# The 1837 Wills Act:

This month we continue the detailed look at the Wills Act 1837. As will writers are aware the *1837 Wills Act (WA1837),* as amended, supplies the detailed background legislation that must be followed whenever a will is drafted. The actual text of the Wills Act is provided along with the current amendments and commentary as to the meaning and effect of the statute. By the addition of the full text of the WA1837 (as amended) will writers have the opportunity to read the actual words of this vital legislation which governs the way in which wills are validly conceived, drafted, interpreted and executed.

You should read the statutory 1837 Wills Act text extracted and the associated notes carefully and then answer the usual 15 CPD questions. Sections that are not mentioned below have been repealed.

### 13 Publication of will not be requisite.

Every will executed in manner herein-before required shall be valid without any other publication thereof.

In order to be valid a will does not need to be published in any other form except in accordance with the provisions of the 1837 Wills Act.

### 14 Will not to be void on account of incompetency of attesting witness.

If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

The validity of a will is not affected if at some later date a witness who has attested the document should subsequently no longer be considered as competent.

### 15 Gifts to an attesting witness to be void.

If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

**Annotations:**

**Modifications etc. (not altering text)**

C1S. 15 amended by Wills Act 1968 (c. 28), **s. 1**

S. 15 amended (E.W.) (1.2.2001) by 2000 c. 29, **ss. 28(4)(a)**, 33, (with s. 35); S.I. 2001/49, **art. 2**

C2S. 15 applied (5.12.2005) by Civil Partnership Act 2004 (c. 33), s. 263(2), **Sch. 4 para. 3**; S.I. 2005/3175, Sch. 1

*1 Restriction of operation of Wills Act 1837, s. 15.*

(1) For the purposes of section 15 of the **M1**Wills Act 1837 (avoidance of gifts to attesting witnesses and their spouses) the attestation of a will by a person to whom or to whose spouse there is given or made any such disposition as is described in that section shall be disregarded if the will is duly executed without his attestation and without that of any other such person.

(2) This section applies to the will of any person dying after the passing of this Act, whether executed before or after the passing of this Act.

*28 Trustee's entitlement to payment under trust instrument*

(4) Any payments to which the trustee is entitled in respect of services are to be treated as remuneration for services (and not as a gift) for the purposes of—

(a) section 15 of the **M1**Wills Act 1837 (gifts to an attesting witness to be void)

Commentary:

Will writers always need to keep a careful eye on the provisions of s15 when discussing with the testator persons who are proposed by the testator to witness their wills. SWW members have an obligation to check that wills drafted by them or their firm have been validly executed. Sub-clause 6.4 of the SWW's Code of Practice says:

*Clients must be provided with the opportunity for the attestation of all documents produced by a Member to be supervised by a Member or his representative and it shall be made clear in the Member's terms of business whether or not this is chargeable. Where a client does not opt for such an attestation service then the Member shall offer free of charge a service to check, as far as is practical, that such documents appear to have been attested correctly*

There are 3 points to mention about the provisions of s15, as follows:

1) The choice of witnesses should take account to the fact that the person(s) chosen may be asked to give evidence of the execution. With this in mind persons who are very old or who may be difficult to trace should be avoided.

2) A person who is either a beneficiary or the spouse of a beneficiary should not be chosen as a witness: although their signature is perfectly valid they would lose their legacies; except where under s15 Wills Act 1837 the will is validly executed without their signature, that is there are still 2 other valid signatures witnessing the execution – in which case they would keep their legacy.

3) There are a number of other exceptions that should be noted – the rule in s15 does not apply:

    a) An informal will made by a privileged testator does not need to be witnessed;

    b) If a beneficiary, or his spouse, including a registered civil partner, signs the will but in some other capacity. Note: the court will apply a rebuttable presumption that any person whose signature appears at the foot of the will is an attesting witness.

    c) When a beneficiary marries an attesting witness after the execution of the will; as s15 only applies to persons who are spouses of a beneficiary at the time that the will is executed.

    d) A gift to an attesting witness who is a trustee under the will, including as a trustee of a secret trust; as these gifts are not beneficial.

    e) Where the gift to a beneficiary is contained in a will or a codicil which was not attested by that beneficiary or his spouse, but a document confirming the will or codicil was attested by such person.

    f) Where the gift to a beneficiary contained in a document which was attested by that beneficiary or his spouse, but the document was confirmed by a will or codicil that was not attested by such person.

    Note: Whereas it is preferable to set out all of the provisions of a will in one document, alterations can be made by a codicil or a new will. It is possible to incorporate an additional document into a will, which can be admitted to probate as long as the following conditions are met:

i) the unattested document must contain wishes made by the testator and be in existence when the will is executed or republished by a codicil. This condition must be fulfilled as a matter of fact.

ii) The document must be referred to by the will as being in existence when the will is executed. A reference to a future intention will not suffice.

iii) The unattested document must be clearly identified in the will.

iv) Reference to another document which is not dispositive, but merely sets out the reasons for either the testator's dispositions or the reasons for omissions cannot be incorporated by the will.

Rule 14(3) of the Non-Contentious Probate Rules 1987 (SI 1987/2024) gives the district judge or probate registrar a discretion to decide whether a document can be incorporated.

g) Where a death occurs after 1 February 2001 and the will makes provision for a trustee or personal representative acting professionally to receive payment from the estate under a "charging clause" – such payment is not treated as a gift and not subject to the provisions of s15 Wills Act 1837 per s28 Trustee Act 2000.

Clause 6.4 of the SWW-CoP requires members to make available an attestation service, which should include a check of the executed documents whenever the client completes the execution unsupervised by a member or his firm. Members are obliged to follow this important guidance to make certain, as far as is practical, that full compliance with the provisions of s15 has taken place. It is in the will writer's interest to ensure that his duty of care in this regard has been properly exercised; so that there is little likelihood that an attesting witness has breached the s15 rules and thereby forfeited his legacy, or invalidated the execution of the will, potentially provoking a claim of negligence.

**16 Creditor attesting to be admitted a witness.**

In case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband**[F1**or civil partner**]** of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

**Annotations:**

**Amendments (Textual)**

**F1**Words in s. 16 inserted (5.12.2005) by Civil Partnership Act 2004 (c. 33), s. 263(2), **Sch. 4 para. 4**; S.I. 2005/3175, Sch. 1

Commentary:

Where a person who is a creditor of the estate or his spouse or civil partner attests the will or codicil, that person, not withstanding that he is a creditor with a charge against the estate, can prove the execution and validity or otherwise of the will.

**17 Executor shall be admitted a witness.**

No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Commentary:

An executor may attest a will or codicil.

**18 Effect of marriage or its termination on wills.**

(1) The following section s18 of the Administration of Justice Act 1982 shall be substituted for section 18 of the Wills Act 1837—

18 Wills to be revoked by marriage, except in certain cases.

(2) A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives.

(3) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person.

(4) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that a disposition in the will should not be revoked by his marriage to that person (a) That disposition shall take effect notwithstanding the marriage; and (b) any other disposition in the will shall take effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage."

18A Effect of dissolution or annulment of marriage on wills.

(1) Where, after a testator has made a will, a decree of court dissolves or annuls his marriage or declares it void (a) the will shall take effect as if any appointment of the former spouse as an executor or as the executor and trustee of the will were omitted; and (b) any devise or bequest to the former spouse shall lapse except in so far as a contrary intention appears by the will.

**Schedule 4 Civil Partnership Act 2004**

1 Amends the Wills Act 1837 as follows.

2 After section 18A insert—

18B Will to be revoked by civil partnership

(2) A disposition in a will in exercise of a power of appointment takes effect despite the formation of a subsequent civil partnership between the testator and another person unless the property so appointed would in default of appointment pass to the testator's personal representatives.

(3) (a) that at the time it was made the testator was expecting to form a civil partnership with a particular person, and (b) that he intended that the will should not be revoked by the formation of the civil partnership. The will is not revoked by its formation.

(4) Subsection (5) applies if it appears from a will (a) that at the time it was made the testator was expecting to form a civil partnership with a particular person, and (b) that he intended that a disposition in the will should not be revoked by the formation of the civil partnership.

(5) The disposition takes effect despite the formation of the civil partnership.

18C Effect of dissolution or annulment of civil partnership on wills

(2) Except in so far as a contrary intention appears by the will (a) provisions of the will appointing executors or trustees or conferring a power of appointment, if they appoint or confer the power on the former civil partner, take effect as if the former civil partner had died on the date on which the civil partnership is dissolved or annulled, and (b) any property which, or an interest in which, is devised or bequeathed to the former civil partner shall pass as if the former civil partner had died on that date.

Commentary;

The statutory provisions of s18 Wills Act 1837 are amended as substituted by s18 of the Administration of Justice Act 1982 and with effect from 5 December 2005 as amended by the Civil Partnership Act 2004 (Schedule 4). The amendments create following changes to the 1837 Wills Act:

The revocation of wills by marriage or formation of a civil partnership:

The amendments provide the basic rule that for wills executed after the operative dates (marriages: after 1 January 1996 and civil partnerships: after 5 December 2005) a will made before a marriage or the formation of a civil partnership, is automatically revoked by the marriage or civil partnership.

The following 3 exceptions to the basic rule are found in the amended sections:

i) 18(3) and 18B(3) provide that a will made in contemplation of a marriage or civil partnership is not revoked if the will confirms that the testator is expecting to marry a particular person at the time that the will is executed. The will must confirm that the testator intends that the will shall not be revoked upon the forthcoming marriage or civil partnership.

ii) 18(4) and 18B(4) provide that where the testator intended that a specific disposition should not be revoked by the marriage or civil partnership then that disposition takes effect together with any other disposition in the will notwithstanding the marriage or civil partnership.

iii) Sections 18(2) and 18B(2) confirm that the exercise of a power of appointment in the will remains effective and is not revoked by the forthcoming marriage or civil partnership as long as the testator has confirmed that intention by his will.

The effect of divorce or annulment on a will:

Sections 18A(1) and 18C(2) provide that the dissolution or annulment by the court of a marriage or civil partnership (judicial separation is not included) has two major effects on a will that was made before the dissolution or annulment:

i) Provisions of a will appointing a former spouse or civil partner as executor or trustee, or containing a power of appointment to be exercised by that person, take effect as if the spouse or civil partner had died on the date that the marriage or partnership was either dissolved or annulled; and

ii) Any gifts of property bequeathed to the former spouse or civil partner pass as if that spouse or civil partner had died on the date of the dissolution or annulment of the marriage or civil partnership.

The rights of a former spouse or civil partner under the Inheritance (Provision for Family and Dependants) Act 1975 (I(PFD)A 1975) are not affected by these provisions.

**19 No will to be revoked by presumption.**

No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

A will cannot be revoked by making a presumption that because the testator's circumstances have changed an existing will is no longer considered to be "fit for purpose", for example. A will must be revoked "by design", see s20 1837 Wills Act below.

**20 No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.**

No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner herein-before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Commentary:

Section 20 Wills Act 1837 deals with the acts of revocation in detail. The instructions amounts to the will only being validly revoked when there has been a clear act of destruction accompanied by the testator having an intention to revoke. Both elements must be present for there to have been a valid revocation.

The act of destruction may be by burning, tearing or otherwise destroying the document for example by shredding. The testator may instruct another person to destroy his will, but to be valid the destruction must be carried out in the testator's presence and by his direction with an intention to destroy the will. The destruction of the will must be total – care should be taken as partial destruction is not sufficient for valid revocation. There exists a danger that only the part destroyed will be revoked. The safest route is always to destroy the will completely and leave no doubt as to the intention; so that new instructions can be issued.

The will can be revoked "by some writing" which declares the intention to revoke the will. To be valid the writing must be executed including attestation in the same manner as the will.

Writing on a will or crossings-out are not advisable, but making illegible the testator's and the attesting witnesses signatures may be effective, see *Re Adams, deceased [1990] Ch 601.*

Partial revocation; that is stopping before the will is completely destroyed is not effective, see *Doe d Perkes v Perkes (1820) 3 B & Ald 489*.

If a will that is known to have been present but cannot be found after the testator's death a presumption arises that the testator has destroyed the will with the intention of revoking it. Evidence that the testator intended to preserve the contents of the will can act to rebut the presumption, provided that the evidence is clear and unequivocal. In *Rowe v Clarke [2005] EWHC 3068 (Ch), [2006] WTLR 347* the court's view was that the presumption that the will had been destroyed would always arise, but the strength of the presumption would depend on the security arrangements that the testator had adopted to safeguard the documents. In *Re Zielinski, Korab-Karpinski v Lucas-Gardiner [2007] WTLR 1655* it was known that despite not being able to find the will on the testator's death, the will had been in the testator's possession shortly before her death, as it had been recently executed and returned to her. The court held that the presumption was rebutted by evidence that the testator was considered by the drafting solicitors to be entirely reliable insomuch that she would have informed them if she had changed her mind about the contents of the will.

A will that is found after death, in a mutilated form is likely to be considered as destroyed by the testator with an appropriate intention to revoke its contents.

**21 No alteration in a will shall have any effect unless executed as a will.**

No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as herein-before is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

Commentary:

It is recommended as safer that alterations should be made by codicil, however any alteration made on the face of the will after the execution of the will, should be executed as such by the testator and initialled by 2 witnesses. Referring to sub-clause 6.4 of the SWW Code of Practice wills sent out to the testator to be executed unsupervised, that is unsupervised by a representative of the drafting firm, should be returned to the firm for checking. The check should ensure that all of the formalities have been properly completed and any alterations properly executed. The will writer should take all steps necessary to ensure that he has provided the testator with an appropriate duty of care, see *White v Jones [1995] 2 AC 207.* In that case the court held that the drafting solicitors were negligent in failing the family by their unconscionable delays in preparing and delivering the testator's requirements. In fact the solicitors caused a lengthy delay to take place and the unfortunate testator hit his head and subsequently died from a heart attack before his requirements could be formalised into a new will and validly executed.

If there is any doubt about the effect of an alteration that comes to the notice of the testator or the will writers, the alteration should be clarified by executing a codicil, which explains the reason for the alteration or restates the effect of the alteration.

**22 No will revoked to be revived otherwise than by Re-execution or a Codicil to revive it.**

No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner herein-before required and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

Commentary:

Where a will has been revoked but not destroyed, the original will can be revived by the testator either by the re-execution of the original document or executing a (further) codicil expressing an intention to revive the original will and any subsequent codicils.

Wills that have been revoked due to the testator getting married or forming a civil partnership can be republished where the content of the initial will remains acceptable to the testator.

A will that is republished takes effect from the date that it is revived.

Concluding remarks:

Although some of the issues that are dealt with in the contents of this paper may be well-known to members, nonetheless they merit careful study because the failure of the will writer to deal correctly with these situations could give rise to a claim for negligence.

A third paper for members will be published during the summer dealing with the remaining Wills Act 1837 clauses.

**Important Reminder:**

These notes are produced solely for the benefit of SWW members when completing the July CPD test to gain 1 hour of structured CPD towards their annual quota. The notes do not represent legal advice and no reliance can be made on the content of the notes in any particular or individual specific client circumstances. Having read the notes members should cement their understanding by considering further reading around the subject – cases details can be found by searching the case references using BAILII or GOOGLE.

The Society of Will Writers