COMMISSARIOT OF LOTHIAN AND BORDERS

SHERIFFDOM OF LOTHIAN AND BORDERS

[2024] SC JED 3

JUDGMENT OF SHERIFF P PATERSON

in the cause

(FIRST) CHRISTOPHER KNAPMAN and (SECOND) PATRICK WADESON

Pursuers

JEDBURGH, 4 NOVEMBER 2022

The sheriff having resumed consideration of the cause, repels the pursuers' pleas-in-law and refuses the craves of the writ.

Introduction

[1] The pursuers seek to invoke the terms of the Requirements of Writing (Scotland) Act 1995 (the Act) to cure the defects of execution of the purported will of the late Jean Dorothy Weatheritt. The "will" has all the hallmarks of a homemade will. It is clearly not professionally drafted and does not appear to have any trace of it being derived from a so called will form. The problem is that of the three pages which are said to form her will, only one is signed and witnessed. The court commonly encounters applications under section 4 of the Act where a will has had only the last page signed and these are normally granted without difficulty. The difficulty with the current case turns on the question of subscription, it not being clear to the court that the page that has been signed is the last page.

Background/Facts

[2] In addition to the initial writ the court has had the advantage of two affidavits from the witness to the will, Michael Collins and affidavits from each of the pursuers. I also had the considerable advantage of learned submissions from Mr MacLeod advocate.

[3] Before considering the legal issues it might be helpful if I describe the three pages in question. The page which bears to have been signed, which is typed, begins conventionally with the words "MY LAST WILL & TESTAMENT. Being of sound mind I, Jean Dorothy Weatheritt". It goes on to appoint the pursuers' as her executors. It then gives instructions for her funeral. It is signed, dated 27 January 2016 and witnessed. What it does not do is provide any guidance as to her beneficiaries. Nor does it make any reference of any sort directly or by implication to the other two pages.

[4] There is a page headed "Financial State as at November 2015". It appears to be in the main a list of assets. It is not signed or dated beyond the heading. It contains no links to the other two pages. The other page sets out instructions in relation to beneficiaries and is dated 24 November 2015. Again there is nothing to link this page to the other two pages.

[5] According to the affidavit of Christopher Knapman, who found the principles of the three pages in the possessions of the deceased, the three pages were stapled together in the order I have described above, namely the signed page, list of assets and finally the page setting out beneficiaries. Mr Knapman also confirms that he found the same documents on the deceased's computer. Mr Wadeson advises that when he met the deceased on 28 May 2021 she showed him a copy of the document and refers to discussions and the deceased striking through a name. Mr Collins only recalls seeing the signed page.

The law

[6] There is no doubt that the starting point is that there is a presumption against intestacy.

[7] Section 2 of the Act sets out certain documents referred to as traditional documents, included in this are wills. Section 3 sets out the requirements for execution and is in the following terms:

> "**Presumption as to granter's subscription or date or place of subscription.**
>
> (1) Subject to subsections (2) to (7) below, where—
>
> (a) a traditional document bears to have been subscribed by a granter of it;
>
> (b) the document bears to have been signed by a person as a witness of that granter's subscription and the document, or the testing clause or its equivalent, bears to state the name and address of the witness; and
>
> (c) nothing in the document, or in the testing clause or its equivalent, indicates—
>
> (i) that it was not subscribed by that granter as it bears to have been so subscribed; or
>
> (ii) that it was not validly witnessed for any reason specified in paragraphs (a) to (e) of subsection (4) below, the document shall be presumed to have been subscribed by that granter.
>
> (2) Where a traditional document is a testamentary document consisting of more than one sheet, it shall not be presumed to have been subscribed by a granter as mentioned in subsection (1) above unless, in addition to it bearing to have been subscribed by him and otherwise complying with that subsection, it bears to have been signed by him on every sheet."

[8] In my opinion subsection 2 is of significance. This makes it clear that there is a distinction between signature and subscription. The implication of this subsection is that

when reference is made to subscription it is referring to the signing on the last page. This matter is put beyond doubt by section 7 which defines subscription in the following terms:

> "**Subscription and signing**
>
> (1) Except where an enactment expressly provides otherwise, a traditional document is subscribed by a granter of it if it is signed by him at the end of the last page (excluding any annexation, whether or not incorporated in the document as provided for in section 8 of this Act)."

[9] In Mr MacLeod's helpful written submissions he refers to a number of authorities, most of which pre-date the Act. In *Taylor's Executrices* v *Thom* 1914 SC 79, Lord President Strathclyde (giving opinion in favour of the majority) observed (at page 82):

> "This Division of the Court has more than once expressed the opinion
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> > '(1) That they would not in the future sustain any document as a will which did not bear the subscription of the testator; and (2) that the recital of the testator's name in the commencement of a holograph writing would not be sustained as a subscription or its equivalent.'
>
> I am quoting from the words of Lord M'Laren in the case of *Goldie* v *Shedden*. And the law was laid down in substantially similar terms in the other Division of the Court. I quote now from the opinion of Lord Trayner in *Foley* v Costello —
>
> > 'I think the law of Scotland requires subscription as the essential and only admissible evidence of a concluded expression of will on the part of a testator. … In my opinion the rule is inflexible —no subscription, no will —and to admit the consideration of facts and circumstances to modify that rule would be very inexpedient and dangerous.'
>
> Lord Moncreiff says in the same case —'Subscription is the test of a holograph will,' and 'the want of subscription cannot be supplied by parole proof.'"

And he concluded (at page 83):

> "Now, I hold that it is now the settled law of Scotland that the lack of a subscription indicates an intention on the part of the testator not to regard the writing as a final and complete act. As Lord Fullerton observed in the case of *Dunlop* v *Dunlop*,
>
> > 'the necessity of subscription to a will is a matter which depends on no technical rule … but is familiar to all the lieges without exception.

> Every man knows the difference between a deed that is signed and one that is unsigned. It appears to me, therefore, that the deceased must have believed and understood that the writing was not effectual so long as he withheld his subscription from it, and that, if we now sustained it as a valid instrument, we should be making a will, which the party died believing to be ineffectual.'

That being so, it seems to me plain, to use the language of Lord Deas in the case of *Skinner* v *Forbes*, that:

> 'There are no doubt advantages in holding that subscription in such cases as this is essential. That rule puts matters of this kind beyond all question, as every man then knows that so long as he does not subscribe a testamentary deed it is not completed, and that he has power to recall it whenever he likes, or not to complete it at all.'"

[10] This has been referred to as the "golden rule". The reasons for the importance placed on subscription are clear and obvious, namely fraud prevention. If a will only requires to be signed on any of its pages, it would be a relatively simple matter to substitute pages not seen by the testator. The need for subscription significantly reduces this risk.

Discussion

[11] Mr MacLeod advanced two arguments for the pursuers. The first was that when read as a whole, the signed page was the last page. The second was that the word "last" in section 7 does not refer to the order of the documents but last in terms of preparation.

[12] Dealing first with the submission that the signed page is the last page. In my opinion there can be no doubt that the signed page is intended to be the first page. First and foremost I have never known a will whether it be professionally drafted, a "will form" or "homemade" that did not, in the first few words, state the name of the testator.
Mr MacLeod observed that he had seen suicide notes that had testamentary effect which did not begin with a name. In my judgement that is quite a different situation. The second thing that goes against this argument is the order in which the documents were found. It is to be

inferred that the deceased put the three pages together in the form they were found. I accept in saying this that this strongly points to the three documents reflecting the testamentary intentions of the deceased, but that in and of its self, does not get round the need for subscription.

[13] I accept that it is likely that the three pages were created in the order the dates suggest and therefore the signed page is the last document chronologically, but that does not make it the last sheet as described in section 3(2) of the Act. It would be a bizarre document that began with a list of assets! In my opinion the definition in section 7 puts the matter beyond doubt. It is talking about the document as a whole and last means the last page of the document. If Mr MacLeod's suggested interpretation was correct it would mean that much of the protection envisaged by the need for subscription would be lost. All the more so when there is no link connecting the three pages. Given that I am of the opinion the signed page is the first page there cannot have been subscription.

[14] It is accepted by the pursuers that if there is no subscription, section 4 of the Act does not assist.

[15] I accept that the consequence of my decision is that the deceased estate will fall into intestacy. However the presumption against intestacy does not assist. The presumption cannot assist in curing a fundamental problem. If there was any ambiguity the presumption might have assisted, but that is not the case.

[16] Given there is no contradictor the question of the expenses does not arise.