Death-bed wills: some issues and pitfalls

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1. Research published in 2011 stated that there are over 29 million people in the UK who do not have a will.¹ Many of those people only choose to correct this at a time when their death has become imminent.

2. Such ‘death-bed wills’ can, however, pose serious challenges to probate practitioners.

Delay

3. It is an obvious proposition that a solicitor cannot and should not unduly delay the will-making process where it is urgent. How long is too long, though?

4. This was a question which has been considered in a number of White v Jones cases,² including White v Jones itself. It was, however, considered most fully in the case of X v Woollcombe Yonge³. In that case, Neuberger J gave some useful guidance as to the factors the Court will take into account in deciding whether the solicitor has delayed unreasonably:

   (1) The solicitor is not under any duty to inquire as to the testator’s medical condition;
   
   (2) Where there is a plain risk that the client will imminently die, anything other than a handwritten document prepared for signature on the spot may be negligent.

² See for example Hooper v Fynmores [2002] Lloyd’s Rep PN 18, in which the solicitor cancelled an appointment to see the testator in hospital and failed subsequently to make any enquiry as to his health or to go and see him. The solicitor was held negligent.
(3) The Judge acknowledged that a will drawn on the spot can lead to undesirable consequences, for example in relation to tax.

(4) In a case relating to someone such as the deceased in X, who was suffering from terminal cancer, but whose death was not thought to be imminent, a delay of 7 days in between the giving of instructions and a finished draft was not unreasonable.

(5) A solicitor should act urgently where there was a real prospect that the client would die if the will drafting was turned around within his normal timeframe.

**Due Execution**

5. After the will is drafted, it is equally important for the solicitor to then take steps to ensure that the will is adequately executed.

6. In *Estherhuizen v Allied Dunbar*\(^4\) and *Gray v Richards Butler*\(^5\), it was held that a solicitor owes a duty to his client testator to take proper care in advising as to the formalities of execution. There is some debate over whether it is negligent for the solicitor to only issue the testator with written instructions, rather than attending the signing. The judgment of Longmore J. in *Estherhuizen* suggests this is indeed the case in ‘ordinary circumstances’. In *Gray*, by contrast, which was like *Estherhuizen* a High Court decision, it was asserted that the nature of the duty should vary according to who the client is and whether he or she is likely to be able to follow written advice as to the relevant procedures.

7. Nevertheless, this question should not make any difference in death-bed cases. In circumstances in which a testator’s physical or mental condition has deteriorated significantly, the risk of improper execution or alternatively of a probate challenge upon that ground is very high. In such circumstances it would seem necessary on both the *Gray* and the *Estherhuizen* tests for the solicitor to personally attend and supervise the execution of the will, or to send someone suitably qualified from the office to do the same.

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\(^4\) [1998] 2 FLR 668.
\(^5\) [2000] WTLR 143.
8. In cases of extreme physical infirmity, the solicitor may need to consider whether to make use of the provision in section 9 (a) of the Wills Act 1837 which allows some other person than the testator to sign the will ‘at his direction’.

9. What exactly is meant by ‘at his direction’ was recently debated in the Court of Appeal case of Barrett v Bem.

10. The Court held that under section 9 it was not enough for the third party to sign the will in the presence of the testator: he must do so at the direction of the testator. Taking into account the normal dictionary meaning of the word ‘direction’, which suggested that active instruction was involved, mere acquiescence could not be enough.

11. It is important to note that the Court did not conclude that a direction ‘by conduct’ alone was insufficient under section 9. It accepted that there may be cases where the putative testator is unable to communicate his desire that the will be signed on his behalf verbally or in written form, and that in such cases the use of a sign such as the nodding of the testator’s head might be enough.

**Capacity: the ‘golden rule’ in death-bed cases**

12. In death-bed cases, the mental capacity of the would-be testator is often in issue.

13. In such circumstances, practitioners must try and observe the so-called ‘golden rule’. This was set out in the judgment of Templeman J. (as he then was) in Re Simpson. It provides that in the case of an aged testator or one who has suffered a serious illness, the making of his will ought to be witnessed or approved by a medical practitioner who satisfied himself of the testator’s capacity. Compliance with the golden rule does not determine whether or not a will is subsequently upheld in a probate action; nevertheless solicitors who have not followed the rule have been subject to severe criticism by the Court.7

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6 (1977) NLJ 487.
7 See for example Key v Key [2010] 1 WLR 2020.
14. Recently, however, there has been a welcome recognition that in cases of real urgency, it may not be possible for the golden rule to be complied with. In *Wharton v Bancroft*[^8], Norris J. made clear that where the solicitor is taking the will of a dying man, it is often simply not possible to conjure up a medical attendant who is willing to witness the will and confirm the testator’s capacity at short notice, given the need for consent from the client, a willing doctor, and potentially payment for the doctor’s attendance.

**Conclusion**

15. Death-bed wills pose particular problems for the practitioner. The urgency of the case means that he or she will not be able to think about the advice to be given at leisure. Yet equally a death-bed case is one in which sound judgment is essential given the possibility of subsequent litigation. Accepting instructions in such cases may on occasion be a quite unenviable task.

[^8]: [2011] EWHC 3250 (Ch).