 L.T. 71; see *Reynolds v Kortright* (1854) 18 Beav. 417.

Electronic wills—proposals for reform

As the law now stands, it is likely that a document which exists only digitally, not physically, cannot be a valid will. No case has held otherwise, though the Law Commission has described the point as uncertain,²² taking the view that while an electronic will would surely satisfy the requirement of writing, it remains unsettled whether an typed name or other electronic signature would meet the need that the will be “signed” by testator and attesting witnesses. As noted by the Law Commission, an electronic document is likely to satisfy a statutory requirement for writing, and in the light of cases such as *Hudson v Hathway*,²³ a name typed or drawn digitally by the testator and attesting witnesses on an electronic document, or even some other type of electronic verification, could well supply the requirement for a signature. Nevertheless, as the law stands, it must be regarded as foolish to attempt to make an electronic will or advise a testator to make one, not least because the Non-Contentious Probate Rules 1987 and the practice of the Probate Registries would require some amendment to allow an electronic will to be admitted.

However, the Law Commission has now recommended that electronic wills should be allowed, but only when certain extra formality requirements are met, in addition to those prescribed for paper wills, in order for electronic wills to provide the same level of protection as paper wills. A “reliable system” would have to be used, which would: (a) link any electronic signature to the person whose signature it is, (b) identify the electronic will so that it can be distinguished from copies of the will, and (c) protect the electronic will against alteration or destruction other than by the testator or at the testator’s direction.²⁴

The report elaborates on what is meant by a “reliable system”, referring to the equivalent phrase used in s.2(2) of the Electronic Trade Documents Act 2023. It envisages that a mere typed name would not suffice as being reliably linked to the testator or attesting witness. The Law Commission also notes that, while there are protections available to prevent strangers having access to one’s data, those that are most likely to attempt to commit fraud by forging an electronic will may have access to the testator’s personal documents and devices, which could make it easy to impersonate the testator electronically, and that even biometric verifications, once obtained by the testator, are often then stored on a device to be used again.²⁵ The Law Commission’s proposals offers no specific solution to these concerns, but propose to confer a regulation-making power on the Secretary of State to elaborate on how the formality requirements for an electronic will may be satisfied. However, according to the draft Bill, it would not require any regulations to have been made before electronic wills would be permitted, so it could fall to the courts to establish what amounts to a “reliable system” in this context.

²² Law Commission’s 2025 Report, *Modernising the Law of Wills* (Law Com. No.419), para.8.19 onwards. The Law Commission’s position on this shifted during the consultation process from its initial view in the 2017 Consultation Paper 231, *Making a Will*, para.6.15.

²³ *Hudson v Hathway* [2022] EWCA Civ 1648; [2023] K.B. 345, a case about an email with a typed name at the bottom which was held to be signed writing within the meaning of s.53 of the Law of Property Act 1925.

²⁴ Law Com. No.219, para.8.211.

²⁵ Law Com. No.219, para.8.138.

Under the Law Commission's proposals, electronic wills would have equal status with paper wills; either could be revoked by the other.²⁶ It is also proposed that electronic wills could be revoked by destruction.

A will must be signed by the testator

3-009 Section 9(a) of the 1837 Act also provides that the will must be signed by the testator, or by some other person in the testator's presence and by the testator's direction.

What is a signature?

3-010 To constitute a signature, the name should be put on the paper with the purpose of authenticating the document. The overarching requirement of s.9 is the prevention of fraud; and thus there must be an original signature of the testator. Hence, it has been held that a photocopy of a signature of the testator was not sufficient.²⁷

A testator's initials have been held to be a signature²⁸; and the words "Your loving Mother" in a holograph will, have been held to be a valid signature.²⁹ A signature uncompleted because of the testator's weakness has been held sufficient where the completed part was intended to be a signature.³⁰ And where a testator wrote their own name as part of the heading to a holograph will, this constituted a signature.³¹

A mark

3-011 It is a sufficient signing if a testator put their mark on the will, even though they could write³² and even where their hand is guided.³³ It is immaterial that the testator's name is not put against the mark, even though the name does not appear anywhere on the face of the will³⁴; or even though a wrong name is written against the mark by another person.³⁵ But probate will not be granted where there is no evidence, or only highly suspicious evidence, to identify the person affixing the mark with the testator.³⁶

A thumb-print has been accepted as a signature,³⁷ as has an undecipherable scrawl.³⁸

²⁶ Law Com. No.219, para.8.201.

²⁷ *Lim v Thompson* [2009] EWHC 3341 (Ch); [2010] W.T.L.R. 661, cited in Law Com. No.219, para.8.29 as evidence that an electronic signature may not suffice.

²⁸ *Re Savory* (1851) 15 Jur. 1042; see *Re Christian* (1849) 2 Rob. Ecc. 110; *Re Blewitt* (1880) 5 P.D. 116; *Reynolds v Reynolds* [2005] EWHC 6 (Ch).

²⁹ *Re Cook* [1960] 1 W.L.R. 353.

³⁰ *Re Chalcraft* [1948] P. 222; cf. *Re Colling* [1972] 1 W.L.R. 1440.

³¹ *Wood v Smith* [1991] 2 All E.R. 939 and on appeal, [1993] Ch. 90 CA; followed and applied in *Weatherhill v Pearce* [1995] 1 W.L.R. 592; and *Couser v Couser* [1996] 1 W.L.R. 1301. cf. *Re Young* [1969] N.Z.L.R. 454.

³² *Baker v Dening* (1838) 8 A. & E. 94; *Re Field* (1843) 3 Curt. 752.

³³ *Wilson v Beddard* (1841) 12 Sim. 28 (although this was a case in which the will was treated as signed at the testator's direction).

³⁴ *Re Bryce* (1839) 2 Curt. 325.

³⁵ *Re Clark* (1859) 1 Sw. & Tr. 460; *Re Douce* (1862) 2 Sw. & Tr. 593.

³⁶ *Edmonds v Lewer* (1865) 11 Jur.(N.S.) 911.

³⁷ *Re Finn* (1935) 154 L.T. 242.

³⁸ *Re Kieran* [1933] Ir.R. 222.

Wrong name

If a testator, intentionally or unintentionally, signs under a wrong or assumed name, provided they sign *animo testandi*, that is a sufficient signature, for the name so written may stand as the mark of the testator.³⁹ **3-012**

Sealing

Signature by a seal with the testator's initials⁴⁰ or a stamp with their name⁴¹ has been held sufficient and probably sealing with a plain seal would suffice. In these cases it would be necessary to show that the testator intended to make that their signature. **3-013**

Position of the testator's signature

Under the current version of s.9 of the 1837 Act, for deaths on or after 1 January 1983, it is not necessary that the testator's signature should be in any particular place on the will. It is merely necessary that the testator "intended by his signature to give effect to the will".⁴² **3-014**

The sheets of which a will consists need not be severally signed by the testator, but they must be in the same room where the execution took place.⁴³ At one time it was thought that, in order to prevent fraud, the sheets must also be attached in some way at the time of execution,⁴⁴ or at any rate held in contact (e.g. with finger and thumb) at that time.⁴⁵ However, it suffices if the sheets are all in the same room and under the control of the testator at the time of execution,⁴⁶ and sheets found after the death of the testator bound together are presumed to have been so bound at the time of execution, even though the numbering of the sheets was not consecutive.⁴⁷

³⁹ *Re Redding* (1850) 2 Rob. Ecc. 339; *Re Glover* (1847) 11 Jur. 1022.

⁴⁰ *Re Emerson* (1882) 9 L.R.Ir. 443.

⁴¹ *Jenkins v Gaisford* (1863) 3 Sw. & Tr. 93.

⁴² As to which see para.3-018. This change to s.9 of the Wills Act 1837 (as amended by the Wills Act Amendment Act 1852, see para.3-015), followed the recommendations of the Law Reform Committee. See Law Reform Committee, Twenty-second Report: *The making and revocation of wills* (1980), Cmnd.7902.

⁴³ *Gregory v Queen's Proctor* (1846) 4 N. or C. 620; *Marsh v Marsh* (1860) 1 Sw. & Tr. 528; *Bond v Seawell* (1765) 3 Burr. 1773; *Lewis v Lewis* [1908] P. 1; *Re Tiernan* [1942] I.R. 572. In *Goodwin v Avison* [2021] EWHC 2356 (Ch) at [102], it was held that the fact that not every page of a will was signed did not give rise to a sufficient doubt about due execution of the will to justify requiring it to be proved in solemn form for costs purposes, even though the attestation clause referred to their having been signed.

⁴⁴ *Re West* (1863) 32 L.J.P. 182; *Re Horsford* (1874) L.R. 3 P. & D. 211; *Re M'Key* (1876) I.R. 11 Eq. 220.

⁴⁵ *Lewis v Lewis* [1908] P. 1; *Re Little* [1960] 1 W.L.R. 495 (pressed together on table).

⁴⁶ *Re Tiernan* [1942] I.R. 572; *Sterling v Bruce* [1973] N.I. 255; as to proof of this see *Re Madden* [1905] 2 I.R. 612. As to proof of what were the constituent parts of the will when it was executed see *Rees v Rees* (1873) L.R. 3 P. & D. 84; *Gould v Lakes* (1880) 6 P.D. 1.

⁴⁷ *Rees v Rees* (1873) L.R. 3 P. & D. 84 at 86; *British Diabetic Association v Chenery* [2024] EWHC 3466 (Ch) at [26], approving this passage. There a will was held valid, though written on two separate pieces of cardboard, cut from food packaging, only one of which was signed, even where the witnesses did not recall seeing the other; the presumption that both pages were together in the room at the time of execution was supported by the pagination of the two pieces, the apparent use of the same pen and the tenor of the two pages read together.

In an Irish case⁴⁸ it was held that if a will was written on several disconnected sheets and only the last was executed, the presumption was that the whole will was in the room and under the control of the testator at the time of execution and ought to be admitted to probate.

Former requirement that signature be at the foot or end

3-015

However, for deaths which occurred before 1 January 1983, the previous law still applies. This required the testator's signature to be "at the foot or end" of the will. Section 9 of the Wills Act 1837 as originally enacted was however made subject to s.1 of the Wills Act Amendment Act 1852, in order to avoid the injustices of the early cases. This verbose provision provided that:

"... every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid ... if the signature shall be so placed at or after, or following, or under,⁴⁹ or beside,⁵⁰ or opposite⁵¹ to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will,⁵² and no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will,⁵³ or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause,⁵⁴ or of the clause of attestation,⁵⁵ or shall follow, or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under, or beside the names or one of the names of the subscribing witnesses,⁵⁶ or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature;⁵⁷ and the enumeration of the above circumstances shall not restrict the generality of the above enactment⁵⁸ ..."

⁴⁸ *Re Tiernan* [1942] I.R. 572.

⁴⁹ *Re Woodley* (1864) 3 Sw. & Tr. 429; *Re Powell* (1865) 4 Sw. & Tr. 34.

⁵⁰ *Re Jones* (1865) 4 Sw. & Tr. 1; *Re Wright* (1865) 4 Sw. & Tr. 35; *Re Coombs* (1866) L.R. 1 P. & D. 302; *Re Ainsworth* (1870) L.R. 2 P. & D. 151; *Re Osborne* (1909) 25 T.L.R. 519; *Re Roberts* [1934] P. 102; *Re Hornby* [1946] P. 171.

⁵¹ *Re Williams* (1865) L.R. 1 P. & D. 4; *Re Hughes* (1887) 12 P.D. 107; *Royle v Harris* [1895] P. 163.

⁵² *Re Beadle* [1974] 1 W.L.R. 417.

⁵³ *Page v Donovan and Hankey* (1857) Dea. & Sw. 278 (a notarial minute interposed).

⁵⁴ *Re Mann* (1858) 28 L.J.P. 19; *Trott v Skidmore* (1860) 2 Sw. & Tr. 12; see *Winsor v Pratt* (1821) 5 J.B. Moore 484.

⁵⁵ *Re Walker* (1862) 2 Sw. & Tr. 354; *Re Huckvale* (1867) L.R. 1 P. & D. 375; *Re Casmore* (1869) L.R. 1 P. & D. 653; *Re Pearn* (1875) 1 P.D. 70; *Re Harris* (1875) 23 W.R. 734.

⁵⁶ *Re Puddephat* (1870) L.R. 2 P. & D. 97; *Re Jones* (1877) 46 L.J.P. 80; *Re Horsford* (1874) L.R. 3 P. & D. 211.

⁵⁷ *Re Wright* (1865) 4 Sw. & Tr. 35; *Re Williams* (1865) L.R. 1 P. & D. 4; *Hunt v Hunt* (1866) L.R. 1 P. & D. 209; *Re Coombs* (1866) L.R. 1 P. & D. 302; *Re Fuller* [1892] P. 377; *Millward v Buswell* (1904) 20 T.L.R. 714; *Re Moore* [1901] P. 44; *Weatherhill v Pearce* [1995] 1 W.L.R. 592 at 595.

⁵⁸ Signature at the back: *Re Hammond* (1863) 3 Sw. & Tr. 90; *Re Archer* (1871) L.R. 2 P. & D. 252. Signature on a separate sheet: *Re Gausden* (1862) 2 Sw. & Tr. 362; *Cook v Lambert* (1863) 3 Sw. & Tr. 46; *Re Horsford* (1874) L.R. 3 P. & D. 211; *Lewis v Lewis* [1908] P. 1; *Foster v Cooper* [1960] 1 W.L.R. 495. Will in envelope: *Re Lambert* (1862) 31 L.J.P. 118; *Re West* (1863) 32 L.J.P. 273; *Re Nicholls* [1921] 2 Ch. 11; *Re Mann* [1942] P. 146; *Re Bean* [1944] P. 83; *Re Beadle* [1974] 1 W.L.R. 417; see *Re Davis* [1952] P. 279. Signature at the top: *Re Stalman* (1931) 145 L.T. 339 CA; *Re*

The section ends with two prohibitions:

"... but no signature ... shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."⁵⁹

Thus in the case of deaths before 1 January 1983, where words followed the testator's signature,⁶⁰ but were not brought into the will in one of the ways set out in s.1 of the 1852 Act, they could not be included in the probate though written with testamentary intention before the execution of the will.⁶¹ The court might therefore admit to proof all that was written above the signature of the testator and reject what was written below, but only if satisfied that such signature was intended to give effect to the words preceding the signature as the testator's will⁶² and not merely to authenticate them.⁶³ It would not take this course where to do so would defeat the testator's intention and make nonsense of their testamentary dispositions.⁶⁴

Where a will was written on several sheets only the last needed to be executed. So where the attesting witnesses to a will of this type only observed the last sheet, there was a presumption of due execution.⁶⁵ This rule did not extend to a series of separate and independent documents.⁶⁶ Where a will consisted of separate sheets these had to be attached at the time of execution, but the attachment might consist of as little as the holding of the sheets between finger and thumb⁶⁷ or a pressing on them by the thumb.⁶⁸

Where a will was in several sheets, any signatures by the testator and the witnesses on earlier sheets were, prima facie, to be regarded as in authentication (to guard against interpolation) and not in execution.⁶⁹ But where a will had been duly executed and there followed additions, duly executed at the end of them, the presumption was that all the dispositions are valid.⁷⁰

Where, from the obvious sequence and sense of the context, it appeared to the satisfaction of the court that the signature of the deceased really followed the dispositive part of the will, though it occupied a place on the paper literally above or before the dispositive part or parts thereof, such part or parts might be admitted to proof.⁷¹

Harris: Murray v Everard [1952] P. 319; *Re Bercovitz* [1962] 1 W.L.R. 321; (in which cases the wills were held invalid).

⁵⁹ *Re Arthur* (1869-72) L.R. 2 P. & D. 273.

⁶⁰ The signature must have been intended to give testamentary effect to the document. See para.3-018.

⁶¹ *Re Evans* (1923) 128 L.T. 669.

⁶² *Re Anstee* [1893] P. 283; *Royle v Harris* [1895] P. 163; *Millward v Buswell* (1904) 20 T.L.R. 714; see *Re Gee* (1898) 78 L.T. 843.

⁶³ *Sweetland v Sweetland* (1865) 4 Sw. & Tr. 6; *Phipps v Hale* (1874) L.R. 3 P. & D. 166; *Re Dilkes* (1874) L.R. 3 P. & D. 164; *Margary v Robinson* (1886) 12 P.D. 8.

⁶⁴ *Sweetland v Sweetland* (1865) 4 Sw. & Tr. 6; *Margary v Robinson* (1886) 12 P.D. 8.

⁶⁵ *Gregory v The Queen's Proctor* (1846) N.C. 620 at 639; *Marsh v Marsh* (1860) 1 Sw. & Tr. 528; *Re Little, deceased* [1960] 1 W.L.R. 495.

⁶⁶ *Re Pearse* (1867) L.R. 1 P. & D. 382; *Re Hatton* (1881) 6 P.D. 204.

⁶⁷ *Lewis v Lewis* [1908] P. 1.

⁶⁸ *Re Little, deceased* [1960] 1 W.L.R. 495.

⁶⁹ *Ewen v Franklin* (1855) Dea. & Sw. 7; *Sweetland v Sweetland* (1865) 4 Sw. & Tr. 6; *Re Dilkes* (1874) L.R. 3 P. & D. 164; *Phipps v Hale* (1874) L.R. 3 P. & D. 166; see *Leonard v Leonard* [1902] P. 243.

⁷⁰ *Re Catrall* (1863) 3 Sw. & Tr. 419.

⁷¹ *Re Kimpton* (1864) 3 Sw. & Tr. 427; *Re Wotton* (1874) L.R. 3 P. & D. 159; distinguished in *Royle v*

Words which followed the signature of the testator were admitted to proof if they could fairly be regarded as interlineations in the body of the will,⁷² or as after the signature was written before execution and that there were words of reference to bring the clause into the will; words such as "see other side" or the use of asterisks to connect the words. But the mere fact that the executed part of the will ended with an incomplete sentence was not sufficient to allow the admission of words following the signature of the testator.⁷⁴

Time when signature made

3-016 Although the strict requirements as to the place of the testator's signature have now been relaxed, it is still essential that the signature be placed on the paper after the testamentary dispositions have been put there, unless the appending of the signature and writing of the will were all part of one operation.⁷⁵

Signature on behalf of the testator by another

3-017 Section 9 provides that a will may be signed by some other person by the testator's direction and in the testator's presence, and this is commonly used where the testator is too physically disabled or frail to sign. Such person may be and commonly is the person who drew the will,⁷⁶ one of the attesting witnesses,⁷⁷ or a beneficiary.⁷⁸ There is good signature if the person signing for the testator signs in their own name,⁷⁹ or in the name of the testator. A mark, whether a cross or facsimile name, is enough,⁸⁰ but not a name pencilled in beforehand.⁸¹

In *Barrett v Bem*, the Court of Appeal confirmed that more than mere acquiescence or passivity by the testator is required; there must be evidence of some active instruction on the part of the testator before this section will be satisfied.⁸² This direction must be apparent to the attesting witnesses; the testator must, by act or word, in some way indicate to the two attesting witnesses that the signature was

Harris [1895] P. 163. See also *Re Gilbert* (1898) 78 L.T. 762; *Re Malen* (1885) 54 L.J.P. 91; *Re Stalman* (1931) 145 L.T. 339 CA; *Re Roberts* [1934] P. 102 (signature in the margin); *Re Long* [1936] P. 167; *Re Hornby* [1946] P. 171; *Murray v Everard* [1952] P. 319; *Re Bercovitz* [1961] 1 W.L.R. 892; [1962] 1 W.L.R. 321 CA; *Gilbert v Heining* (1965) 109 S.J. 112; *Re Smith* [1931] P. 225 has not been followed.

⁷² *Re Birt* (1871) L.R. 2 P. & D. 214; see *Re White* (1860) 30 L.J.P. 55; *Re Malen* (1885) 54 L.J.P. 91; *Re Greenwood* [1892] P. 7; *Re Hornby* [1946] P. 171.

⁷³ *Re Watkins* (1865) L.R. 1 P. & D. 19; *Re Dallow* (1866) L.R. 1 P. & D. 189; *Palin v Ponting* [1930] P. 185.

⁷⁴ *Re Anstee* [1893] P. 283; *Re Gee* (1898) 78 L.T. 843; *Palin v Ponting* [1930] P. 185.

⁷⁵ *Wood v Smith* [1993] Ch. 90; *Weatherhill v Pearce* [1995] 1 W.L.R. 592; approving dicta in *Re White* [1991] Ch. 1. See also Samuels [1983] *Conveyancer* 21.

⁷⁶ As in *Ashkettle v Gwinnett* [2013] EWHC 2125 (Ch); [2013] W.T.L.R. 1331.

⁷⁷ *Re Bailey* (1838) 1 Curt. 914; *Smith v Harris* (1845) 1 Rob. Ecc. 262.

⁷⁸ *Re Elcock* (1869) 20 L.T. 757. But the Law Commission has proposed Law Com. No. 219 extending s.15 of the Wills Act 1837 to invalidate legacies to those who sign on a testator's behalf, their spouses, civil partners (and cohabitants), subject to a saving power: see para.10-013.

⁷⁹ *Re Clark* (1839) 2 Curt. 329; *Re Blair* (1848) 6 N.C. 528.

⁸⁰ *Jenkins v Gaisford* (1863) 3 Sw. & Tr. 93.

⁸¹ *Reeves v Grainger* (1908) 52 S.J. 355.

⁸² *Barrett v Bem* [2012] EWCA Civ 52; [2012] Ch. 573. See also *Re Ashkettle* [2013] EWHC 2125 (Ch); [2013] W.T.L.R. 1331.

placed there at their request. If a previous positive direction had been given to the agent to sign the will the testator need not repeat it, but the testator must do something to show that they understood at the time that the other party was signing on their behalf.⁸³ In the context of destruction of a will at the testator's direction, it has been held that a gesture may be a sufficient direction even though the testator was capable of communicating normally.⁸⁴

Affirmative evidence that a signature made by another was made in the testator's presence and by their direction is not essential⁸⁵; but a suitable attestation clause should be used.⁸⁶ The cases relating to the presence of witnesses⁸⁷ apply to the presence of the testator where a will is signed on their behalf.

The testator must by their signature intend to give effect to that will

Under s.9(b) of the Wills Act 1837, in the case of deaths on or after 1 January 1983, it must appear that the deceased intended by their signature to give effect to the will. This requirement has sometimes been thought of as a statutory codification of the need for the testator to have an *animus testandi*, but it is addressed to something rather different; it was introduced by the Administration of Justice Act 1982 in lieu of the requirement that the signature be at the foot or end of the will.

In *Marley v Rawlings*,⁸⁸ an elderly couple signed mirror wills, but in error, each testator signed the will meant for the other. The Supreme Court, reversing the judge and first instance and the Court of Appeal, held that the requirements of the section are satisfied if a testator signs a document which they believe to be their will, intending to give effect to it as such. The content of the will could then be rectified under s.20 of the Administration of Justice Act 1982.⁸⁹ The previous cases holding that testators who sign a document mistaking it for another cannot have intended to make the document their will were thus overruled.⁹⁰

Testator's signature must be made or acknowledged in the presence of two or more witnesses present at the same time

Section 9(c) of the Wills Act 1837 provides that the testator's signature must be "made or acknowledged by the testator in the presence of two or more witnesses present at the same time".

This requirement is considered in detail below. The temporary amendments to and relaxation of these provisions under the Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 (SI 2020/952) with effect from 1 February 2020 to 31 January 2024 are then considered.⁹¹

⁸³ *Re Marshall* (1866) 13 L.T. 643; see *Re Summers* (1850) 2 Rob. Ecc. 295; *Morritt v Douglas* (1872) L.R. 3 P. & D. 1.

⁸⁴ *Crew v Oakley* [2024] EWHC 2847 (Ch) at [179].

⁸⁵ *Gaze v Gaze* (1843) 3 Curt. 451.

⁸⁶ The Probate Registry will need to be satisfied that the testator had knowledge of the will: See Non-Contentious Probate Rules 1987 r.13.

⁸⁷ See paras 3-019 onwards.

⁸⁸ *Marley v Rawlings* [2014] UKSC 2; [2015] A.C. 129. For rectification in these circumstances, see para.19-005.

⁸⁹ See Ch.15 for rectification of wills.

⁹⁰ *Re Hunt* (1875) L.R. 3 P. & D. 250; *Re Meyer* [1908] P. 353.

⁹¹ See para.3-031.

Both attesting witnesses must be present at the signature or acknowledgment

3-020

Accordingly, where a will has been witnessed by two witnesses, both of those witnesses must have been present at the same time when the testator either signed the will or acknowledged their signature on it.⁹² For these purposes, the requirement that the testator be "in the presence of" the witnesses means that the witnesses must have been in the visual presence of the testator, within reach of the organs of sight, and although there seems to be no need to prove that the witnesses were actually looking, they must have been conscious of the event that they are said to be witnesses of so that they can say with truth that the testator had signed or acknowledged the signature on the document.⁹³ Unless the will was made between 1 February 2020 and 31 January 2024, it is not thought that a "remote" presence by means of electronic videoconferencing technology or the like would suffice.⁹⁴

If the witnesses see the testator writing what the court is satisfied is the signature to the will that is sufficient, although they do not see the signature itself and the testator does not acknowledge it.⁹⁵ The witnesses must be conscious of the act done. Bodily presence is not enough, nor the possibility of being able to see the testator's signature if the attention of the witnesses was taken up by some other matter.⁹⁶

If the witnesses at the time of an alleged acknowledgment neither saw nor had the opportunity of seeing the signature there can be no valid acknowledgment. In this regard, Jessel MR said in *Re Gunstan*⁹⁷ (quoting *Jarman on Wills*):

"There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature,⁹⁸ not even though the testator should expressly declare that the paper to be attested by them is his will"; and I may add in my opinion, it is not sufficient even if the testator were to say 'My signature is inside the paper' unless the witnesses were able to see the signature."⁹⁹

It is therefore immaterial whether the witnesses actually saw the signature or not, provided they had the opportunity to do so.¹⁰⁰ For these purposes, "opportunity" means the physical opportunity. It does not mean that the testator would have shown them the signature had they asked.¹⁰¹

⁹² The requirement in s.9(c) that both witnesses be present when the testator signs or acknowledges the signature is in contrast to the position under s.9(d) whereby the witnesses need not themselves attest and sign the will in each other's presence. This distinction was described as "rather curious" in *Couser v Couser* [1996] 1 W.L.R. 1301 at 1304B.

⁹³ *Brown v Skirrow* [1902] P. 3 and *Couser v Couser* [1996] 1 W.L.R. 1301 at 1307-1308. See also *Doe d. Wright v Manifold* (1813) 1 M. & S. 294 at 295, and *Coady v Coady* (14 August 2025) Birmingham District Registry.

⁹⁴ Otherwise, it would not have been necessary for Parliament to amend s.9 temporarily under the Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 (SI 2020/952). See also Law Com. No.219, para.8.32. But remote presence would suffice in the case of an electronic will, if the Law Commission's proposals to permit such wills were to be enacted in accordance with their recommendations.

⁹⁵ *Smith v Smith* (1866) L.R. 1 P. & D. 143.

⁹⁶ *Hudson v Parker* (1844) 1 Rob. 14 at 24; *Brown v Skirrow* [1902] P. 3; *Burgess v Penny* [2019] EWHC 2034 (Ch).

⁹⁷ *Re Gunstan* (1882) 7 P.D. 102, 107.

⁹⁸ It is sufficient if part of the signature is visible: *Hocking v Glass* (1961) 105 S.J. 612.

⁹⁹ See also *Ilott v Genge* (1842) 3 Curt. 160; (1844) 4 Moo. P.C. 265; *Hudson v Parker* (1844) 1 Rob. Eccl. 14; and *Re Groffman (Deceased)* [1969] 1 W.L.R. 733.

¹⁰⁰ *Daintree v Butcher and Fasulo* (1888) 13 P.D. 102 at 103; *Re White* [1991] Ch. 1.

¹⁰¹ *Re Groffman (Deceased)* [1969] 1 W.L.R. 733 at 739E.

Acknowledgment of signature by the testator

3-021

Where the will is not signed by the testator (or by another on their behalf) in the presence of the attesting witnesses, the testator may acknowledge a previously written signature to such witnesses present at the same time.¹⁰²

As to what constitutes acknowledgment, in *Hudson v Parker*¹⁰³ Dr Lushington said:

"... acknowledgment may be expressed in words that will adequately convey that idea, if the signature be proved to have been then existent; no particular form of expression is required either by the word 'acknowledge' or by the exigency of the act to be done. It would be quite sufficient to say 'that is my will,' the signature being there and seen at the time, for such words do import an owning thereof; indeed, it may be done by any other words which naturally include within their true meaning acknowledgment and approbation."

Sir H.J. Fust went further in *Re Thomson*¹⁰⁴ where he said:

"When a paper is produced by a testator to the witnesses, with his name signed thereto, and they have an opportunity of seeing his name, and they attest the same by subscribing the paper, they being present at the same time, this is a sufficient acknowledgment of his signature by the testator."

Cotton LJ stated in *Daintree & Butcher v Fasulo*¹⁰⁵ that:

"Now it is admitted law that it is not necessary for the testator to say 'this is my signature,' but if it is placed so that the witnesses can see it, and what takes place involves an acknowledgment by the testator that the signature is his, that is enough. In my opinion, when the paper bearing the signature of the testatrix was put before two persons who were asked by her or in her presence to sign as witnesses that was an acknowledgment of the signature by her. The signature being so placed that they could see it, whether they actually did see it or not, she was in fact asking them to attest that signature as hers."

Thus, the witnesses need not be told that the document is a will.¹⁰⁶ Perhaps they may even be deceived by the testator into believing that the document is a deed.¹⁰⁷ Further, it is not necessary that a witness is aware that a testator had to acknowledge the signature in order for the will to be valid; it is enough that the witness intended to and did sign a will as a witness having heard or seen the words and deeds which contributed the testator's acknowledgment of the signature.¹⁰⁸ However, as noted

¹⁰² This passage approved in *Cooper v Chapman* [2022] EWHC 1000 (Ch) at [86]; [2022] W.T.L.R. 895.

¹⁰³ *Hudson v Parker* (1844) 1 Rob. 14 at 25 (quoted in *Re Gunstan* (1882) 7 P.D. 102). See also *Henderson v Priestman* [1918] 2 Ir. R. 90.

¹⁰⁴ *Re Thomson* (1846) 4 N.C. 643 at 644; approved in *Daintree v Butcher and Fasulo* (1888) 13 P.D. 102.

¹⁰⁵ *Daintree & Butcher v Fasulo* (1888) 13 P.D. 102 at 103.

¹⁰⁶ *Daintree & Butcher v Fasulo* (1888) 13 P.D. 102 where the testator simply told the witnesses that she had something that required two witnesses and neither witness knew what sort of paper they were attesting.

¹⁰⁷ *Re Benjamin* [1934] All E.R. 359. But see *Re Sherrington* [2005] W.T.L.R. 587 at 601A, "we do not agree with the view of Langton J in *Benjamin* that the intention of the witness is immaterial if the will is in proper form"; see para 3-024.

¹⁰⁸ *Kayll v Rawlinson* [2010] W.T.L.R. 1443.

above, there cannot be a valid acknowledgment unless the witnesses at the time of the alleged acknowledgment saw the signature or had the opportunity of seeing it. For a signature to be acknowledged, it must therefore already be on the will. While it is not essential that there should be positive evidence that the testator's signature was on the document before acknowledgment, the court must be satisfied that it was, in fact, there.¹⁰⁹ Where positive evidence is lacking the court must have regard to all the circumstances.¹¹⁰

The testator may acknowledge their signature by means of gestures.¹¹¹ As little as a nod of the head has been held sufficient.¹¹²

If the witnesses are asked to sign the document by some person in the presence and hearing of the testator, and see or have an opportunity of seeing the signature, that is a valid acknowledgment by the testator though no word is spoken; for the request of another in the presence of the testator may be regarded as the equivalent of a request by the testator himself.¹¹³ Similarly it has been said in an Irish case that if a silent testator has the will brought in, and can see and acquiesce in the witnesses' action of signing the will as witnesses that is an acknowledgment that it is their signature.¹¹⁴

If, however, the signature has not been written by the testator, but by some person in the testator's presence and by their direction, the testator must by word or act indicate that the signature was put there at their request and on their behalf.¹¹⁵ The testator must not remain entirely passive in such a case.¹¹⁶

Who may be witnesses

Capacity and competence

3-022 Section 14 of the Wills Act 1837, which appears to allow persons not competent (in the modern sense) to give evidence to act as attesting witnesses, refers to those persons who in 1837 were deemed incompetent to give evidence, e.g. the parties, their spouses, persons of no religious belief, etc.

A blind person is incapable of being a witness to a will.¹¹⁷ Moreover the requirement of the "presence" of the witnesses refers to their mental as well as their physical presence.¹¹⁸

It is suggested that a minor can witness a will,¹¹⁹ but it is not recommended.

¹⁰⁹ *Fischer v Popham* (1875) L.R. 3 P. & D. 246; *Wright v Sanderson* (1884) 9 P. & D. 149.

¹¹⁰ *Blake v Knight* (1843) 3 Curt. 547; *Re Huckvale* (1867) L.R. 1 P. & D. 375.

¹¹¹ *Re Davies* (1850) 2 Rob. Ecc. *Re Davies* (1850) 2 Rob. Ecc. 337.

¹¹² *Goodall v Hadler*, *The Times* 20 October 1960.

¹¹³ *Faulds v Jackson* (1845) 6 N.C. Suppl.i; *Inglesand v Inglesand* (1874) L.R. 3 P. & D. 172; *Re Marshall* (1866) 13 L.T. 643.

¹¹⁴ *Cooke v Henry* [1932] I.R. 574, 579; and see *Kavanagh v Fegan* [1932] I.R. 566.

¹¹⁵ *Re Marshall* (1866) 13 L.T. 643; see *Re Summers* (1850) 2 Rob. Ecc. 295.

¹¹⁶ *Re Marshall* (1866) 13 L.T. 643; *Morritt v Douglas* (1872) L.R. 3 P. & D. 1.

¹¹⁷ *Gibson, In the Estate of* [1949] P. 434. But of course a blind person can make a will: see para. 3-025.

¹¹⁸ *Hudson v Parker* (1844) 1 Rob. Ecc. 14 at 24.

¹¹⁹ *Smith v Thompson* (1931) 47 T.L.R. 603.

Beneficiaries or their spouses or civil partners

Section 15 of the Wills Act 1837 deprives attesting witnesses and their spouses and civil partners of any benefit under the will, but expressly permits them to give evidence of the validity or invalidity of the will.¹²⁰ 3-023

The witnesses' attestation of the will

Under s.9(d) of the 1837 Act for deaths on or after 1 January 1983, it is a requirement that: 3-024

"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 is necessary."¹²¹

This means that the witnesses signing must intend their signatures in attestation of the document, and must not append them for other reasons. Attestation therefore means something more than merely signing the will: it means to bear witness to the fact of the testator having executed the will.¹²²

There is a presumption that a signature appearing after that of a testator is the signature of a witness to the will,¹²³ and an intention to attest will be inferred from a witness's signature in the absence of strong evidence.¹²⁴

The presence of the testator

The witnesses must be in the presence of the testator when they sign.¹²⁵ This means that the attestation took place in the visual presence or within reach of the organs of sight of the testator.¹²⁶ It is not necessary that the testator should actually see the witnesses attest the will provided that the testator is in such a situation that 3-025

¹²⁰ For detailed consideration of this section and the destination of the interest forfeited see para.10-012. The Law Reform Committee recommended that this rule be retained in its *Twenty-second Report: The making and revocation of wills* (1980), Cmnd.7902, and the Law Commission, Law Com. No.219, *Modernising Wills Law*, para.7.65 now proposes extending it to the cohabitants of attesting witnesses.

¹²¹ See para.3-006. The provision allowing for acknowledgment of their signature by a witness was new in 1983 and would have saved the will in question in *Re Colling* [1972] 1 W.L.R. 1440. It does not apply where the testator died before 1983. The old form of s.9 continues to apply in such cases. Section 9(d) in its earlier form had stated that the witnesses "shall attest and shall subscribe the will", thus distinguishing between attestation and subscription—a distinction which was somewhat barren and did not mean that attestation could be independent of subscription, see *Hindmarsh v Charlton* (1859) 1 Sw. & Tr. 433 at 439. See also discussion in Law Com. No.219, para.5.60 onwards as to the meaning of "attest".

¹²² See para.3-024; *Re Sherrington* [2005] EWCA Civ 326; [2005] W.T.L.R. 587 at [37]; *Payne v Payne* [2018] EWCA Civ 985; [2018] 1 W.L.R. 3761 at [28]; *James v Scudamore* [2023] EWHC 996 (Ch) at [103]–[104]; *Sangha v Sangha* [2023] EWCA Civ 660; [2023] 4 W.L.R. 60 at [92].

¹²³ See *Re Bravda* [1968] 1 W.L.R. 479 at 492H, per Salmon LJ.

¹²⁴ *Sherrington v Sherrington* [2005] EWCA Civ 326; [2005] W.T.L.R. 587 at [41].

¹²⁵ The Law Reform Committee recommended this requirement be retained. See Law Reform Committee, *Twenty-second Report: The making and revocation of wills* (1980), Cmnd.7902.

¹²⁶ *Doed, Wright v Manifold* (1813) 1 M. & S. 294 at 295. See also *Couser v Couser* [1996] 1 W.L.R. 1301 at 1307–1308.

they might see them if they chose to look¹²⁷ and was conscious of the act of attestation.¹²⁸

If a testator is in a state of insensibility when their signature will is attested, the will is not duly executed, although corporally present when the witnesses subscribe their names.¹²⁹ The testator must be aware of the presence of the witnesses.¹³⁰ Where the testator is blind it must be shown that the testator would, had they been sighted, have been able to see the witnesses sign.¹³¹ But the witnesses must not themselves be blind even if the testator is sighted.¹³²

Witnesses' signature or acknowledgment—deaths before 1983

3-026

Where the death occurred before 1 January 1983, the will was invalid unless both witnesses attested and subscribed after the testator's signature had been made or acknowledged. This was not expressly provided for by s.9 of the Wills Act, but it was implicit from the requirement that the testator's signature "shall be made or acknowledged... in the presence of two or more witnesses... and such witnesses shall attest and shall subscribe the will...." (emphasis added).

The words "shall" were held to be prospective,¹³³ to be construed as "shall then."¹³⁴ Many wills were refused probate for failure to comply with these requirements. The most common circumstance was where the testator signed in the presence of only one witness, W1, who then duly attested and subscribed, and the testator later acknowledged their signature in the presence of W1 and a second witness, W2, who then also attested and subscribed. The will failed because it was witnessed by W1 before the testator acknowledged their signature to W2.¹³⁵ The position was the same where W1 traced over their signature with a dry pen on the occasion when W2 was present.¹³⁶ Where either¹³⁷ or both¹³⁸ witnesses signed the will before the testator signed, the will was again invalid. If a witness was present when a testator started to sign but then left, it was not sufficient unless the part which the witness had seen written constituted the testator's name or mark.¹³⁹

¹²⁷ *Shires v Glasscock* (1685) 2 Salk. 688; *Casson v Dade* (1781) 1 Bro. C.C. 99 (perhaps the most extreme case); *Newton v Clarke* (1839) 2 Curt. 320; wills were pronounced against in *Doe d. Wright v Manifold* (1813) 1 M. & S. 294; *Re Newman* (1838) 1 Curt. 914; *Re Ellis* (1840) 2 Curt. 395; *Re Colman* (1842) 3 Curt. 118; *Tribe v Tribe* (1849) 1 Rob. Ecc. 755; *Jenner v Ffinch* (1879) 5 P.D. 106.

¹²⁸ *Couser v Couser* [1996] 1 W.L.R. 1301 at 1307F–1307G; citing *Brown v Skirrow* [1903] P. 3 at 5.

¹²⁹ *Right v Price* (1779) 1 Doug. 241.

¹³⁰ *Re Killick* (1864) 3 Sw. & Tr. 578; *Jenner v Ffinch* (1879) 5 P.D. 106.

¹³¹ *Re Piercy* (1845) 1 Rob. Ecc. 278.

¹³² *Re Gibson* [1949] P. 434.

¹³³ *Cooper v Bockett* (1843) 3 Curt. 648.

¹³⁴ *Re Allen* (1839) 2 Curt. 331.

¹³⁵ *Moore v King* (1842) 3 Curt. 243; *Cooper v Bockett* (1843) 3 Curt. 648; *Hindmarsh v Charlton* (1861) 8 H.L. 160; *Wyatt v Berry* [1893] P. 5; *Re Davies' Estate* [1951] 1 All E.R. 920; *Re Colling* [1972] 1 W.L.R. 1440; *Couser v Couser* [1996] 1 W.L.R. 1301.

¹³⁶ *Re Maddock* (1874) L.R. 3 P. & D. 169.

¹³⁷ *Chesline v Hermiston* [1928] 4 D.L.R. 786; *Re Young* [1969] N.Z.L.R. 454.

¹³⁸ *Re Olding* (1841) 2 Curt. 865; *Re Byrd* (1842) 3 Curt. 117; *Pennant v Kingscote* (1843) 3 Curt. 642; *Brenchley v Still* (1850) 2 Rob. Ecc. 162, in which there was some conflicting witness evidence as to the circumstances of attestation, but the court applied the presumption of execution and upheld the will—see para.3-034, onwards.

¹³⁹ *Re Colling* [1972] 1 W.L.R. 1440; distinguishing *Re Chalcraft* [1948] P. 222.

Witnesses' signature or acknowledgment—Deaths after 1982

In the case of deaths on or after 1 January 1983, s.9(d) as substituted provides that a will made in any of the circumstances listed above will now be valid, provided each of the witnesses acknowledges their signature to the testator after the testator has made or acknowledged their signature.¹⁴⁰

The principles applying to the acknowledgment of a testator's signature also apply when considering the acknowledgment of the signature by a witness.¹⁴¹

The attesting witnesses need not sign or acknowledge in the presence of each other

Although it is essential that both witnesses should be present with the testator when the testator signs or acknowledges the will, it is not essential that both witnesses should be present when they sign or acknowledge their signatures,¹⁴² provided that each does so in the presence of the testator. A will is valid, therefore, if one of the witnesses to leave the testator's presence after the testator has signed, for the other witness then to sign in the testator's presence and leave, and for the first witness then to return and sign in the testator's presence.

This was also the case prior to 1983, although the cases supporting this proposition were few and old,¹⁴³ and there was one decision to the contrary.¹⁴⁴

The signatures of the witnesses

The witnesses may sign their names or make their mark or sign in such other way (including signature with initials) as is descriptive of the witness.¹⁴⁵

In *Payne v Payne*,¹⁴⁶ the names and addresses of the witnesses had been completed by the witnesses in capital letters, but there were no separate "signatures"; nor indeed a separate space for such "signatures" to be added. However, the court found that nonetheless the will was valid; in the absence of a separate place for signatures, the absence of a conventional "signature" was hardly surprising.

A witness's mark is a good signature even though another person writes the witness's name alongside it,¹⁴⁷ or even writes a wrong name.¹⁴⁸ A witness may sign

¹⁴⁰ *Sangha v Sangha* [2023] EWCA Civ 660; [2023] 4 W.L.R. 60 at [93], confirmed that the order of events remained important under the amended s.9: "The testator must sign or acknowledge his signature in the presence of both witnesses together, or must acknowledge his signature in the presence of both together. This is the essential act. The witnesses must then confirm that they have witnessed this essential act. They do this either by signing the will, or, if they have already signed, by acknowledging their signature after the essential act." See also *Barrett v Bem* [2012] EWCA Civ 52; [2012] Ch. 573 at [18]; *James v Scudamore* [2023] EWHC 996 (Ch) at [94]–[105]; [2023] Ch. 391.

¹⁴¹ See para.3-019.

¹⁴² Although witnesses usually do sign in each other's presence, the Law Reform Committee recommended that this practice should not be a statutory requirement. See Law Reform Committee, Twenty-second Report: *The making and revocation of wills* (1980), Cmnd.7902.

¹⁴³ *Faulds v Jackson* (1845) 6 N.C. Suppl. i; *Re Webb* (1855) Dea. & Sw.1.

¹⁴⁴ *Casement v Fulton* (1845) 5 Moo. P.C. 130.

¹⁴⁵ *Re Christian* (1849) 2 Rob. Ecc. 110; *Hindmarsh v Charlton* (1861) 8 H.L. Cas. 160.

¹⁴⁶ *Payne v Payne* [2018] EWCA Civ 985; [2018] 1 W.L.R. 3761 at [27].

¹⁴⁷ *Harrison v Harrison* (1803) 8 Ves. Jr. 185; *Re Ashmore* (1843) 3 Curt. 756.

¹⁴⁸ *Re Ashmore* (1843) 3 Curt. 756, unless it is done to deceive; *Re Leverington* (1886) 11 P.D. 80.

with a mark although able to write. A witness may sign with initials. A description is a good signature, e.g. "servant to X".¹⁴⁹

It has been held that witnesses do not validly attest by placing their seals alone upon the paper,¹⁵⁰ but the decision would seem to be incorrect in view of the cases in which it has been held that a testator may sign with a seal.¹⁵¹

The hand of the witness may be guided¹⁵² but unlike a testator, witnesses must sign themselves.¹⁵³

Whatever form the attestation may take the court must be satisfied that what was written upon the will by the witnesses was intended to represent their names. Thus it has been held that the mere correction of an initial is not enough¹⁵⁴; nor the addition of an address.¹⁵⁵ The word "witness" written by the second attesting witness against the name of the first was held not to be a valid subscription, where the second witness did not subscribe their own name.¹⁵⁶ But where a witness had written the word "executors" against their own signature it was held, on the evidence, that they had signed in the character of witness as well as in that of executor.¹⁵⁷ Where a witness, through feebleness, wrote only part of a signature this was held to be an insufficient attestation.¹⁵⁸ But the decision seems to be incorrect since, as already pointed out,¹⁵⁹ the incomplete signature of a testator is sufficient.

The signature must have been written for the purpose of attesting the due execution of the will and not for other reasons.¹⁶⁰ Thus where a will contains two signatures of the testator, one sufficient, the other insufficient for the purposes of s.9 of the Wills Act 1837, there will be no proper attestation if the witnesses intend to witness the insufficient signature only.¹⁶¹

Position of the signatures of the attesting witnesses

3-030

In *Re Braddock*¹⁶² Sir James Hannen said¹⁶³:

¹⁴⁹ *Re Sperling* (1863) 3 Sw. & Tr. 272.

¹⁵⁰ *Re Byrd* (1842) 3 Curt. 117.

¹⁵¹ See para.3-013.

¹⁵² *Harrison v Elvin* (1842) 3 Q.B. 117; *Re Kilcher* (1848) 6 N. of C. 15. *Re Frith* (1858) 1 Sw. & Tr. 8; *Lewis v Lewis* (1861) 2 Sw. & Tr. 153.

¹⁵³ *Re Cope* (1850) 2 Rob. Ecc. 335; *Pryor v Pryor* (1860) 29 L.J.P. 114; *Re Duggins* (1870) 39 L.J.P. 24; *Bulloch, In the Estate of* [1968] N.I. 96.

¹⁵⁴ *Hindmarsh v Charlton* (1861) 8 H.L.C. 160. However, this was in the context of the pre-1983 law that a testator could not validly acknowledge their signature to W2 where W1 had already signed the will and also acknowledged their signature, but did not re-attest the will.

¹⁵⁵ *Re Trevanion* (1850) 2 Rob. Ecc. 311.

¹⁵⁶ *Re Eynon* (1873) L.R. 3 P. & D. 92.

¹⁵⁷ *Griffiths v Griffiths* (1871) L.R. 2 P. & D. 300.

¹⁵⁸ *Re Maddock* (1874) L.R. 3 P. & D. 169.

¹⁵⁹ See para.3-010.

¹⁶⁰ *Re Cunningham* (1860) 4 Sw. & Tr. 194 in which a testator made alterations to a duly executed will; the testator and witnesses traced their previous signatures with a dry pen, held no due execution. The witnesses also marked the alterations in the margin, but it was held that such alterations were not intended to be attestations of the will.

¹⁶¹ *Re Bercovitz* [1962] 1 W.L.R. 321; *Re Beadle* [1974] 1 W.L.R. 161; *Re Sherrington* [2005] EWCA Civ 326; [2005] W.T.L.R. 587.

¹⁶² *Re Braddock* (1876) 1 P.D. 433.

¹⁶³ *Re Braddock* (1876) 1 P.D. 433 at 434.

"The law does not require that the attestation should be in any particular place, provided that the evidence satisfies the court that the witnesses in writing their names had the intention of attesting."¹⁶⁴

The signatures may even be on a different page from that of the testator.¹⁶⁵ But in considering whether persons have attested as witnesses the position of the signatures may be material. If they are placed against a particular clause in the will the inference is, *prima facie*, that they were put there to give effect or testify to the words of that clause,¹⁶⁶ or to give effect to alterations. It must be the operative signature which is witnessed and attested.¹⁶⁷

However, if the witnesses have not signed on the same sheet as the testator, the sheet on which they sign must be physically connected with that signed by the testator. No mode of affixing one piece of paper to another is laid down; they may be pinned together¹⁶⁸ or even held in the testator's fingers or under the pressure of their hand.¹⁶⁹ The will may be in an envelope which alone is signed by the witnesses.¹⁷⁰ It does not matter if the sheets subsequently become detached.¹⁷¹ But, it seems, that where there is nothing from which some such connection can be inferred, probate must be refused.¹⁷² A duplicate will, one part of which was signed by the testator and another by the witnesses was held to be invalid¹⁷³; as was the second of two wills written on one piece of paper of which only the first was attested.¹⁷⁴

Temporary relaxation of requirements due to Covid-19—witnessing by video-conferencing technology

Between 31 January 2020 and 31 January 2024 inclusive, an amendment to s.9 of the Wills Act 1837 permitted a testator's signature to be witnessed remotely by means of videoconference or other visual transmission.

On 25 July 2020, given the difficulties in witnessing wills in person posed by "social distancing" rules introduced to combat the coronavirus epidemic, the Government announced that it would introduce secondary legislation to permit the witnessing of wills via video-conferencing technology.¹⁷⁵

The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus)

3-031

¹⁶⁴ See *Phipps v Hale* (1874) L.R. 3 P. & D. 166 at 168; *Re Bercovitz* [1961] 1 W.L.R. 894 (affirmed on appeal [1962] 1 W.L.R. 321).

¹⁶⁵ *Re Chamney* (1849) 1 Rob. Ecc. 757; *Re Davis* (1843) 3 Curt. 748; *Roberts v Phillips* (1855) 4 El. & Bl. 450; *Re Streatley* [1891] P. 172; *Re Denning, Harnett v Elliot* [1958] 2 All E.R. 1 (signatures on back of page).

¹⁶⁶ *Re Wilson* (1866) L.R. 1 P. & D. 269 at 271; see *Ewen v Franklin* (1855) Dea. & Sw. 7; *Phipps v Hale* (1874) L.R. 3 P. & D. 166; see also *Re Dilkes* (1874) L.R. 3 P. & D. 164; *Sweetland v Sweetland* (1865) 4 Sw. & Tr. 6.

¹⁶⁷ *Re Martin* (1849) 1 Rob. Ecc. 714; *Re White* [1991] Ch. 1, see para.6-006 regarding alterations.

¹⁶⁸ *Re Braddock* (1876) 1 P. & D. 433.

¹⁶⁹ *Lewis v Lewis* [1908] P. 1; *Foster v Cooper* [1960] 1 All E.R. 387.

¹⁷⁰ *Re Nicholls* [1921] 2 Ch. 11; compare *Re Beadle* [1974] 1 W.L.R. 161.

¹⁷¹ *Lewis v Lewis* [1908] P. 1.

¹⁷² *Re Pearce* (1867) L.R. 1 P. & D. 382; but see *Re Tiernan* [1942] I.R. 572.

¹⁷³ *Re Hatton* (1881) 6 P.D. 204.

¹⁷⁴ *Re Taylor* (1851) 2 Rob. Ecc. 411.

¹⁷⁵ <https://www.gov.uk/government/news/video-witnessed-wills-to-be-made-legal-during-coronavirus-pandemic>; <https://www.gov.uk/guidance/guidance-on-making-wills-using-video-conferencing> [Accessed 4 October 2025].