

Mitra's Monday Aide-Mémoire

Welcome to my Monday Aide-Mémoire ...

Due execution of a Will – the correct “ritual of execution”

One of the grounds on which the validity of a Will can be challenged is lack of due execution. On the face of it, where a Will has been signed by a Testator and 2 witnesses and is supported by the correct attestation clause, one would assume that it has been correctly executed.

However, due execution is not as straightforward as having 3 signatures on the Will. It requires the 3 individuals, being the Testator (T) and the 2 witnesses (W1 and W2), being together and following a particular “ritual of execution” or sequence of events. This sequence is vital. If not followed in the correct order, there is a risk that the Will will be declared invalid.

Section 9 of the Wills Act 1837 (as substituted by s17 of the Administration of Justice Act 1982)

Practitioners in this area will be well versed in the provisions of s9 of the Wills Act 1837. In brief, a Will is valid if it is signed by the Testator (T) in the presence of 2 witnesses (W1 and W2). Very often, a meeting will be arranged where T, W1 and W2 all attend at the same time and sign the Will. However, this does not always happen and there have been cases where the second witness joins the Testator and the first witness after they have both signed.

Hypothetical Scenario

T signs the Will first in the presence of W1; W1 signs after T; W2 then walks in and signs in the presence of T and W1 after T acknowledges his signature. If all three were present at the same time, is there an argument that the Will was not duly executed?

I will focus on sections 9(c) and 9(d) of the Wills Act 1837 which are the relevant provisions addressing the question in the above scenario:

Section 9(c): The signature is made or acknowledged by T in the presence of 2 or more witnesses present at the same time; and

Section 9(d): Each witness either:

- (i) attests and signs the Will; or
- (ii) acknowledges his signature in the presence of T.

These sections were considered in depth in a recent Court of Appeal case - ***Sangha v Sangha [2023] EWCA Civ 660***. One of the issues in debate was (using the above hypothetical scenario) whether section 9(d) required W1 to acknowledge his signature *after* W2 walked in and T had acknowledged his signature to W2? In this case, T had clearly complied with section 9(c) by acknowledging his signature in the presence of 2 witnesses. But was this sufficient to comply with section 9(d)?

The sequence to follow

I found the detailed judgment dealing with the 2nd ground of appeal (due execution of the 2007 Will) particularly helpful and recommend reading paragraphs 93-104. The judgment sets out the sequence which should be followed when executing a Will and here is a summary of the correct “ritual of execution” when faced with a scenario such as one set out above:

- 1) T signs the Will in the presence of W1;
- 2) W1 acknowledges this by signing the Will;
- 3) W2 then enters the room where both, T and W1, are present;
- 4) T acknowledges his signature to W2;
- 5) W1 acknowledges his signature;
- 6) W2 then signs as a witness.

Following the above sequence would satisfy the provisions of sections 9(c) and 9(d).

If you have any questions or wish to discuss the above, feel free to contact me on 0121 746 3352.

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