FORMALITY v. INTENTION — WILLS IN AN AUSTRALIAN SUPERMARKET

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[*The author undertakes a functional analysis of the formal requirements for effective testation, in order to determine whether it is desirable to dispense with all or some of these formalities. The author discusses the merits of the two modes of reform which have been proposed: a dispensing power being given to the courts, or allowing the relaxation of formalities. It is considered appropriate to re-examine the suitability of formal requirements imposed in 1837 in the light of current economic and social conditions.*]

> What is a testament? It is the expression of the will of a man who has no longer any will, respecting property which is no longer his property; it is the action of a man no longer accountable for his actions to mankind; it is an absurdity, and an absurdity ought not to have the force of law.[1]

It is ironical, and indicative of human nature, that on 2 April 1791, when Mirabeau's passionate address against freedom of testation was read by Talleyrand to the French National Assembly, the dying Mirabeau was executing his will.

Ever since the existence of succession laws under a multitude of legal systems, the principles of succession on death have covered the entire spectrum between total freedom of testation and the denial of any right to dispose of assets on death. It appears that almost total freedom of testation has only occurred twice in western civilisation, in Rome between the 5th and 1st centuries B.C. and in England (and her colonies) between the 19th and 20th centuries.[2] The historical pattern of succession laws in Western Europe commenced with the tribal or communal ownership of property, followed by the recognition of individual property rights, the devolution of property on death being governed by fixed rules of intestate succession. The recognition of an individual's entitlement to deviate from those laws[3] by allowing limited rights of testation, which gradually expanded, has been accompanied by the development of formal requirements for effective testation. Those formal requirements under the European civil law systems were more rigorous than in England and included the need to execute wills before notaries. The trend during the twentieth century has been to modernise the laws of succession, including wills formalities, recognising a need for an international will[4] and

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[1] Mirabeau 'Discours sur l'egalite des partages', translated in Bulwer, H., *Historical Characters* Vol 1, 114, reproduced by McMurray, O. K., *Liberty of Testation and some modern limitations thereon* 536, 537. Most of the research for this article was completed whilst the author acted as consultant to the Law Reform Commission of New South Wales on a reference dealing with the making of wills. The opinions expressed here are those of the author and not the views of the Commission.

[2] Hines, N. W., 'Freedom of Testation and the Iowa Probate Code' (1963-4) 49 *Iowa Law Review* 724, 724-6.

[3] Hines, N. W., *op. cit.* 725.

[4] Uniform Law on the Form of an International Will; Hall, C., 'Towards a Uniform Law of Wills: The Washington Convention 1973' (1974) 23 *International and Comparative Law Quarterly* 841.

restricting freedom of testation by conferring additional protection on the family (such as Family Provision Act 1982 (N.S.W.)).

Some academic discussion of the aims and goals of succession laws has indicated the need for greater flexibility in the law of wills, including the rules dealing with wills formalities.[5] Even in legal systems which accept the concepts of private property and freedom of testation, the laws of succession should reflect several goals which need to be balanced, having regard to prevailing social, economic and political views and attitudes. It is generally agreed that succession laws should reflect the interests of the individual, his or her family and dependants, and of society at large.[6] The validity of a will, as an expression of testamentary intention, should require adequate proof of that intention, free from extraneous improper influence, expressed with sufficient clarity.[7] It has become increasingly apparent that the insistence on the formalities that evolved in Anglo-Australian and North American jurisdictions has not achieved consistently the aims of giving effect to genuine and rational expressions of testamentary intention, frequently defeating that intention and resulting in injustice.[8]

There is evidence that will making during the 16th to 19th centuries was not the exclusive privilege of the affluent, but by the twentieth century there has emerged a mass market for wills by almost the entire community.[9] The increasing level of community education, the much greater availability of legal advice, including free legal advice, changes in living standards and lifestyles, justify a fundamental re-examination of wills formalities. As Mechem pointed out, wills formalities should not exhibit a 'big-law-office philosophy',[10] as if every testator should instruct a high-powered law firm to prepare his or her will, overlooking the fact that most persons whose wills fail to meet the formal requirements for execution

> do not have the job supervised by a high-powered law firm, but who instead have the matter looked after by some very bad lawyer or by the local J.P. or the local banker or the local real estate man or on the advice of those who happen to be gathered at some lonely deathbed. These persons have the same right to make wills as their more prosperous or sophisticated brothers and sisters who employ good lawyers; the governing philosophy should be to design a wills act that as far as is consistent with safety adapts itself to the knowledge (or ignorance), psychology, and habits of such people so as to create the minimum risk that their testamentary attempts will be frustrated.[11]

It is likely that the highest incidence of informally executed wills occurs in homemade wills in relatively small estates, where the consequences of invalidity and the expense of litigation can be afforded least.[12]

[5] Some of the literature dealing with this topic is referred to and discussed by Friedman, L. M., 'The Law of the Living, the Law of the Dead: Property, Succession, and Society' (1966) *Wisconsin Law Review* 340, and by Gaubatz, J. T., 'Notes Towards a Truly Modern Wills Act' (1976-77) 31 *University of Miami Law Review* 497.

[6] Gaubatz, *ibid.* 501 *et seq*; Morton J. M., 'The Theory of Inheritance' (1894-1895) 8 *Harvard Law Review* 161, 163-7; Hines, *op. cit.* 726; Friedman, *op. cit.* 358.

[7] Gaubatz, *ibid.* 499.

[8] Morton, *op. cit.* 161.

[9] Friedman, *op. cit.* 366-8, 373, 378.

[10] Mechem, P., 'Why not a Modern Wills Act?' (1947-8) 33 *Iowa Law Review* 501, 503.

[11] *Ibid.*

[12] The Law Reform Commission of Western Australia Discussion Paper (1984) *Wills: Substantial Compliance*, 8.

It is intended to re-examine the current Australian wills formalities and to suggest a direction towards legislative reforms which should enable the legal system to satisfy better the needs of the present and future mass legal supermarket for wills.

HISTORICAL INTRODUCTION

The formalities for making and revoking wills in the Australian states and territories originated in England. Up to the 16th century there were no formal requirements for making wills. The contents of nuncupative (oral) wills could be proved by two 'honest' witnesses.[13] Written wills could be altered by oral wills and vice versa. The first statutory requirements for formalities were imposed in 1540,[14] enabling real property to be devised by will. Wills were required to be in writing, although there was no requirement for writing or for signature by the testator or for attestation. Oral instructions by a testator for a will, written out by another person, complied with those requirements, even if not read to or by the testator, nor signed by the testator.[15]

By the 17th century, as feudalism came to an end, an affluent middle class of merchants and townspeople emerged and there was perceived the need for greater sophistication in disposing of property, including on death. Some of the events leading up to the enactment of the Statute of Frauds[16], in 1677, were described by Scrutton L.J.:

> Before the *Statute of Frauds* it was not necessary for wills to be in writing. A nuncupative will when the testator orally declared his will before a sufficient number of witnesses was good if clearly proved. In 1676 *Cole v Mordaunt* reported in a note to *Mathews v Warner* (4 Ves 195) a remarkable case was fought where it was endeavoured to prove a nuncupative will by nine witnesses most of whom were afterwards convicted of perjury or subordination thereof. In dealing with the case Lord *Nottingham* is reported to have said 'I hope to see one day a law that no written will should be revoked but by writing.'[17]

Section V of the Statute of Frauds, 1677 imposed the following formalities for making wills dealing with real property:

> All devises and bequests of any lands or tenements, deviseable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

These provisions did not apply to the wills of soldiers on actual military service or of mariners or seamen at sea, or to the execution of wills of personal property when the estate was of the value of 30 pounds or less. However, as was pointed out by Holdsworth:

> But, in other cases, a nuncupative will of personal property was not to be valid unless (a) it was proved by the oath of three witnesses who were present at its making, and were requested by the testator to bear witness to it; and (b) it was made during the last sickness of the deceased, and in the

[13] Holdsworth, W., *A History of English Law* (5th ed. 1942) vol. III, 539.
[14] Wills Act, 1540, 32 Henry VIII, c. 1.
[15] *Brown v. Sackville* (1553) Dyer 72a; 73 E.R. 152; *Stephens v. Gerard* (1666) 2 Keble 128; 84 E.R. 81.
[16] 29 Car. II c 3.
[17] *Godman v. Godman* (1920) P. 261, 279.

house in which he had been resident ten days before its making. Further, after a period of six months from the making of a nuncupative will, no testimony was to be received to prove it, unless such testimony had been committed to writing within six days of its making.[18]

Those limitations rendered it difficult to rely on nuncupative wills, which gradually went out of fashion. By the 18th century it was recognised that the strict application of the statutory formalities rendered invalid some honestly made testamentary instruments. In 1757 Lord Mansfield pointed out:

I am persuaded many more fair wills have been overturned for want of form, than fraudulent have been prevented by introducing it. I have had a good deal of experience at the delegates; and hardly recollect a case of a forged or fraudulent will, where it has not been solemnly attested. It is clear that judges should lean against objections to the formality. They have always done so, in every construction upon the words of the statute . . . And still more ought they to do so, if that system would spread a snare, in which many honest wills must unavoidably be entangled.[19]

The Real Property Commissioners considered the law of wills, including formalities, and in 1833 published their Fourth Report, dealing with this topic, recommending repeal of the provisions of the Statute of Frauds relating to nuncupative wills and the reduction of the formalities required for making and revoking wills. Their recommendations were incorporated in the Wills Act 1837,[20] which eliminated the differences in formalities relating to real and personal property. Section 9 of that Act, which is the source of the current requirements for formalities in most Anglo-Australian, American and Canadian jurisdictions, is expressed as follows:

And it be further enacted, that 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.

FORMAL REQUIREMENTS IN AUSTRALIA

The formal requirements specified in s. 9 of the Wills Act, 1837 (U.K.) have been adopted in each Australian jurisdiction.[21] In Western Australia there is no requirement for the testator to sign the will 'at the foot or end thereof' and it is sufficient if:

it is signed by the testator or signed in his name by some other person in his presence and by his direction, in such place on the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will.[22]

The requirement for testators to sign wills at the 'foot or end' gave rise to so much difficulty in England within the first decade after the introduction of that

[18] Holdsworth, *op. cit.* vol VI, 385.
[19] *Windham v. Chetwyn* (1757) 1 Burr. 414, 420-1, 97 E.R. 377.
[20] 7 Will IV & 1Vict c 26.
[21] Wills Ordinances 1968 (A.C.T.) s. 9.; Wills Probate and Administration Act 1898 (N.S.W.) s. 7; Wills Ordinance 1938 (N.T.) s. 8.; Succession Act 1981 (Qld) s. 9.; Wills Act 1936 (S.A.) s. 8; Wills Act 1840 (Tas.) s. 9; Wills Act 1958 (Vic.) s. 7.; Wills Act 1970 (W.A.) s. 8.
[22] s. 8(b).

requirement in 1837, that in 1852 an amendment was enacted[23] in order to clarify and amplify it. That was adopted in each Australian jurisdiction and constitutes part of the current legislation,[24] except in Western Australia. The following provision, contained in the New South Wales legislation, followed the English provision almost verbatim:

> s. 8(1) 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 within the meaning of this Part, of this Act if the signature shall be so placed at, or after, or following, or under, or beside, or opposite 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, and no such will shall be affected by the circumstance—
>
> (a) that the signature does not follow or be immediately after the foot or end of the will; or
> (b) that a blank space intervenes between the concluding word of the will and the signature; or
> (c) that the signature is placed among the words of the testimonium clause or of the clause of attestation, or follows, or is after or under the clause of attestation, either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses; or
> (d) that the signature is 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 is written above the signature; or
> (e) that there appears 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.
>
> (2) The enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under this Part of this Act 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.

The other divergence in Australia with reference to wills formalities relates to judicial dispensation with those formalities, in Northern Territory, Queensland and South Australia.

FUNCTIONAL ANALYSIS OF THE FORMAL REQUIREMENTS

In order to determine whether some or all of the formalities for making wills should be dispensed with it is necessary to consider the functions which those formalities may be performing. It has been pointed out[25] that formalities 'should not be revered as ends in themselves, enthroning formality over frustrated intent'. There is some academic literature relating to a functional analysis of these formalities.[26] Nelson and Starck identified the following goals of wills formalities,[27] indicating that the list may not be exhaustive:

> (1) That the testator has thought seriously about the nature and value of his property, those who have natural claims upon the testator for support, and how those claims can be satisfied;
> (2) That the testator reached a final decision on the disposition of the assets. Although it is not necessary that the testator make complete disposition, it is desirable that the testator's state of mind be final on the disposition made in the will;

[23] Wills Amendment Act 1852.; 15 & 16 Vict. c 24.

[24] Wills Ordinance 1968 (A.C.T.) s. 10; Wills Probate and Administration Act 1898 (N.S.W.) s. 8; Wills Ordinance 1938 (N.T.) s. 9; Succession Act 1981 (Qld) s. 10; Wills Act 1936 (S.A.) s. 9; Wills Act 1852 (Tas.) s. 1; Wills Act 1958 (Vic.) s. 8.

[25] Gulliver and Tilson 'Classification of Gratuitous Transfers' (1941) 51 *Yale Law Journal* 1, 3.

[26] Gulliver and Tilson, *ibid.*; Fuller L. L.; 'Consideration and Form' (1941) 41 *Columbia Law Review* 799; Langbein, J. H., 'Substantial Compliance with the Wills Act' (1975) 88 *Harvard Law Review* 489; Nelson and Starck, 'Formalities and Formalism: A Critical Look at the Execution of Wills' (1979) 6 *Pepperdine Law Review* 331.

[27] *Ibid.* 348.

(3) That the testator's decision, when made, be free of excessive influence by others. Although it is recognized that testators are inherently influenced by all that surrounds them, the testator should weigh those influences against his or her own values and come to an independent decision;
(4) That there be a record of the scheme of disposition which is free from alteration or substitution by others;
(5) That the testator's choices be expressed in language and form which enables the implementation of those choices on a routine basis.

Several attempts at a functional or purposive analysis of wills formalities identified five distinct functions of these formalities; *i.e.* evidentiary, ritual, cautionary, protective and channelling functions.

(1) *Evidentiary function*

The requirement for writing preserves in permanent form the language chosen by the testator to express his testamentary wishes and to indicate testamentary intention. It enables the courts to ascertain with some degree of certainty testators' wishes. This formality provides some protection against fraud and lapse of memory, since at the time when these matters must be determined the testator will be dead and unable to testify. There may also be an extended lapse of time between statements of testamentary intention and the grant of probate, so that the witnesses may be dead or unavailable, or their evidence may be unreliable as regards the contents of the will. Some testators do not wish to reveal to the witnesses the contents of their wills.

The testator's signature authenticates the document and identifies the maker of the will. That function is not always observed, because (i) the testator's signature may not be his correct name; (ii) it may be in the form of a sign or mark; (iii) the testator may authorise someone else to sign the will on his behalf. However, generally the testator's signature does indicate finality of testamentary intention and authenticates the document as the testator's will. Gulliver and Tilson pointed out:

> The possibility of a forged signature must be controlled by the abilities of handwriting experts. There is judicial support for the theory that the requirement that the will be signed at the end has an evidentiary purpose of preventing unauthenticated or fraudulent additions to the will made after its execution by either the testator or other parties.[28]

The testator's signature at the end of the will and attestation provide evidence of completeness, and act as some safeguards against interpolation. Attestation provides important evidentiary functions with reference to execution and testamentary capacity.[29]

Generally the wills formalities facilitate the proof of wills and provide important evidentiary functions, although as Nelson and Starck pointed out:

> It cannot be said with certainty that these goals will be achieved by the requirements of such formalities. Interpolation of a signed and witnessed will is not impossible since there is no requirement that the witnesses know what is in the instrument. The fact that they promote achievement of the goals is, however, sufficient to warrant their inclusion in the statute.[30]

[28] Gulliver and Tilson, *op. cit.* 7.
[29] Gulliver and Tilson, *ibid.* 9, Fourth Report of Real Property Commissioners (1833) 18.
[30] *Supra* 351.

(2) *Ritual function*

The requirements for writing, signing and witnessing wills have a ritual function. They emphasise the solemnity of the testamentary act and tend to preclude the possibility that the testator was acting casually or haphazardly. The presence of the signature shows that the instrument was adopted by the testator as his will and that the writing was not merely deliberative, or a preliminary draft, or haphazard scribbling. The requirement for attestation also confirms that the testator gave due consideration to the consequences of the testamentary act. However, as Nelson and Starck pointed out,[31] ritual or ceremony cannot guarantee that each testator is aware of the solemnity of the testamentary act.

(3) *Cautionary function*

The requirements for writing, signature and attestation perform a cautionary or deterrent function, by impressing on testators the finality and solemnity of the testamentary act. They tend to cause testators to be more careful and cautious with the expression of testamentary intentions in permanent form.

(4) *Protective function*

Historically the protective function was an important reason for the imposition of formalities in the United Kingdom. The formalities of writing, signing and attestation were designed to protect testators against fraud and undue influence. However, it is doubtful whether formalities are able to perform protective functions adequately.[32] Nelson and Starck pointed out:

> While fraud may be practiced at the time of execution of the will, undue influence usually occurs over a much longer period of time. Inherently, therefore, the fact that witnesses are disinterested or that they attest in the presence of each other is little safeguard against imposition. On the other hand, failure to adhere to the formality can result in the will being disallowed probate even where the court is satisfied that no fraud or undue influence has occurred . . .
> Since fraud and undue influence have usually been brought to bear upon the testator prior to the execution of the will, it seems that the continuation of the requirements that the witnesses attest in the presence of each other and that the witnesses be disinterested are unnecessarily formalistic and should not be continued. Fraud and undue influence are usually the results of objective acts which may be proven at probate and which do not usually require the testator's presence.[33]

(5) *Channelling function*

Wills formalities perform a channelling function, by facilitating 'judicial diagnosis'[34] whether a legally enforceable transaction was intended. The formalities are important in establishing the integrity of the will and to minimize the judicial time and effort required to ascertain the nature and purpose of the document and to implement it after the testator's death. It also tends to avoid litigation and expense

[31] *Supra* 349.
[32] Gulliver and Tilson, *op. cit.* 9, 13.
[33] *Supra* 352-3.
[34] Fuller, *op. cit.* 801.

and make the provision of legal advice more certain.[35] However, as Nelson and Starck pointed out:

> the critical factor is not whether the testator created something which looked like a will, but whether the language of the transmission was adequate to express the testator's intent. Formalities, as they are presently structured, do not prescribe language of transmission, but only the requirements surrounding execution.[36]

(6) *Interrelation of functions*

Although each perceived function of wills formalities may be considered separately, they interrelate. Thus, a person who is compelled to provide a written record of testamentary intention will be induced to deliberate over that intention and the manner in which it should be expressed. Devices which induce deliberation will have evidentiary value.[37] Devices which provide evidence and encourage deliberation will advance the channelling function of these formalities. Having considered such a functional analysis of wills formalities, the Manitoba Law Reform Commission concluded[38] that the formalities 'serve valid purposes in probate law and that' their 'reduction or elimination . . . is not an advisable solution. Furthermore, it is not the formalities which create the current difficulties but rather the approach taken to them.' That conclusion was shared by the Law Reform Commission of British Columbia,[39] which did not recommend relaxation of the formalities for executing wills.

RELAXING SOME FORMAL REQUIREMENTS

(A) *Writing*

(1) *Current requirements for writing*

The current legislative requirement in Australia is for wills to be in writing except for privileged wills. Any permanent form of visual representation is sufficient,[40] on any material, including on an egg shell,[41] in ink, pencil, typewriting, printing, lithography, photography,[42] in any language, including in a code or by using abbreviations.

(2) *Nuncupative Wills*

Nuncupative or oral wills were effective in England up to 1540, and, in respect of personal property, up to 1677. Oral wills were abolished in 1837, except for

[35] Law Reform Commission of British Columbia Report on the Making and Revocation of Wills (1981) 25.
[36] *Supra* 353.
[37] Fuller, *op. cit.* 803.
[38] Report on 'The Wills Act' and the Doctrine of Substantial Compliance (1980), 17.
[39] Report on the Making and Revocation of Wills (1981), 33.
[40] Mellows A. R., *The Law of Succession* (3rd ed. 1977) 72.
[41] *Hodson & Another v. Barnes* (1926) 43 T.L.R. 71, although that 'will' failed for lack of testamentary intention.
[42] Hardingham, Neave and Ford, *Wills and Intestacy in Australia and New Zealand* (1983) 27.

privileged wills. Although oral wills are permitted in some jurisdictions,[43] there are some inherent problems in proving and interpreting oral wills. There are strong grounds for not introducing nuncupative wills in Australia on a functional analysis of the need for writing, persuading the Law Reform Committee of the United Kingdom,[44] the Law Reform Commission of British Columbia[45] and the Law Reform Commission of Tasmania[46] not to recommend the relaxation of the need for writing.

(3) *Electronic Wills*

The emergence of modern technology poses the possibility of permitting the execution of electronic wills, recorded on tape recorder, video tape or other media.

A tape recorded will does not satisfy the current statutory requirements for writing, not being a visual representation of the words used. The use of tape recording has some of the disadvantages of oral wills, *i.e.* less attention to accuracy of expression and detail, but avoids the difficulty of proving the words used. It is possible to tamper with tape recordings and the genuineness of entire tapes or parts of tapes could give rise to considerable difficulties. Although electronic wills can perform some of the functions of written wills, such as the recording of the contents of wills in permanent form, evidencing its authenticity and testamentary intention,[47] the Law Reform Commission of British Columbia considered it premature at this time to expand the scope of 'writing' so as to embrace electronic wills, because:

> the electronic storage and transmission of data is a rapidly changing field of technology, and for that reason we are not prepared to attempt to identify any new and acceptable medium for recording testamentary intentions.[48]

This author agrees that this topic will need to be reconsidered in the future, when the use of electronic forms of communication and recording become more widespread and adequate safeguards against tampering shall have been developed.

(B) *The testator's signature*

(1) *Current requirements for signature*

The requirement for the testator's signature has been applied by the courts with considerable latitude. No particular form of signature is required, but it must be intended as execution (or authentication) by the testator of the will. Signature by mark, initials, assumed name or stamped name, or by description (such as 'your

[43] *E.g.* in Scotland for small bequests, in some States of the United States and in Spain, as discussed in Report on the Making and Revocation of Wills of Law Reform Commission of British Columbia, 25-6.

[44] Twenty-second Report on the Making and Revocation of Wills, 8-9.

[45] Report *supra* 26, n. 43.

[46] Report on Reform in the Law of Wills, Report No 35 (1983), 10.

[47] Langbein, J., 'Substantial Compliance with the Wills Act' (1975) 88 *Harvard Law Review* 489, 519.

[48] Report, *op. cit.* 52.

loving mother'[49])[50] is acceptable. However, it is essential that the testator should have completed writing what was intended as a signature, even if that was only part of the testator's name.[51] The signature may be made by the testator or by some other person in his presence and by his direction. That is useful, to include a person who is physically unable to execute a will and such an execution is effective if the agent signs the testator's name, or the agent's name, or both.[52] The courts have adopted considerable latitude when a testator is unable to give express authority to the agent and the authority may be evidenced by conduct.[53] The agent may also attest the will as one of the witnesses.[54] The testator must either sign the will in the presence of the witnesses, or having already signed the will (without the witnesses having attested that signing) acknowledge the signature to the witnesses.

No serious practical problems have been disclosed in litigation by reason of this requirement or its application by the courts. There is no justification for dispensing with signature as a formal requirement, having regard to the function of that formality. The more difficult question, whether the courts should have the power to dispense with the need for a signature in an appropriate situation, is considered later in this article with reference to the judicial dispensing power.

(2) *Position of the testator's signature*

The requirement for the testator's signature to be situated at the foot or end of the will caused difficulties and resulted in the failure of many wills. In order to resolve those difficulties, in 1852 the Wills Act Amendment Act was passed in the United Kingdom. Section 1 of that Act has been adopted in each Australian jurisdiction, except currently in Western Australia. That provision (whose New South Wales equivalent is reproduced earlier in this article) outlines some commonly occurring situations in which the signature is not physically at the foot or end of the will, but is effective within the expanded statutory requirements. That additional provision solved some problems, but not all, and added two new requirements. First, it became necessary that the signature be so placed that it *shall be apparent, on the face* of the will, that the testator intended to give effect by that signature to the writing signed as his will. Secondly, the signature should not give effect to any disposition (i) which is underneath or follows it; or (ii) which shall be inserted after the signature has been made.

[49] *In the Estate of Cook* [1960] 1 W.L.R. 353.

[50] Hardingham, Neave and Ford, *op. cit.* 28-9; Sherrin, Barlow, and Wallington, *Williams' Law Relating to Wills* (5th ed. 1980) Vol. I, 83-5.

[51] For example, 'E. Chal' was held to be sufficient as the signature of E Chalcraft, when the testatrix was unable to complete her signature and it was held that she had completed her signature (*In the Goods of Chalcraft* [1948] P. 222). That decision needs to be contrasted with *Re Colling* [1972] 3 All E.R. 729, where the partial signature was ineffective, as the testator intended to sign his full name and did complete the signature after the witness left.

[52] *In the Goods of Clark* (1839) 2 Curt 329; 163 E.R. 428; *In Goods of Bailey* (1838) 1 Curt 914; 163 E.R. 316.

[53] Williams, *op. cit.* 84-5; *In the Estate of Holtam* (1913) 108 L.T. 732; *In Goods of Marshall* (1866) 13 L.T. 643.

[54] *In Goods of Bailey* (1838) 1 Curt 914; 163 E.R. 316.

The aberrations in signatures being placed in almost any position in some wills has continued and is still causing difficulties. Mellows commented:

> It is . . . almost as if there was an underground organisation of troublesome testators who plotted together to see where else they could place their signatures. Signatures were placed lengthwise and sideways in the margin, in the middle of the text, at the top, on the back, and in almost every conceivable place.[55]

Generally signatures at or near the top of wills have been held ineffective[56]. In *In re Stalman*[57] Lord Hanworth M.R. pointed out that although the statutory provision gives a 'wide geographical liberty' where to place the testator's signature, it does not go so far as to permit it to be placed at the beginning of the will. Some judges have expressed regret at being unable to hold such wills effective, when clearly the testator intended to give effect by the wrongly placed signature to the will and there was no question of fraud or subsequent addition to the will.[58] In one decision[59] the testator signed at the foot or end of the will, but there was also a signature at the top of the will which was attested. One ground for holding that will to be ineffective was because the testator's operative signature was at the top and the one at the end was only made either for the purpose of identification or it may have been made subsequently to its execution. Clearly the testator's intention was defeated. That particular estate was large, the will was made in 1940 and the testator died almost 20 years later. The testator probably relied on that will being effective, over a long period, whilst the witnesses' recollection would have become unreliable over such a long period.

In several decisions signatures written perpendicularly in the margin of the will, near or towards the top of the will have been held to be effective,[60] even in a space specially ruled off for the signature.[61] The judges have struggled with the express terms of the statutory requirements and the desire to give effect to testamentary intention contained in dubiously executed wills. The end of a will could be construed geographically or spatially (subject to the latitude permitted by the statutory provisions), or in terms of the time of the signature (*i.e.* after the entire will has been completed), or at the end in intention.[62] A complex and almost irreconcilable body of judicial decisions emerged in dealing with the problems caused by the position of testators' signatures. Many decisions were concerned with wills signed at the bottom of the first or second pages, which were followed by subsequent pages that were not signed. In some decisions it was possible to regard execution on the first page as being at the foot or end of the will because of manipulation of the paper by the testator or by the incorporation by reference of later parts of the will in the part which had been signed.[63] The courts have dealt in

[55] Mellows, *op. cit.* 74.
[56] *In re Stalman* (1931) 145 L.T. 339; *In the Goods of Harris* [1952] P. 319; 2 All E.R. 409; *In the Estate of Roffe* (1920) 20 S.R. (N.S.W.) 632.
[57] *In re Stalman supra* 340, n. 56.
[58] For example, *In the Estate of Roffe supra* p. 91, 634, n. 56.
[59] *In the Estate of Bercovitz* [1962] 1 All E.R. 552.
[60] *In the Will of Everingham* (1900) XXI L.R. (N.S.W.) (B & P) 15; *In Estate of Roberts* [1934] P. 102; 151 L.T. 79.
[61] *In the Goods of Hornby* [1946] P. 171; [1946] 2 All E.R. 150.
[62] Mellows, *op. cit.* 75.
[63] *Cinnamon v. Public Trustee* (1934) 51 C.L.R. 403.

three different ways with wills in which testators' signatures were not situated geographically at the end of the writing:

(1) by granting probate of the entire will;[64]
(2) by granting probate of that portion of the instrument situated before the signature;[65]
(3) by refusing to grant probate on the ground that the will was not signed at the foot or end.[66]

Two well known decisions illustrate how testators' intentions were sometimes defeated by the application of this requirement. In *Sweetland v. Sweetland*[67] the will comprised six pages. The testator and two witnesses signed the bottom of each of the first five pages. The witnesses signed the last page, but the testator failed to sign on that page. It was held that the will failed, because the testator failed to execute it at the foot or end, the other signatures being only for indentification and to prevent the subsequent interpolation of other pages into the will. In *Re Beadle*[68] the testatrix was assisted in preparing her will by Mr and Mrs Mayes, to whom she referred as Charley and Maisy. Mrs Mayes wrote the will as dictated by the testatrix. The testatrix and Mr Mayes signed the paper in the right hand corner, but Mrs Mayes did not sign it. The testatrix then wrote on an envelope 'My last will and testament, E. A. Beadle, to Charley and Maisy'. After the will was placed inside the envelope which was sealed, Mr. Mayes wrote on the back of the envelope 'We certify that the contents of this letter was written in the presence of ourselves' and Mr and Mrs Mayes signed it. Although Goff J. held that there was a sufficient connection between the paper and the envelope to enable them to constitute the will, neither of the testatrix's two signatures constituted an effective signature at the foot or end of the will and the attestation was also defective.

A significant judicial attempt to rationalise this topic was undertaken by Helsham J. (as he then was) in *In the Will of Spence*.[69] His Honour held that the court should determine what is the face of the will, which may be carried out with the aid of extrinsic evidence, including how the testator handled, read, treated and signed the paper. Only then may the court determine the geographical end of the will and whether it is apparent from the position of the signature relative to that end that the testator intended 'to give effect by such his signature to the writing signed as his will'. Whilst his Honour's approach appears to be justified in principle,[70] it does not resolve all of the anomalies and difficulties.

(3) *Some possible reforms*

The confused state of the law with respect to the requirement of the testator's signature being placed at the foot or end of the will, and the fact that genuine expressions of testamentary intention had been rendered nugatory because of

[64] *In the Will of Plain* (1927) 27 S.R. (N.S.W.) 241; *In the Will of Smith* [1965] Qd. R. 177.
[65] *Royle v. Harris* [1895] P 163 72 L.T. 474; *Re Allee* [1960] V.R. 481; *In Re Robertson* (1972) 2 S.A.S.R. 481.
[66] *In the Will of Moroney* (1928) 28 S.R. (N.S.W.) 553.
[67] (1865) 4 Sw & Tr 6; 164 E.R. 1416.
[68] [1974] 1 All E.R. 493.
[69] (1969) 89 W.N. (Pt 1) (N.S.W.) 641.
[70] Hardingham, Neave and Ford, *op. cit.* 32.

failure to satisfy this requirement, justify consideration of suitable legislative reforms. There are several options for reform:

(i) To rephrase the legislation so as to cover some of the problems and to improve the clarity of the statutory provisions. Judicial experience with this legislation does not indicate much prospect of success in eliminating problems by redrafting or expanding the current provisions.

(ii) To delete the requirement for the testator to sign the will at the end. In 1833, the Real Property Commissioners recommended the requirement for signature at the end of the will,[71] because it was 'the almost invariable practice to sign Wills, Deeds, Receipts and all other written Instruments at the foot', and it was 'right to require this usual form, in order to prevent questions, whether the name of the Testator appearing in any other part of the Will is a sufficient signature,' and 'in order to cause Wills to be made in a formal manner, and to render void imperfect pages.' However, in 1980, the Law Reform Committee of the United Kingdom, in its Report on the Making and Revocation of Wills, concluded:

> 2.8 Whilst we accept that the end of the narrative is the normal place for putting the signature on any document, we see no compelling reason why a will should be invalid where the signature is at the top. The original reason for providing that the signature should be at the end of the will may have been to ensure that testators did not leave space in which to add further dispositions after execution. However those who use printed will forms often leave a large space between the end of the narrative and the signature, so that the present rule does not necessarily avoid this danger. Moreover, section 1 of the 1852 Act makes it clear that the validity of a will cannot be challenged merely by the existence of such a space, which reinforces our conclusion that whatever the original reasons for the rule were, it is no longer necessary.

The requirement for signature at the foot or end of the will has been deleted legislatively in the United Kingdom,[72] in Western Australia,[73] and there is no such requirement under the Uniform Probate Code of the United States.[74] The Law Reform Commission of Tasmania favoured retention of the present requirement, because 'the present rules achieve a reasonable balance between the strictness needed to guard against unauthorised additions and the flexibility needed to take account of the eccentricities of testators'.[75]

(iii) To include in the statutory revision the concept of subjective intention by the testator, so that it should be 'apparent from the position of the signature relative to the end of the will that the testator intended to give effect by his

[71] Fourth Report (1833), 16.
[72] Administration of Justice Act 1982 (U.K.) s. 17.
[73] Wills Act 1970 (W.A.) s. 8(b).
[74] Section 2-502, Approved in 1969 by the National Conference of Commissioners on Uniform State Laws, which has been adopted by several States.
[75] Tasmanian Report *supra* 10, n. 46, p. 90.

signature to the writing signed as his will'.[76] The Law Reform Committee of the United Kingdom opted for such a solution, by recommending[77] 'that a will should be admitted to probate if it is apparent on the face of the will that the testator intended his signature to validate it. It is our view that, if this conclusion is accepted, the cumbersome provision contained in the 1852 Act can be repealed''. That recommendation was adopted in the United Kingdom,[78] being similar to s. 8(b) of Wills Act 1970 of W.A., and met with mixed reception. One commentator[79] considered that the Committee's recommendations were argued 'courageously and convincingly'. Davey also supported the recommendation, commenting[80] that whether the new requirement has been satisfied in a particular case 'could then be determined by all the surrounding evidence, which may satisfy the court that the subsequent portion was intended to be authenticated by it.' However, the provision has been criticised on the basis that it offers little guidance to testators as to where their signatures to wills should be situated, although the law should assume an educative and guiding function in this requirement.[81]

(iv) That the current legislation should remain unaltered and any difficulties with the position of testators' signatures should be dealt with by the courts under a general dispensing power with wills formalities. That solution was preferred by the Law Reform Commission of British Columbia in its 1981 report.[82]

This author favours the second and third of these solutions. Although it is anticipated that most wills, whether professionally prepared or home-made, will be signed at the end, thus avoiding difficulties, such a relaxation in formalities is rational, justified and should avoid most of the difficulties. It will enable the courts to give effect to the intention of the testator, whilst considering evidence of intention and surrounding circumstances. Judicial decisions illustrate that the assistance of testators by professionals in executing wills usually avoids formal difficulties, but that is not always the position.[83]

(C) *Witnessing*

(1) *Holograph wills and the need for attestation*

The current formal requirement is that a testator must make or acknowledge his signature in the presence of two witnesses. Two issues that should be examined are

[76] *In the Will of Spence supra* 645, n. 69, p. 93.
[77] Para 28 of Report *op. cit.*
[78] Administration of Justice Act 1982 (U.K.) s. 17.
[79] Identified as 'SM' in (1981) 125 *The Solicitors' Journal* 263, 264.
[80] Davey M., 'The Making and Revocation of Wills' [1980] *The Conveyancer and Property Lawyer* 64, 68.
[81] Borkowski and Stanton, 'The Administration of Justice Act 1982: Darning Old Socks?' (1983) 46 *Modern Law Review* 191, 198-9.
[82] Law Reform Commission of British Columbia Report 30-2, *supra* n. 35, p. 88.
[83] *In re Robertson* (1972) 2 S.A.S.R. 481 (execution at the office of the Public Trustee); *Seale v. Perry* [1982] V.R. 193; *In the Estate of Blakely* (1983) 32 S.A.S.R. 473 (both executed erroneously in solicitor's office).

whether the requirement for witnesses should be retained and if so, whether the number of witnesses should remain two.

A holograph will is written in the handwriting of the testator and is signed by him, without there being any requirement for attestation. Holograph wills were recognised as effective in France under the Napoleonic Code and have been adopted in many civil law jurisdictions, including in more than 20 States of the United States of America and in the majority of the Canadian provinces and territories.[84] It has been claimed that the majority of wills in Germany and in France are holograph wills.[85] With regard to France, it has been pointed out:

> This is the simplest and most commonly used. The only requirements are that it should be written entirely by the hand of the testator and dated and signed in his handwriting. This form has the obvious advantages of cheapness, simplicity and secrecy . On the other hand, there are the very real risks of forgery, undue influence, and difficulty of construction of its terms.[86]

Although there has been relatively little litigation in the United States and in Canada relating to holograph wills, some serious difficulties were indicated in the judicial decisions. Those related to what will suffice as an effective signature to a holograph will,[87] the requirement for the *entire* will to be written in the testator's handwriting,[88] and in determining whether particular informal instruments were made with testamentary intention and constituted wills.[89] For example, in *Barney v. Hayes*,[90] the Montana Supreme Court held that the following letter from the testator to his lawyer constituted an effective codicil:

> So much explanatory; will enlighten you further on the subject, if you wish, when I see you. Now, what I want is for you to change my will so that she will be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended to as soon as convenient. I don't know what the laws are in Montana. I suppose Babcock and Rowley will have to witness the change or codicil. I don't know what ought to be done, but you do . . . Let me hear from you soon on this subject, as soon as you can make it convenient . . .

It has been suggested that this decision was clearly erroneous being a letter of instruction lacking in testamentary intention.[91] Nelson and Starck pointed out:

> Holographic wills, though required to be in writing, are often cast in very conversational tones which have the reader wondering whether the expression was nothing more than a segment of the writer's "stream of consciousness" instead of a finalized act.[92]

They refer, as an excellent illustration of such conversational 'stream of consciousness' to a letter[93] by Kimmele to two of his sons in which 'the sequence of presentation was advice on how to pickle pork, ruminations of the cold winter and a short statement of disposition of property "if ennything [sic] happens" '.

[84] Law Reform Commission of British Columbia Report 34, *supra* n. 35, p. 88. Yates H. C., 'Wills — Validity of Signature for Holographic Wills' (1975) 28 *Arkansas Law Review* 521; Best, J. W., 'Holographic Wills in Montana — Problems in Probate' (1963) 24 *Montana Law Review* 148.

[85] Cohn, E. J., *Manual of German Law* (2nd ed. 1968) Vol. I 273-4; Amos and Walton's *Introduction to French Law* (3rd ed. 1967) 318.

[86] Amos and Walton, *ibid.*

[87] Yates, *op. cit.* 521.

[88] Best, *op. cit.* 149.

[89] Best, *ibid.* 155-9.

[90] II Mont 571; 29 Pac 282. [1892].

[91] Best, *op. cit.* 156.

[92] Nelson and Starck, *op. cit* 349.

[93] *Re Kimmel's Estate* 123 Atl 405. [1924].

On a functional analysis, the major justification for holograph wills is that they satisfy the evidentiary function of will formalities. An instrument which is entirely written by the testator, as well as signed, furnishes cogent evidence of its genuineness. The handwriting and signature partially fulfil a protective function, but holograph wills do not fulfil the protective function of preventing fraud or undue influence. Furthermore holograph wills do not adequately fulfil the cautionary, ritual or channelling[94] functions of will formalities, which are serious deficiencies.

The Law Reform Committee of the United Kingdom recommended against the introduction of holograph wills[95] and English commentators have accepted that conclusion, on the basis that the difficulties with holograph wills outweigh the advantages,[96] or because the better way to deal with unattested wills is by relying on a judicial dispensing power rather than by recognising holograph wills.[97]

In Canada, the Ontario Law Reform Commission recommended[98] the recognition of holograph wills. The Commission listed the following arguments against holograph wills:

1. The presence of two witnesses lessens the possibility of forgery, or makes it easier to prove that the will is the will of the testator.
2. A provision for holograph wills would induce more people to prepare their own wills and this, in turn, would lead to:
   (a) additional litigation involving interpretation of home-made wills; and
   (b) unintelligent disposition of estates.
3. The provision for holograph wills would raise a new series of problems and litigation as to what is and what is not a will.
4. A holograph will lends itself more readily to fraud or undue influence than does a will executed in the English form with the safeguard of witnesses.[99]

Although the Commission recognised that there were some problems with holograph wills, it considered that they did not justify denying the validity of holograph wills, since most of the above arguments could be satisfactorily rebutted:

> If anything, it would seem that a will completely in the handwriting of the testator can more easily be proved to be his will than a printed or typewritten document which he merely signs, the presence of witnesses notwithstanding. . . . It is open to question whether a provision for the making of holograph wills would appreciably increase the number of home-made wills. . . . It would be very difficult to induce a testator by fraud or trickery to make a holograph will through ignorance of its contents. . . . The presence of witnesses is no guarantee against fraud. The real value of witnesses in guarding against undue influence is open to considerable doubt.[1]

In 1980, the Manitoba Law Reform Commission discussed some difficulties with holograph wills,[2] in the context of reform proposals relating to granting courts a dispensing power with reference to formalities. However, since holograph wills

[94] Fuller, *op. cit.* 804.
[95] Law Reform Committee of the United Kingdom Report 9-10, *supra* n. 44, p. 89.
[96] Davey *op. cit.* 73.
[97] 'SM' (1981) 125 *The Solicitors' Journal* 263, 265.
[98] Report of the Ontario Law Reform Commission on The Proposed Adoption in Ontario of the Uniform Wills Act (1968).
[99] *ibid.* 10-11.
[1] *Ibid.*
[2] Law Reform Commission of Manitoba Report — 'The Wills Act' and the Doctrine of Substantial Compliance 9-10.

were then recognised in Manitoba, the Commission did not consider whether the provisions permitting such wills should be repealed.

In 1981, the Law Reform Commission of British Columbia considered whether holograph wills should be accepted in that Canadian province.[3] The Commission pointed out that the availability of holograph wills would assist testators living in remote areas without access to solicitors; when *in extremis* without the opportunity of arranging for the preparation or formal execution of a will; or those who, because of poverty, ignorance or prejudice, cannot or will not consult a solicitor. However, the Commission referred to the difficulty of attributing testamentary intention to some instruments, such as letters, which might otherwise be holograph wills and pointed out:

> The objection that the introduction of holograph wills will result in new problems is well taken. Although the problems so generated are far from insoluble, their existence detracts somewhat from the desirability of holograph wills.[4]

The Commission concluded that a holograph will is merely a type of informal will and did not favour the introduction of holograph wills as such, but to encompass unattested testamentary instruments within the scope of a judicial dispensing power with wills formalities.

This author agrees that if the formality of attestation performs a useful function, as is suggested, then rather than relax or omit that formality, the more appropriate solution is to accord validity to some testamentary instruments which have not been attested, through the use of judicial dispensing power.

Regarding the number of witnesses, in 1833, the Real Property Commissioners reported:

> The presence of witnesses is required in order to prevent fraud or coertion, and to prove the capacity of the testator; the number two was fixed on instead of one, in order to increase the chance that a witness would be living at the death of the testator . . . The protection against forgery is greatly increased by requiring a second witness, on account of the difficulty of engaging an accomplice, the necessity of rewarding him, and the danger to be apprehended from his giving information, or not being able to elude a discovery of the fraud by a searching cross-examination. We think it expedient not to require more than two witnesses but of course the number should not be restricted.[5]

The United Kingdom Law Reform Committee concluded:

> a rule requiring two witnesses provides a greater safeguard against forgery and undue influence than would a rule requiring only one. The present law is generally well known and we see no reason to recommend that it should be altered.[6]

There appears to be no rational justification or practical need for increasing or decreasing the number of witnesses, which is established in most Anglo-Australian and North American jurisdictions.

(2) *The Presence of Two or more Witnesses*

'Presence' covers several distinct matters. First, there needs to be both physical and mental presence on the part of the witnesses. Accordingly, a blind person is

[3] Law Reform Commission of British Columbia Report 34-9, *supra* n. 35, p. 88.
[4] *Ibid.* 36.
[5] Fourth Report (1833) pp. 17-8.
[6] Law Reform Committee of the United Kingdom, Twenty-second Report — Report on the Making and Revocation of Wills (1980) para. 2.9.

incapable of being a witness,[7] because a will cannot be signed in his 'presence' and he cannot witness the visible act of signing. A witness should also be mentally conscious of being a witness, otherwise the witness 'might be asleep, or intoxicated, or of unsound mind'.[8] Secondly, the witnesses must either see or have the opportunity of seeing the testator's signature, which is not satisfied if the signature is covered with blotting paper.[9] In *In the Goods of Gunstan*, the Court of Appeal expressed regret at this requirement not having been satisfied, Brett L.J. having pointed out:

> In this case we have a document which is in form a will, leaving a large amount of property, and it is undoubted that the testatrix meant thereby to deal with her property in the manner therein pointed out, and it is equally clear that she signed the document meaning it to be her will, and equally clear that she thought she was complying with the requirements of the statute, and that this document represents her last and final intentions as to the disposition of her property.
>
> That being so, no one can be astonished if the Court should have made every endeavour to uphold it so far as it could in accordance with law, for one must feel distressed at the result that the disposition of her property which this lady intended to make must depend upon the accident of putting a piece of blotting paper a quarter of an inch higher or lower . . . our decision must be attended with the unhappy consequence that the clearly known and expressed intention of this lady with regard to her property must be set aside, and persons whom she clearly meant to benefit be deprived of all benefits under it.[10]

Thirdly, the signing or acknowledgement must occur in the presence of both witnesses at the same time. It is insufficient for the testator to sign or to acknowledge his signature separately to each witness.[11]

The Real Property Commissioners considered[12] that:

> great additional security against forgery and fraud is obtained by requiring that the witnesses should be present at one time. In case of forgery, it is easier to get two accomplices at different times, than both together . . . It was also important that the competency of the testator at the time of the execution of his will should be satisfactorily established; and if the transaction must be witnessed by both witnesses at one time, they must then agree in the same story, and perjury will be more easily detected by cross-examination.

In *Casement v. Fulton*[13] Lord Brougham said that the requirement for signature by the testator in the presence of two or more witnesses present at the same time was 'a most wholesome addition' to the law; 'for, if one witness may be present one day and another a different day, perhaps at an interval of years, how can we say that both attest the same fact, but important fact for which their presence is required — the capacity of the testator? He might be sane one day and insane another; and thus his capacity would only be attested by a single witness because his two different conditions would only have one witness each'.

In 1980, the Law Reform Committee of the United Kingdom considered whether this formal requirement should be relaxed, concluding:

> we do not consider that this requirement causes any great injustice and on the whole we think it is right that the three necessary participants in the 'ritual' of execution of a will should be present together during the essential part of it, namely the signature or acknowledgement of his signature by the testator.[14]

[7] *In the Estate of Charles Gibson* [1949] P.434.
[8] *Hudson v. Parker* (1844) 1 Rob. Ecc. 14, 24 *per* Dr Lushington.
[9] *In the Goods of Mary Gunstan* (1882) 7 P.D. 102.
[10] *Ibid.* 111.
[11] *Re Groffman* [1969] 2 All E.R. 108.
[12] Fourth Report (1833) pp. 17-8.
[13] (1845) 5 Moo. P.C.C. 130, 139; 13 E.R. 439, 443.
[14] *Supra*. n. 6 para. 2.10.

(3) *Attesting and Subscribing the Will*

The witnesses should each attest and subscribe a will *after* the testator has signed the will. Attesting is witnessing the execution of the will, by seeing the testator's act of signing or by witnessing the acknowledgement. Subscribing is the act of signing the will as a witness. As in the case of the testator, a witness can sign the will by using a signature or mark. However, it is essential that each witness should actually append his signature on the instrument[15] and should complete the signature that is intended as an attestation of the will.[16] The witnesses' signatures must have been appended with the intention of attesting the will and not merely for the purpose of identification or to certify that the will has been attested.[17] There is no need for the attestation to be positioned in any particular place in the will, it need not be at the end of the will, or next to or below the testator's signature, or next to the signature of the other attesting witness. It is usual (and prudent) for both witnesses to execute the attestation at the end of the will, following the testator's signature, to avoid difficulties in establishing due execution of the will and to avoid the suggestion that signatures far removed from the testator's were not for attestation, but for some other purpose. It is essential that the witnesses should attest the operative signature of the testator, *i.e.* the testator's signature to the will, and not some other signature on the will.[18]

(4) *The Presence of the Testator*

'Presence' means in this context that the testator should see, or have the opportunity of seeing the witnesses subscribe their signatures to the will. There have been several decisions in which there was a factual issue, when after the testator signed the will the witnesses took the document to another room or part of a house, whether the testator could have seen the witnesses append their signatures from the positions which they each occupied at that time.[19] Presence also requires mental and physical presence by the testator at the time of the witnesses subscribing their signatures by being conscious of the witnesses' activities with reference to the will.

It could be argued with some justification that there is no need for the requirement that after the will has been executed and attested, the signature of each witness should be in the 'presence' of the testator. When the validity of a will needs to be established the testator is dead and little benefit is gained from this requirement having been satisfied. It has been suggested that the purpose of this requirement is to prevent fraud by disabling a witness from substituting another page for part of the will or from making some other alteration to the will, which appears to be somewhat far-fetched and unlikely. Mechem regarded that suggestion 'preposterous', since:

[15] *In the Goods of Eynon* (1873) L.R. 13 P & D 92.
[16] *In the Goods of Maddock* [1874-1880] All E.R. 367.
[17] *Sweetland v. Sweetland* (1865) 4 Sw. & Tr. 6, 164 E.R. 1416; *Re Beadle* [1974] 1 All E.R. 493.
[18] *In the Estate of Bercovitz* [1962] 1 All E.R. 552.
[19] *Casson v. Dade* (1781) 1 Bro. C.C. 99; 2 E.R. 1010; *Carter v. Seaton* (1901) 85 L.T. 76; *In the Will of Callow* [1918] V.R. 406.

> It assumes a group of witnesses (and possibly an attorney as well) who have carefully prepared in advance an elaborate scheme of forgery and deception. It assumes a testator who is too unconscious or too indifferent to identify his own will when it is brought back to him; it assumes that he either dies at once or never bothers to look at his will after its execution. And finally, it involves the super-absurdity of assuming that a group of expert criminals who are capable of executing such a scheme and have located a suitably incompetent victim, could be frustrated in their fell designs by the existence of a statutory provision requiring the will to be attested in the presence of the testator![20]

The only justifications for retaining this requirement are that testators and witnesses should be encouraged to complete all formalities simultaneously in the presence of each other[21] and that this requirement has not caused practical difficulties except in a handful of decisions.

(5) *Acknowledgement by witnesses*

Although the testator can acknowledge his or her signature to the attesting witnesses, witnesses cannot acknowledge their signatures to the testator or to each other. Thus in *Re Colling*,[22] the testator, a patient in a hospital, requested another patient and a nurse to witness his will. Whilst the testator was signing it, the nurse had to leave in order to attend another patient. The testator completed his signature and the other patient attested it. When the nurse returned, the testator and the witness both acknowledged their signatures and the nurse then subscribed her signature. The will was held not to have been effectively executed, because the testator completed his signature and one witness attested it before the acknowledgement of both signatures to the second witness. That involves the distribution of the witnesses between a signature (by the testator) and a subsequent acknowledgment or between two separate acknowledgments,[23] which is not permitted under the present Australian statutes. This problem, resulting in ineffective wills, has occurred in several reported decisions.[24]

The solution is to permit a witness to acknowledge his signature. The Law Reform Committee of the United Kingdom recommended[25] that testators' intentions should not be defeated by such a technicality and that was adopted in the following provision enacted in 1982:

> (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).[26]

This recommendation was approved by commentators,[27] although it was also perceived that a better solution may have been to relax the requirement for the

[20] Mechem, *op. cit.* 505.
[21] Law Reform Commission of Tasmania Working Paper 16; Mechem, *ibid.* 505.
[22] [1972] 1 W.L.R. 1440.
[23] Hardingham, Neave and Ford, *op. cit.* 39.
[24] *E.g. Hindmarsh v. Charlton* (1861) 8 H.L. Cas. 160.
[25] Report on the Making and Revocation of Wills *supra.* n. 6, p. 98, para. 2.11.
[26] Section 17 of the Administration of Justice Act 1982 substituting a new s. 9 in the Wills Act 1837.
[27] (1981) 125 *The Solicitors' Journal* 263, 264; Davey *op. cit.* 69; Borkowski and Stanton, *op. cit.* 199; Law Reform Commission of Tasmania Working Paper on Reform in the Law of Wills (1981) 15.

simultaneous presence of both witnesses when the testator has signed or acknowledge his signature[28] or by granting to the court a general dispensation power to deal with technical defects in execution.[29] This author favours the United Kingdom solution, because on a functional analysis of wills formalities, signing or acknowledgement by a witness in the presence of the testator fulfils the same function. It appears to be unjustified to permit the technicality which occurred in *Re Colling (supra)* and in some other decisions to defeat genuine expressions of testamentary intention, otherwise effectively executed and expressed.

(6) *Should Witnesses be Required to Sign in the Presence of each other?*

It has been regarded as established in judicial decisions that the witnesses need not sign the will in the presence of each other,[30] although some doubt has been expressed regarding the correctness of that view.[31] The Law Reform Committee of the United Kingdom did not consider it necessary to alter the present requirement:

> We understand that in practice the witnesses generally do subscribe in each other's presence although the law does not at present actually require them to do so. So where for example the testator signs his will and is followed by one witness who then leaves the room and therefore does not witness the signature of the second witness, the will is nonetheless valid. Because it provides a further safeguard against the dangers of duress and undue influence, we think it right that witnesses should sign or acknowledge their signature in each other's presence and that the present practice should be continued and encouraged.[32]

The 1982 legislative amendment, reproduced in the preceding section of this article, makes it quite clear that the witnesses are not required to sign the will in the presence of each other.

JUDICIAL DISPENSING POWER

(1) *Formalities and Formalism*

There are many illustrations of instruments executed with testamentary intention, which were rendered ineffective because of failure to observe strictly the formalities for the execution of wills. Palk observed:

> Testators have restlessly wandered their houses while witnesses have signed. Witnesses have come and gone like the ebb and flow of the tide. Attestation clauses have travelled north, south, east and west across the page. Weird and mysterious scratchings have appeared in the place of signatures . . .
>
> Doubtless not all the errors made can be laid at the door of human folly. People are struck down with sudden illnesses and, with no will made, mistakes occur in the urgency to make one. Pieces of paper have conspired to be just the wrong size for what the testator wanted to say.[33]

[28] Manitoba Law Reform Commission Report *supra* 6-7, n. 2; Law Reform Commission of British Columbia *supra* 33, n. 35, p. 88.

[29] The solution which has been adopted in Queensland, South Australia and Northern Territory.

[30] Hardingham, Neave and Ford, *op. cit.* 39; *Re Hancock* [1971] V.R. 620.

[31] Frisby Smith, R., 'Execution of Wills — Presence of Attesting Witnesses' (1935) 8 *Australian Law Journal* 363.

[32] Report on the Making and Revocation of Wills *supra* n. 6, p. 98, para. 2.12.

[33] Palk, S. N. L., 'Informal Wills: From Soldiers to Citizens' (1976) 5 *Adelaide Law Review* 382.

The main problems have occurred in testators failing to place their signatures at the end of the wills and in having wills correctly witnessed, particularly in the case of home-made wills, due to ignorance or inadvertence.[34] The courts have struggled to observe and to enforce the statutory requirement for literal compliance with the will formalities, and at the same time to give effect to genuine instruments which expressed testators' clear testamentary intentions, but deviated in some respects from the accepted methods of execution. The courts have been uncomfortable in being bound to give effect to statutory formalities and not being able to give effect to some genuine testamentary instruments. That has resulted in a complex and inconsistent body of judicial decisions, in which some dubiously executed instruments were held to be effective and some genuine wills were held ineffective, with expressions of judicial regret at the result.[35] Professor Langbein claimed that literal or strict compliance with the wills formalities:

> although meant to promote certainty in testamentation — breeds litigation on account of the unpredictability about when and how courts will apply it. The rule has achieved what is in many respects the worst of both worlds. It produces results of unexampled harshness when it is enforced, and it frequently leads the courts to dishonesty and caprice when it is not.[36]

Langbein argued that the insistent formalism of the law of wills is 'mistaken and needless' and that:

> The finding of a formal defect should lead not to automatic invalidity, but to a further inquiry: does the noncomplying document express the decedent's testamentary intent, and does its form sufficiently approximate Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act?[37]

Nelson and Starck identified a need to reduce the burden on the courts and on testators for literal compliance and to amend the statutory requirements so as to 'implement the purposive needs of the state for judicial implementation of a testator's wishes'.[38]

(2) *Substantial Compliance*

In 1975, Professor Langbein advocated the adoption of a substantial compliance doctrine, to alleviate the problems caused by literal compliance with will formalities.[39] He pointed out that a peculiarity of the law of wills is not the prominence of formalities, but the judicial insistence that defects in compliance automatically and inevitably render wills ineffective. This lack of flexibility has inflicted 'constant and mostly uncontrollable inequity'.[40] He claimed[41] that 'the rule of literal compliance with the Wills Act is a snare for the ignorant and ill-advised, a needless

[34] Reform of the Law of Intestacy and Wills (1974), 28th Report of South Australian Law Reform Committee, 10.
[35] For example, *Re Colling* [1972] 1 W.L.R. 1440, 1442; *Re Davies* [1951] 1 All E.R. 920, 922.
[36] Langbein, J. H., 'Crumbling of the Wills Act: Australians Point the Way' (1979) 65 *American Bar Association Journal* 1192, 1193.
[37] Langbein, J. H., 'Substantial Compliance with the Wills Act' (1975) 88 *Harvard Law Review* 489.
[38] 'Formalities and Formalism: A Critical Look at the Execution of Wills' (1979) 6 *Pepperdine Law Review* 331, 332.
[39] *Supra* n. 37.
[40] *Ibid.* 500-501.
[41] *Ibid.* 531.

hangover from a time when the law of proof was in its infancy'. His proposal was to reduce the presumption of invalidity applied to a defectively executed will from a conclusive presumption of invalidity to a rebuttable presumption:

> The proponents of a defectively executed will should be allowed to prove what they are now entitled to presume in cases of due execution — that the will in question expresses the decedent's true testamentary intent. They should be allowed to prove that the defect is harmless to the purpose of the formality.[42]

He pointed out that a doctrine of substantial compliance is not a rule of no formalities, nor is it a rule of minimum or maximum formalities,[43] but rather, it is a 'purposive' approach to wills formalities and enables courts to excuse formal defects when the purposes of the legislation have been satisfied notwithstanding some deficiencies in complying literally with all the specified formalities. Nelson and Starck pointed out the attraction of such an approach:

> There is something inherently fair about an approach which says that formalities are important but they are a tool and not a sword. If the result has been achieved without the tool, then the tool becomes unimportant.[44]

(3) *Legislative formulation of substantial compliance*

In 1978, the Queensland Law Reform Commission recommended the adoption of the doctrine of substantial compliance as part of the law of wills:

> We have therefore decided to recommend that some relaxation in the court's standard should be permitted, and that provided substantial compliance is shown, and the court is satisfied that the instrument presented for probate represents the testamentary intention of the maker of it, the court may admit it to probate. It will be for the court to work out what it understands by substantial compliance, but it is envisaged that the courts will be cautious in their approach to the latitude given, and that only in cases of accident and minor departures will it be possible to give effect to the obvious intention of the testator, as in cases where the court has hitherto wished to admit an instrument to probate but has felt unable to do so because of the shackles of its policy of meticulous compliance.[45]

In 1981, the formulation recommended by the Queensland Law Reform Commission became enacted as a proviso to s. 9 of Succession Act 1981:

> (a) the Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator.

In addition, the following evidentiary provision was enacted:

> s. 9(b) the Court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument.

Although these provisions have been in operation since 1 January 1982, up to 1 January 1985 there has been no reported or unreported judicial decision on their meaning or operation. However, the express formulation of the dispensing power in terms of substantial compliance has been criticized. First, it has been pointed out that such an approach is excessively narrow, because there must be an attempt to comply with the prescribed formalities which should have failed, and furthermore

[42] *Supra* 1194. n. 36.
[43] *Supra* 513, n. 37.
[44] *Supra* 355, n. 38, p. 103.
[45] Report on the Law Relating to Wills (Queensland Law Reform Commission 22) 7.

there needs to be 'substantial' compliance.[46] Secondly, the term 'substantial' is ambiguous[47] and can be interpreted either broadly or narrowly. Nelson and Starck observed:

> Does it mean that whenever the previously set forth goals have been met, we then have substantial compliance? Does it mean that some formalities are more important than others and that substantial compliance involves completion of only the important formalities? If the former, then the statute governing execution of wills ought to be framed in such a way as to inform the potential testator of the objective to be achieved and how to best go about it. If the latter, then would there not be a reversion back to the more parochial situation where judicial decision-making leaves a wide discrepancy between courts as to what is important and what is less important?[48]

The Law Reform Commissions of Manitoba[49] and British Columbia[50] each preferred the granting of a dispensation power to the legislative adoption of the doctrine of substantial compliance. More recently, the Law Reform Commission of Tasmania favoured a dispensing power 'only where the deceased has at least attempted to comply with section 9 [Tas] requirements; but where the defect is so unconsequential and harmless to the purpose of the formalities that the court is satisfied that it can give effect to the true intentions of the testator without defeating the purpose of section 9 (a doctrine of "substantial compliance")'.[51]

(4) *South Australian reform*

In 1974, the South Australian Law Reform Committee considered reforms to the laws of intestacy and wills. It concluded its review of difficulties for testators in observing the will formalities with the following recommendation:

> It would seem to us that in all cases where there is a technical failure to comply with the Wills Act, there should be a power given to the Court or Judge to declare that the will in question is a good and valid testamentary document if he is satisfied that the document does in fact represent the last will and testament of the testator.[52]

The Committee posed the following hypothetical situation:

> A person dying of thirst in the desert or a person in the icefields of Australian Antarctica may well scratch out what is without doubt his last will and testament but there is no hope at all of his having or obtaining witnesses to that will and yet there is no doubt that what is recorded is in fact his last will. The position becomes of greater importance today as people cease to live in families and elderly people in particular are left to fend for themselves in the cities. They too may have no way of summoning somebody to attest their last will.[53]

The Committee's approach, as exemplified by that hypothetical situation, has been questioned:

> One might of course expect intelligent persons to make wills before they disappear into arid deserts and frozen wastes. Similarly it is difficult to conceive of older folk, sane enough to have testamentary capacity and being seized of an acute desire to make a will, who in these days of the welfare state are not in touch with somebody.[54]

[46] Manitoba Law Reform Commission *supra* 22, n. 2; Law Reform Commission of British Columbia Report on The Making and Revocation of Wills 42.
[47] Manitoba Report *ibid.* 22.
[48] *Supra* 355-6, n. 38, p. 103.
[49] Manitoba Report *supra* 27-9, n. 46, p. 104.
[50] British Columbia Report *supra* 50-4, n. 46, p. 104.
[51] Tasmanian Report *op. cit.* 10.
[52] *Supra* 11, n. 34, p. 102.
[53] *Ibid.* 10-11.
[54] By Palk *op. cit.* 393.

The Committee's recommendation had been accepted and is reflected in the following statutory provision contained in the Wills Act 1936:

> 12(2) A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.

(5) *The South Australian experience*

Between 1976 and 1984 there have been 12 reported decisions which considered and applied s. 12(2) of the Wills Act 1936. These decisions indicate the scope of the section and contain valuable discussions of the judicial approach to the dispensing power.

The earliest decision, *Re Graham*,[55] was considered by Professor Langbein as a 'great milestone in the progress of probate law in the United States and the common law world', when 'For the first time a common law court excused a testator's failure to comply strictly with the wills act formalities'.[56] The testatrix handed her signed will to her nephew 'to get it witnessed'. The nephew took it separately to each of two neighbours each of whom signed it. The method of execution was defective in several respects: the testator did not sign or acknowledge the will in the presence of either of the witnesses, and the attestation was equally defective. Jacobs J exercised the dispensing power and granted probate of the will, pointing out:

> if there is one proposition that may be stated with reasonable confidence, it is that s 12(2) is remedial in intent, that is to say, that its purpose is to avoid the hardship and injustice which has so often arisen from a strict application of the formal requirements of a valid will, as dictated by s 8 of the Act . . .
>
> It was nevertheless suggested that there must be some further implied limitation, if sub-paragraphs (a), (b) and (c) of s 8 are themselves not to be swept away; and that since those provisions have been retained Parliament must have intended that there should be at least some attempted compliance with them, before s 12(2) can be successfully invoked. I find no warrant for such a limitation in the language that Parliament has used, and indeed if it were adopted, it would defeat the present will, notwithstanding that I am clearly satisfied, in the plain terms of s 12(2) that the deceased intended the document to constitute her will. It cannot really be said that she ever *attempted* to comply with s 8 at all.[57]

The following are suggested as being the main principles and factors emerging from the South Australian judicial decisions dealing with s. 12(2) of the Wills Act up to the end of 1984:

1. The section applies to wills executed or altered at any time, including before 1976, if the testator shall have died after 1975.[58]
2. The section covers the execution of the whole or part of a testamentary instrument, including an alteration to a will.[59] It has been suggested that s. 12(2), by referring to 'a document . . . be deemed to be a will', might not

[55] *In the Estate of Graham* (1978) 20 S.A.S.R. 198.
[56] *Supra* 1192, n. 36, p. 103.
[57] *Supra* 202, 205, n. 55.
[58] *In the Estate of Standley* (1982) 29 S.A.S.R. 490; *In the Estate of Kolodnicky* (1981) 27 S.A.S.R. 374.
[59] *In the Estate of Standley, supra* n. 58; *In the Estate of Possingham* (1983) 32 S.A.S.R. 227.

apply to testamentary instruments of revocation.[60] None of the reported decisions expressly covers this point, although it is strongly suggested that s. 12(2) can apply to the most frequently used method of revocation covered in s. 22, *i.e.* 'another will or codicil executed in manner hereinbefore required'.[61]

3. The Court has relied on the section to grant probate of a will when the testator was too weak to sign it, but managed to place a mark on it, which the Court accepted as an indication of the testator's acceptance of the will and as a signature.[62]
4. Defective witnessing of wills can be dispensed with:
   (i) When the testator's signature has not been witnessed at all;[63]
   (ii) When the witnesses were not present at the same time when the testator signed the will;[64]
   (iii) When neither of the witnesses saw the testator execute the will;[65]
   (iv) When the first witness acknowledged his signature to the second witness who was not present when the first witness witnessed the will.[66]
5. The more serious the departure is in a particular case from compliance with the formal requirements, the harder it is for the Court to be satisfied that dispensation should be granted.[67]
6. The fact that the testator was aware of the need to satisfy some formal requirement, which was nevertheless not observed, does not preclude the Court from granting dispensation under s. 12.[68] In other words, there need not be an attempted compliance with the formalities.
7. The most contentious issue has been whether there is a minimum requirement that the testator has executed the will[69] or a subsequent alteration to the will[70] (by signing or initialing the alteration), before the court may exercise the dispensing power. In *Baumanis v. Praulin*,[71] a patient in a hospital gave instructions for the preparation of a will. After reading the typewritten will that was prepared the testator requested some small alterations and it was taken away for retyping. The testator died before the retyping had been completed. Mitchell J. refused to grant probate of the retyped and unexecuted document, because the testator did not intend the first typed document to be his will, but the retyped one which had not been made when the testator died. Furthermore, the will has not been executed:

[60] Hardingham, Neave and Ford, *op. cit.* 25-6.
[61] *In the Estate of Kelly* (1983) 34 S.A.S.R. 370, 381 *per* Zelling J.
[62] *In the Estate of Radziszewski* (1982) 29 S.A.S.R. 256.
[63] *In the Estate of Kelly* (1983) 32 S.A.S.R. 413; 34 S.A.S.R. 370; *In the Estate of Crocker* (1982) 30 S.A.S.R. 321; *In the Estate of Clayton* (1982) 31 S.A.S.R. 153.
[64] *In the Estate of Kolodnicky, supra* n. 58, p. 106. *In the Estate of Dale* (1983) 32 S.A.S.R. 215.
[65] *In the Estate of Kelly, supra* n. 63.
[66] *In the Estate of Standley, supra* n. 58, p. 106.
[67] *In the Estate of Graham, supra* n. 55, p. 106. *In the Estate of Clayton, supra* n. 63; *In the Estate of Williams* (Full Ct of Supreme Court of South Australia; 6 July 1984; *per* Legoe J., 16).
[68] *In the Estate of Graham, supra* n. 55, p. 106. *In the Estate of Clayton, supra* n. 63.
[69] *In the Estate of Graham, supra* n. 55, p. 106. *Baumanis v. Praulin* (1980) 25 S.A.S.R. 423; *In the Estate of Radziszewski, supra* n. 62.
[70] *In the Estate of Kurmis* (1981) 26 S.A.S.R. 449; *In the Estate of Possingham, supra* n. 59.
[71] *Supra* n. 69.

> Section 12(2) does not say that a document may be deemed to be a will of the deceased "notwithstanding that it has not been executed" but "notwithstanding that it has not been executed *with the formalities required by the Act*". The phrase used seems to presuppose some form of execution. I would think that some execution is necessary although it need not be execution in the manner prescribed by s 8.[72]

That approach was shared by some other judges of the Supreme Court of South Australia.[73] However, in *In the Estate of Blakely*,[74] White J. argued that under the section it is possible to dispense even with the requirement for signature. Solicitors prepared 'mirror' wills for a husband and wife. Although they executed those wills at the solicitors' office, by oversight the husband executed the wife's will and *vice versa*. White J. said:

> If the court is otherwise satisfied by strong evidence 'that there can be no reasonable doubt that the deceased *intended* the document to *constitute* his will', there does not seem to be any reason in logic why the husband's signature on the wife's will should not be notionally transposed to his will and deemed to be his signature thereon. After all, that is where he intended to place his signature, and he went to the trouble and expense of ensuring that he did just that . . . in the present case the deceased intended, in one sense, to sign his wife's will which was physically under his eyes and his pen. . . .
>
> Even if some signature by the deceased is thought to be necessary, it was sufficient, in my opinion, if, as here, he placed his signature in some place from which his intention to constitute a particular piece of paper his will is beyond doubt. I hold that this signature on the wife's document (which he thought to be his will) was such a signature.

In addition, his Honour held that s. 12(2) was wide enough to cover a totally unexecuted document which the testator intended to constitute his or her will.[75] The Full Court of Supreme Court of South Australia held, in *In the Estate of Williams*,[76] that s. 12(2) enables the court to grant probate of an unexecuted instrument, and to dispense with the testator's signature. Mr and Mrs Williams personally wrote out their respective wills by hand and called two neighbours to their home to witness them. Mr Williams signed his will in the presence of the two witnesses, but Mrs Williams accidentally omitted to sign her will, which was attested by the witnesses. Probate of the unsigned will was granted, since the court was satisfied that Mrs Williams intended the unsigned document to constitute her will. King C.J. 'fully agreed' with the reasoning of White J. in *In the Estate of Blakely*[77] and pointed out that execution within s. 12(2) included signature. The signature of the testator is one of the formalities required by the legislation for valid execution of a will and 'there is no reason, as a matter of construction or logic, to differentiate between signature and any of the other formalities for execution required by section 8',[78] when considering the scope of the dispensing power under s. 12(2).

8. Section 12(2) is remedial in its purpose,[79] and liberal in its approach,[80] being 'designed to avoid failure of the testamentary purpose caused by non-

[72] *Ibid.* 425.

[73] Jacobs J., *In the Estate of Graham, supra* 205, n. 55; Sangster J., *In the Estate of Kurmis, supra* 452-4, n. 70; *contra* Zelling J., *In the Estate of Kelly, supra* 383, n. 63.

[74] (1983) 32 S.A.S.R. 473.

[75] *Ibid.* 476-80.

[76] *Supra* n. 67.

[77] *Supra* n. 74.

[78] *In the Estate of Williams, supra* n. 67, p. 107.

[79] *In the estate of Graham, supra* n. 55, p. 106. *In the Estate of Williams, supra* n. 67, p. 107, *per* King C.J. and Legoe J.

[80] *In the Estate of Kelly, supra* 389, n. 61, p. 106, *per* Bollen J.

compliance with the formalities required by section 8 arising out of ignorance or inadvertence.'[81]

The courts should construe the section according to the plain and natural meaning of its words.[82]

9. Legoe J pointed out that:

> section 12(2) contains its own criteria for its application, namely a document that:
> (a) embodies testamentary intentions and which
> (b) has not been executed with the formalities required by the Act, and which
> (c) the court is satisfied is a document in respect of which there can be no reasonable doubt that the deceased intended the document to constitute a will.
> In my judgment equal stress should be placed on all these criteria. If this approach is adopted then the document itself, the circumstances regarding its contents (including such marks, signatures or other components as may be proved to be done or made contemporaneously with the document) and all other relevant material establishing the testator's intention in relation to that document, can be taken into account for the purpose of applying section 12(2).[83]

10. It is noteworthy that out of the 12 reported decisions since 1976, seven were uncontested applications which were not opposed, one required the applicant to prove the requirements without opposition to an order for the grant of probate, and only three of the decisions were fully contested. In all these matters, with a single exception, the Court was satisfied that there was no reasonable doubt that the deceased intended the document to constitute his or her will and an order was made granting probate of formally defectively executed wills.

(6) *Arguments relating to the introduction of a dispensing power*

Three practical arguments had been considered by Law Reform Commissions and legal academics with reference to the introduction of a judicial dispensing power with wills formalities.

(a) *Tendency to discourage the use of proper formalities*

If wills formalities have a functional purpose then it is wrong in principle to dispense with those formalities which are considered important. Furthermore, the existence of a dispensing power will tend to reduce the importance of the formalities and might encourage testators to ignore them. It will tend to create and authorise a multiplicity of will forms, including holograph wills. This line of argument has been strongly refuted by the Manitoba and British Columbia Law Reform Commissions and by Professor Langbein. The incentive for due execution continues even if there is a dispensing power, because due execution will reduce litigation. It is likely that the majority of wills will continue to be professionally prepared and care will be used to ensure due execution. Even if execution has been 'bungled', it should be possible to fall back on the dispensing power, which is remedial and will apply largely, although not exclusively, to home-made wills.[84]

[81] *In the Estate of Williams*, *supra* n. 67, p. 107, per King C.J.
[82] *In the Estate of Williams*, *supra* n. 67, p. 107, *per* King C.J. and Legoe J.
[83] *Ibid.* 15.
[84] Langbein *supra* 524-5, n. 37; British Columbia Report *supra* 47, n. 46, p. 104.

The danger which needs to be avoided is the validation by the use of a judicial dispensing power of informal and holograph instruments[85] which were executed without testamentary intention. However, the South Australian judicial decisions dealing with s. 12(2) of the Wills Act 1936, suggest that the courts are likely to test the evidence and to apply the dispensing power cautiously and responsibly.

(b) *Increase in litigation*

It has been suggested that the existence of a dispensing power will lead to increased litigation, expense and delay. That was a principal reason for its rejection by the United Kingdom Law Reform Committee:

> 2.5 While the idea of a dispensing power has attractions, most of us were more impressed by the argument against it, namely that by making it less certain whether or not an informally executed will is capable of being admitted to probate, it could lead to litigation, expense and delay, often in cases where it could least be afforded, for it is the home-made wills which most often go wrong. . . . We think that to attempt to cure the tiny minority of cases where things go wrong in this way might create more problems than it would solve and we have therefore concluded that a general dispensing power should not be introduced into our law of succession.[86]

Some commentators on the United Kingdom Report were not convinced by these arguments and favoured reform by introducing the doctrine of substantial compliance or some dispensing power.[87] Professor Langbein strongly argued that insistence on literal compliance with formalities actually increased litigation, by encouraging parties dissatisfied with wills to attack the validity of execution.[88] The Manitoba and British Columbia Law Reform Commissions did not find the 'floodgates' argument compelling. Both of those Commissions felt that extra litigation and delay would be justifiable in the interests of fulfilling testators' intentions.[89] The floodgates argument is not borne out by the quantity of litigation generated in South Australia and in Queensland. The existence of a dispensing power has proved very beneficial in South Australia in enabling the Supreme Court to give effect to genuine testamentary instruments and there have been few contested probate suits generated through that power.

(c) *Uncertainty*

It has been suggested that the existence of a dispensing power may increase the uncertainty whether particular defectively executed instruments would or would not be rendered effective. That was not accepted by the British Columbia Law Reform Commission[90] and by Professor Langbein,[91] because the judicial application of literal compliance with formalities has caused considerable litigation and uncertainty. The judicial approach to a dispensing power is likely to simplify

[85] Langbein, *ibid.* 522.
[86] Twenty Second Report on The Making and Revocation of Wills *supra* n. 6, p. 98, para. 2.5.
[87] Davey, *op. cit.* 75; S.M. (1981) 125 *The Solicitors Journal* 263; Borkowski and Stanton, *op. cit.* 199.
[88] Langbein, *supra* n. 37; pp. 525-6.
[89] Manitoba Report *supra* 20, n. 46, p. 104; British Columbia Report *supra* 49, n. 46, p. 104.
[90] British Columbia Report *ibid.* 50.
[91] Langbein, *supra* 525-6, n. 37, p. 103.

litigation, concentrate on the real issues and may reduce both uncertainty and litigation. It is suggested that this is borne out by the South Australian experience since 1976.

THE SCOPE OF THE REMEDIAL POWER

(1) *Threshold requirements*

There are two possible threshold requirements of formal execution before a judicial dispensing power may be utilised to overcome other defects in formal execution. First, that there should be a written instrument, which would exclude nuncupative wills, for the reasons already given. Secondly, that the testator should have signed the written instrument. The British Columbia Law Reform Commission recommended[92] those two threshold requirements, concluding:

> that insisting on a signature is a valuable safeguard which will prevent injustice, confusion and unnecessary expense far more often than it will cause hardship.[93]

This author agrees, although this is a contentious issue, having regard to some South Australian decisions whose factual situations might justify the existence of a dispensing power without there being an inflexible need for a signature placed on the actual testamentary instrument[94] or anywhere.[95]

Signatures provide strong evidence of finality of intention and genuineness. Professor Langbein recognised the importance of signing, posing the possibility of exceptions:

> The formality of signature is so purposive that it is rarely possible to serve the purposes of the formality without literal compliance. Because the proponents of an unsigned purported will bear an almost hopeless burden of proof, it is unlikely that people would litigate such claims in any number.
>
> Nevertheless, there may be rare cases where it would be appropriate to admit to probate an unsigned will. Consider the testator who publishes the document as his will to his gathered attesting witnesses and takes up his pen and lowers it toward the dotted line when an interloper's bullet or a coronary seizure fells him. In such unique cases where there is persuasive evidence that the testator's intention to sign the will was final, and only a sudden impediment stayed his hand, the purposes of the Wills Act are satisfied without signature.[96]

The Manitoba Law Reform Commission quoted Professor Langbein's illustration as a situation in which it may be proper to dispense with even the minimum formalities, including signing.[97] The Law Reform Commission of British Columbia rejected this approach on the basis that the harm which would ensue from relaxation of the requirement for writing outweighs any benefit which would accrue from its abolition, *e.g.* by courts having to consider the validity of unsigned papers found after the testator's death.[98] In addition, there are many better illustrations of unfortunate circumstances leading to failure by testators in executing instruments than the fanciful example suggested by Professor Langbein. Should an unsigned will be validated in any of the following circumstances:

92 British Columbia Report *supra* 51-3, n. 46, p. 104.
93 *Ibid.* 53.
94 *In the Estate of Blakely supra* n. 74, p. 107.
95 *In the Estate of Williams supra* n.67, p. 107.
96 Langbein, *supra* 518, n. 37, p. 103.
97 Manitoba Report *supra* 23, n. 46, p. 104.
98 British Columbia Report *supra* 53, n. 46, p. 104.

(i) if the testator is killed whilst travelling to his solicitor's office to execute it;

(ii) if the testator suffers a heart attack, or stroke, or is in a permanent coma after giving instructions for a will, perhaps after its preparation, before the testator has been able to execute it;

(iii) if the testator suffers from the circumstances in (i) or (ii) after having called at the solicitor's office to execute the will, which was not then executed, because
   (a) the solicitor was unavailable, or
   (b) the original typed will was temporarily mislaid and the testator made a new appointment to call for execution of a freshly typed original.

A multitude of similar illustrations can be given. The testator should have some responsibility to ensure that an effective will is executed before death or some other circumstance intervenes to prevent testation.

(2) *Burden of proof*

The Law Reform Commissions of Manitoba and British Columbia both favoured the adoption of the civil onus of proof.[99] The Queensland provision requires substantial compliance and the courts will have to determine the nature and degree of proof to satisfy the court, although it is feasible that the court will be satisfied by evidence according to the civil onus. The South Australian legislation adopted the criminal standard, that there should be no reasonable doubt that the deceased intended the document to constitute his will. The South Australian judicial decisions do not disclose any difficulty with that issue or with the quantity or quality of evidence required to satisfy the court. Nevertheless, it appears to be anomalous and contrary to the principles applied in civil litigation, including probate litigation, to impose a criminal standard of proof. If the validity of a will is opposed on formal grounds and also because of alleged lack of testamentary capacity, *e.g.* mental capacity or vitiated by fraud or undue influence, the dispensation from formalities would be determined under a different standard of proof from that required for the other issues. There is little cause for concern that courts will not scrutinise closely the written and oral evidence before exercising the dispensing power. It is suggested that the civil standard provides sufficient safeguards and should be adopted.

(3) *Evidence*

The issue should be addressed whether a judicial dispensing power needs to be accompanied by some statutory provision defining (and broadening) the evidentiary rules. Some of the difficulties were highlighted by the following comments by Palk[1] when discussing the potential consequences of the South Australian legislation:

[99] Manitoba Report *supra* 27-8, n. 46, p. 104; British Columbia Report *ibid.* 53-4.
[1] Palk *op. cit.* 400.

> Without the certainty of formalities, the Supreme Court, if it adopts a broad approach to s 12(2), must keep a very tight rein indeed on those wills it admits to probate . . . All sorts of friends and relatives and business associates will be coming forward with letters, and notes, and copies of wills either as new wills or codicils to an original will. Once the Supreme Court admits these to probate, it may well unleash a process it cannot control . . . There will thus be increasing pressure on the Supreme Court to admit more and more documents to probate for fear of doing an injustice, and the criterion of 'no reasonable doubt' will be lost. Either way, whether many or few documents are admitted, s 12(2) may well have the net effect not of upholding the testator's intention, but of abusing it.

The principles of evidence dealing with declarations made by testators in relation to their wills are rigid and beset by technicalities.[2] They are severely limited by the application of the hearsay rule to this topic. Thus, the declarations of a testator are inadmissible to prove the execution of the will, although they may be received as original evidence to support or to rebut a presumption of due execution, arising from a partial compliance with wills formalities.[3] Declarations of intention by the testator are admissible to identify a testamentary instrument, and also to determine what instruments constitute the will,[4] and whether it (or some instrument of revocation) has been executed with testamentary intention. Declarations by testators are also admissible as secondary evidence of the contents of lost wills.[5] Generally a testator's declarations are admissible to prove state of mind or intention with reference to testamentary instruments, including revocation. However, declarations by a person now dead are of limited evidentiary effect in proving facts, in particular, they cannot be adduced as evidence relating to execution.

The Queensland Law Reform Commission considered this topic, its recommendation[6] having been adopted and is contained in s. 9(b) of the Succession Act 1981:

> (b) The Court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument.

The South Australian reported decisions have not disclosed any major difficulties with the rules of evidence as they might apply to facts adduced in connection with exercise of the dispensing power. However, the Queensland evidentiary provision appears to be a useful adjunct to a judicial dispensing power and is in keeping with the rationale for that power.

(4) *Relaxation of formalities and dispensing power*

The issue has been posed by academics and by Law Reform Commissions whether the solution to the problems illustrated in the judicial decisions with reference to wills formalities is by relaxing the formalities, or by providing a dispensing power, or both. The United Kingdom Law Reform Committee opted for relaxation of the formalities. The Queensland, South Australian and Northern

[2] The principles are discussed in more detail in Buzzard May and Howard, *Phipson on Evidence* (13th ed. 1982) para. 24-84; Gobbo Byrne and Heydon, *Cross on Evidence* (2nd Australian ed. 1979) 491-4; and by Ormiston W.F., 'Formalities and Wills: A Plea for Caution' (1980) 54 *Australian Law Journal* 451, 454-6.

[3] Phipson, *ibid.*

[4] *Gould v. Lakes* (1880) VI P.D. 1.

[5] Phipson, *op. cit.* para. 24-85.

[6] Report on the Law Relating to Succession (Queensland Law Reform Commission 22) 7.

Territory legislation and the British Columbia and Manitoba recommendations have favoured a dispensing power, without relaxing the formalities. Only one commentator favoured both the relaxation of formal requirements and the conferring of a dispensing power:

> These two ideas are not mutually exclusive. If the formalities can reasonably be relaxed then they ought to be relaxed whether there is to be a dispensing power or not, because court applications are not to be encouraged if they can possibly be avoided. Nor indeed would a dispensing power solve all the problems even if its exercise could always be sought, because there would be cases in which, although the will was genuine, the evidence required to prove it so could no longer be produced. A dispensing power is best considered, therefore, as a long stop measure of moderate efficiency.[7]

It is suggested that the better approach to wills formalities is to impose only those formalities which are considered appropriate and necessary in the current social conditions and, in addition, to confer a dispensing power. The English formal requirements for wills, imposed following the Property Law Commissioners' Report in 1833, although cogent at that time, involved the making of certain value judgments, based on the social conditions and attitudes existing during the early 19th century. Extensive litigation over more than a century in three continents has disclosed considerable evidence as to which of the formalities are more important and which ones have caused undue difficulties or could be safely relaxed or deleted. That experience has been accompanied by a modernisation and rationalisation of the law of succession, a general increase in the level of awareness and education of the community and greater facilities for and encouragement of the preparation of wills without professional advice. It is appropriate to reexamine the suitability of formal requirements, imposed in 1837, to the latter half of the twentieth century, and to suggest such alterations or modifications as are appropriate for current economic and social conditions and needs. However, any reform of formalities will leave anomalies and would lead to the development of a literal and formalistic judicial approach to those reduced set of formalities. Accordingly, it is appropriate, indeed necessary, to supplement the relaxation of formalities with a dispensing power.

(5) *Terminology of the dispensing power*

The Manitoba Law Reform Commission favoured the South Australian approach, without imposing any threshold requirements or the need to establish attempted compliance, recommending[8] that the terminology used in South Australia be used, but altered to read 'be deemed to be a will of the deceased person if *it is proved* upon application for admission of the document to probate as the last will of the deceased, that the deceased intended the document to constitute his will'.

The Law Reform Commission of British Columbia recommended[9] that the dispensing power should be expressed as follows:

Notwithstanding section 4, a document is valid as a will if

(a) it is in writing,

(b) it is signed by the testator,

[7] S.M. (1981) 125 *The Solicitors' Journal* 263.
[8] Manitoba Report *supra* 28-9, n. 46, p. 104.
[9] British Columbia Report *supra* 54, n. 46, p. 104.

(c) the testator dies after this section comes into force, and the court is satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect.

This author's preference is for a dispensing power to be expressed in the following terms:

Notwithstanding section[ ],[10] an instrument made at any time shall be deemed to be a will and may be admitted to probate if

(a) it is in writing,
(b) it is signed by the testator,
(c) the testator dies after this section comes into force,
(d) the court is satisfied that the testator intended the instrument to have testamentary effect as his will, or as an alteration to or revocation of his will.

[10] The section in which the formal requirements for execution are imposed in the legislation of the particular jurisdiction.