VALIDITY OF A WILL

Valid execution: A will, but no way

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***Wilson v Spence* is a useful reminder of the evidential burden on a party propounding a will. Dilan Deeljur discusses**

Goldsmith Chambers (Chambers of Anthony Metzer QC)

Dilan Deeljur is a barrister and deputy head of civil at **Goldsmith Chambers**. He acted as trial counsel for the defendants in *Wilson*

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> ***Practitioners (on either side, whether propounder or examiner of a will) should not simply take a will at face value and assume valid execution.***

In *Wilson v Spence* [2022] the claimants sought to propound a professionally drawn will which on its face appeared valid. However following the trial, the court held that this will was invalid under s9 of the Wills Act 1837 for lack of proper execution, and that the deceased did not have testamentary capacity and knowledge and approval of the alleged will.

Facts of the case

Wilson concerned the estate of Mr Ernest Francis who died on 2 May 2019 in London. Ernest had married Ms Theodosia Smith in 1989. Theodosia had around 11 or 12 children by multiple men, none of whom were by Ernest.

The two defendants, Angella Spence and Dwayne Smith, were two of those children, and therefore step-children of Mr Francis (the deceased). The first claimant, Beverley Wilson, maintained that she was a daughter of the deceased. The second claimant, Tamar Williams, as the daughter of Beverley Wilson maintained that she was therefore the granddaughter of the deceased. The defendants did not accept that the first claimant was the blood-related daughter of the deceased. The court did not have to decide this point as, as will be seen below, it was not, unusually perhaps, crucial in this case.

What *was* important was that after the death of Mr Francis, the defendants, on the basis that Mr Francis had died intestate, obtained a grant of letters of administration dated 23 May 2020.

The claimants had then issued a claim against the defendants for the revocation of that grant on the basis that they (the claimants) were in possession of a purported will of the deceased dated 5 December 2018 (the 2018 will). That 2018 will named the first claimant as a beneficiary and the second claimant as an executor.

The claimants therefore propounded the 2018 will.

The defendants denied that the deceased made the will. They argued it was not (and could not have been) made on 5 December 2018. They argued it had not been witnessed as

purported to be, and was therefore invalid. They also argued that at the time the will was made, the deceased did not have the testamentary capacity to make, know of and approve of the will.

The claimants additionally stated by way of factual background to their claim that there had been a previous 2015 will where the first claimant was one of the beneficiaries but the second claimant was not an executor. The claimants did not seek to rely upon or propound the 2015 will.

On the face of it, and as noted by the court, the claimants' case appeared a simple one, and difficult to controvert. The claimants had an apparently professionally drafted will from 2018, which they alleged to be signed by the deceased, to have been witnessed by two witnesses and to reflect the last will of the deceased as to the disposition of his estate.

However the defendants had much to say (and prove) on the 2018 will. In essence they stated as follows:

- The signature on the 2018 will was not that of the deceased.
- In any event the deceased did not and would not have had capacity to sign the will in December 2018. The deceased, they said, had been in hospital from 3 November 2018 to 5 December 2018.
- There was reason to doubt when the professional writer actually took instructions from the deceased.
- The deceased could neither read nor write (which was accepted by all parties). There was no evidence that the will was read out to the deceased.
- That, coupled with his ill health, meant he could not have signed the will.
- On the day of the purported signing, Samuel Smith, a stepson of the deceased, was at home with the deceased and let no one into the property.

Verdict

Following a trial of nearly two days, Deputy Master Dray pronounced *against the 2018 will.* The court found:

- the 2018 will was invalid in form;
- even if not invalid in form, the claimants had not proved that the deceased knew and approved of its contents; and
- in any event the deceased lacked testamentary capacity at the purported time of signing the 2018 will.

Valid execution under s9 – the relevant law

Unsurprisingly, in *Wilson* the court considered a number of authorities that since 1837 have illuminated our understanding on the validity of wills and specifically on s9 of the Act.

In relation to s9 it was paramount that *the propounder of a will must prove its due execution*, and that included the witnessing of the will. That was one of the formal

requirements for proof of a will: *Face v Cunningham* [2020] at para 46; *Sangha v Sangha* [2021] at paras 130-131.

If the court was faced with a will that contained an attestation clause (ie where on its face, as in *Wilson*, the document is apparently duly executed in accordance with the statutory provisions), the court will make a presumption of due execution. That presumption was however rebuttable.

But the presumption could usually be rebutted only by the strongest of evidence. There was a public interest in upholding valid testamentary dispositions: *Sherrington v Sherrington* [2005] and *RNID v Turner* [2015].

In *Sherrington*, Peter Gibson LJ considered attestation and execution of wills and quoted authority dating back to 1869 at para 41:

> *To similar effect was Lord Penzance in Wright v Rogers (1869) at p. 682. In this case the survivor of the attesting witnesses of a will, which was signed by the testator and the witnesses at the foot of an attestation clause, gave evidence a year later that the will was not signed by him in the presence of the testator. Lord Penzance said at p. 682 that the question was whether the court was able to rely on the witness's memory. He continued:*
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> > *'The Court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause, and signed by the testator, was not duly executed, otherwise the greatest uncertainty would prevail in the proving of wills. The presumption of law is largely in favour of the due execution of a will, and in that light a perfect attestation clause is a most important element of proof. Where both the witnesses, however, swear that the will was not duly executed, and there is no evidence the other way, there is no footing for the Court to affirm that the will was duly executed.'*

There was a sliding scale as to evidence. What constituted the strongest evidence in one case may not do so in another. Regard must be had to the totality of the relevant facts of the case and the court's evaluation of the probabilities. The court must have looked at all the circumstances relevant to attestation (see para 23(4) of *Wilson*).

Therefore there are many cases in which the presumption is of real practical importance; for example if the attesting witnesses have died or the will was made many years before the trial. Where (as here in *Wilson*) the will and statements of those concerned are relatively fresh, the court is justified in deciding whether the will was duly executed on the strength of all the evidence, on the balance of probabilities, making all appropriate allowances for the usual fallibility of recollection even over a relatively short period of time (see para 23(5) of *Wilson*).

It was also appropriate to bear in mind that, given the implications of concluding that a will was not signed as it was purported to be, namely that there had been a serious deception, the court should be satisfied that there was cogent evidence justifying such a conclusion before reaching it: *Gardiner v Tabet* [2021] at para 89.

Wilson: the court's findings on attestation

In *Wilson* a number of interesting factual features *inter alia* led to the court pronouncing against the 2018 will.

First, the first claimant, Beverley Wilson, did not give any evidence. She was not in the country at the time. It was the second claimant who propelled the claim forward, stating she had organised the 2018 will, got it signed and arranged for the claim to be made at court.

Second, the witnesses to the alleged 2018 will did not present themselves at court to give evidence. They did provide witness statements but they were of dubious quality. No reasons (or good reasons) were given by the claimants for the failure of the witnesses to attend at court. One of the witnesses had in fact failed to sign her own witness statement and the court rightly did not give weight to that unsigned statement. Therefore the evidence on attestation was scant.

Third, although the second claimant did give evidence (and provided two witness statements) after cross-examination, she was described by Deputy Master Dray as 'not an impressive witness overall'. Moreover discrepancies in her evidence were described as 'astonishing and incredible', and 'a mess':

- One of the second claimant's claims was that the deceased had instructed the professional will writer from *his own home* on 29 November 2018. As hospital records later showed the court found that this was *manifestly impossible* as the deceased was in hospital at the very same time.
- The second claimant also changed her evidence (from her first witness statement to her second statement) once the defendants had disclosed medical records of the deceased's hospitalisation, which seriously cast doubt on the timeline that she had espoused as to the deceased instructing a will writer.
- The second claimant who claimed to have organised the drafting of the will, and the signing of it, made no mention of *what time in the day* the 2018 will was supposedly executed. That proved to be a significant area of dispute and a major concern of the court, especially where the claimants had failed to mention this in their evidence.
- She also failed to mention that she had gained access (on her account) to the deceased's property, to facilitate the signing of the will, because one of the step-children had left the door unlocked or unlatched (para 47):

> *Strictly speaking, the second claimant did not give evidence as such on the point; she merely raised the suggestion about the door being left on the latch when cross-examining. In any event, it is noteworthy that nowhere in her short statements is there any mention of how she gained entry to the property. One would have expected to see such detail if she lacked the normal means of access, namely a key.*

- The second claimant sought to rely on photographs purporting to show the deceased signing the 2018 will. In court the judge went so far as to look at the phone of the second claimant where the photographs had been taken. They did not assist the claimants: they did not show the deceased's face or where he was nor did they show the witnesses present at the scene. They did not back up the claimants' claim.

Fourth, the scant witness statements of the alleged witnesses to the 2018 will provided very little corroboration with the second claimant's account especially once details of the alleged signing were elicited in cross-examination.

Conclusions for practitioners

If this case shows one thing it is that practitioners (on either side, whether propounder or examiner of a will) should not simply take a will at face value and assume valid execution.

When advising on the execution of a will, consideration should be given to the following:

- Witnesses attesting to the signing of a will should make a short note just after with brief details of where (location, room), when (date and exact time), with whom and memorable circumstances like what the testator was wearing etc. That note should be signed by the witnesses.
- Consider the use of video recording (with a phone) the signing of the will by the testator and the witnesses. As was seen in *Wilson*, the court is rightly willing to consider such evidence even when faced with its existence without notice on the day of the trial. Such video evidence should be clear and offer no doubt as to the identity of the testator.
- On that note the Wills Act 1837 (Electronic Communications) (Amendment) Order 2022 provides that the application of the provisions for witnessing of wills via *live video link* is extended to wills made between 31 January 2020 and 31 January 2024.

Those seeking to propound a will in court should note the lessons in *Wilson*:

- Although a will could look regular on its face, and despite the starting-point of a presumption of due execution, on the facts a court can quite properly satisfy itself that there is cogent evidence which rebuts any presumption or notion that a will was properly and validly executed.
- The court will look at all the facts and circumstances of the case relevant to the attestation of the will, but where there is strong evidence that *on the balance of probabilities* the will was not executed as it was purported to be, the court will not hesitate to find this.
- The propounder therefore must make every effort at court to show and produce evidence of the valid execution of a will notwithstanding the prima facie appearance of a professionally drafted and attested will.

In *Wilson* the court also found that the deceased lacked testamentary capacity and knowledge and approval of the contents of the 2018 will. Those aspects of the case were important and doubtless all added together to lead to the pronouncement against the alleged 2018 will.

The epilogue to this case comes in two parts. First, the defendants were awarded their costs of defending the claim, payable directly by the claimants, and not from the estate. Second, the court revoked the defendants' grant of letters of administration *suo moto* on the basis that they were admittedly the step-children of the deceased and therefore not entitled to the original grant under r22 of the Non-Contentious Probate Rules 1987. That point was not raised by the claimants.

Cases Referenced

- Face v Cunningham & anor [2020] EWHC 3119 (Ch); [2021] WTLR 1261 ChD
- Gardiner v Tabet & anor [2021] EWHC 563 (Ch); [2020] WTLR 931 ChD
- RNID & ors v Turner [2015] EWHC 3301 (Ch)
- Sangha v Sangha & ors [2021] EWHC 1599 (Ch); WTLR(w) 2021-12
- Sherrington & ors v Sherrington [2005] EWCA Civ 326; [2005] WTLR 587 CA
- Wilson & anor vs Spence & anor [2022] EWHC 158 (Ch); WTLR(w) 2022-09
- Wright v Rogers (1869) LR 1 PD 678

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