Testing Times for Attestation

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Section 9 of the Wills Act 1837 requires a will valid in English Law to be in writing and signed by the testator (or someone else at his direction)[1] in circumstances where the signature was intended to give effect to the will.[2] The signature must be made or acknowledged in the presence of at least two witnesses,[3] and the witnesses must either "attest[ ] and sign" the will or acknowledge their signatures in the testator's presence.[4] The Act expressly provides, however, that "no *form* of attestation shall be necessary".[5] In its recent Consultation Paper on *Making A Will*, the Law Commission asserted that: "[i]f 'attestation' does not require anything more than the witnesses being present and bearing witness to the testator's signature (or his…acknowledgement of the signature) then the requirement for the witness to 'attest' appears redundant",[6] and provisionally proposed its removal.[7] Even if the requirement is retained, the Commission suggested that the difficult notion of attestation "be defined to mean that the witness must sign the will and intend that his or her signature serve as clear evidence of the authenticity of the testator's signature" and apply even where the witnesses have acknowledged their signatures.[8]

Meanwhile, the requirement to attest and sign remains in force, and in its 2018 judgment in *Payne v Payne*, the Court of Appeal had to consider circumstances in which it was alleged that the witnessing of a will was invalid.[9] In light of *Payne* and other case law, this note will assess the desirability of abolition or reform of attestation, as suggested by the Law Commission. In exploring *Payne*, it will consider the nature and importance of

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[1] Wills Act 1837, s. 9(a).

[2] Wills Act 1837, s. 9(b).

[3] Wills Act 1837, s. 9(c).

[4] Wills Act 1837, s. 9(d).

[5] Wills Act 1837, s. 9(d), emphasis added.

[6] Law Commission, *Making a Will* (Consultation Paper 231, 2017) (C.P. 231) at [5.65].

[7] Ibid, Consultation Question 23.

[8] Ibid, Consultation Question 24.

[9] [2018] EWCA Civ 985, [2018] 1 W.L.R. 3761 ("*Payne*").

attestation from a comparative perspective, with particular reference to the vital authenticating role that witnesses are expected to play.

Facts

John Payne (henceforth only "the deceased") had been married to Vera for over 30 years, and the couple had four children including a son, also called John (and referred to as such in what follows). But the marriage ended in divorce and the deceased married Kim in 1997. While he and Kim had no children of their own, Kim had a daughter, Emily, from a previous marriage. There was a history of bad feeling between John, his son Thomas and Vera on the one hand, and Kim and Emily on the other, and disputes only increased following the deceased's death in August 2012. Restraining orders were made against John in respect of Kim.

The deceased had made at least two purported wills. One was made in 2012, a few months before his death. It was typed, but not professionally drawn, and left his residuary estate to John subject to legacies of £15,000 each for Thomas and Kim. The witnesses were Thomas' girlfriend and her mother. The other was made in 1998, around a year into the deceased's marriage to Kim. It was made on a printed form and made only one substantive gift: following the printed words "I give and bequeath unto", the words "my wife Kim Payne my property, post office pension, insurance's shares, and any money in my Abbey National account" were written in manuscript.[10] The space on the form for a residuary gift was not filled in, but the deceased had apparently written his signature in the appropriate place on the form. Underneath, there was a standard printed attestation clause:

> "Signed by the above-named testator (testatrix) in the presence of us present at the same time who in his (her) presence and at his (her) request and in the presence of each other have hereunto subscribed our names as witnesses."

[10] According to press reports, the property that Kim claimed by virtue of the 1998 will included a "three-quarters stake in the home [the deceased originally shared with Vera] and a share portfolio worth an estimated £250,000": T. Kirk, "No way my father would have left her that! Son in £600,000 battle with stepmother" (27 March 2018), *Evening Standard*, *https://www.standard.co.uk/news/uk/no-way-my-father-would-have-left-her-that-son-in-600000-battle-with-stepmother-a3800371.html* [Accessed 15 April 2019].

There were then two sets of spaces designated "Witness", "Address" and "Occupation". Significantly, however, there was no separate space for a signature, which is at least partially explained by the fact that the form used apparently dated from a time when a witness was required to "subscribe" rather than "sign".[11] The three spaces were apparently filled in by Michael Hogwood and Robert Gordon in capital letters in different hands, but as Henderson LJ was eventually to put it, "there were no separate signatures in the sense in which that word is now commonly understood".[12] The will was also apparently signed by a solicitor, corroborating Kim's claim that "she took it to her (or possibly the deceased's) solicitors who sent it on to the Winchester District Probate Registry for safe keeping".[13]

Numerous allegations were made between the protagonists after the deceased's death, including one (investigated by the police but with no charges being pressed) that the 2012 will had been forged altogether. Around two years after the death, John and Thomas sought proof in solemn form of the 2012 will. Kim entered a defence and counterclaim denying that the 2012 will was validly executed and seeking proof of the 1998 will.

First Instance Decision

In August 2015, Judge Faber rejected both the claim and the counterclaim, holding that neither will should be admitted to probate, with the result that the deceased died intestate.[14] While the size of the estate is not apparent from the Court of Appeal's judgment, there would have been a division of the estate between Kim and the deceased's issue on intestacy, with her probably receiving most of it.[15]

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[11] The change was introduced by the Administration of Justice Act 1982, s. 17, coming into force on 1 January 1983. The form's instructions provided that a will must be signed at "*the foot or end thereof*", which also reflected the pre-1983 position.

[12] *Payne* at [5].

[13] *Payne* at [43].

[14] The judge did not approve the transcript before retirement (*Payne* at [10]); this summary is therefore constructed from Henderson LJ's judgment.

[15] The estate was valued at £600,000 in the press: *https://www.standard.co.uk/news/uk/no-way-my-father-would-have-left-her-that-son-in-600000-battle-with-stepmother-a3800371.html*. Kim would have received all personal chattels, £250,000 and half of any balance absolutely: Administration of Estates Act 1925, s 46. The other half of the balance would have been divided between the deceased's issue. See, generally, B. Sloan, *Borkowski's Law of Succession*, 3rd edn (Oxford: OUP, 2017), Ch. 2.

In relation to the 2012 will, the judge found the evidence of Thomas Payne and the two attesting witnesses (his girlfriend and her mother) to be "utterly unreliable" such that any presumption of due execution[16] was displaced.[17] She found herself unable to hold that the will had been correctly witnessed or that the deceased knew and approved of its contents.[18] The issues surrounding the 2012 will arguably provide a good illustration of limitations of the rule that a gift to the spouse or civil partner of a witness is void,[19] in light of the fact that Thomas and one witness were apparently in a relationship but not married so that the gift to him would have been unaffected. The Law Commission has provisionally proposed reform to extend the rule at least to cohabitants.[20]

As for the 1998 will, Judge Faber concluded that Kim had failed to produce a copy of the will properly signed or to call either witness to give oral evidence (albeit that she claimed to know who they were). Significantly, Kim had also failed to produce the original will, a fact on which the Court of Appeal would have much to say. The judge found that Kim was "not an entirely reliable witness",[21] even if she accepted Kim's account of how the will was executed. The judge thus considered herself unable to find that the will was properly attested. She apparently considered that the will was not validly "signed" by the witnesses, describing it as "unsigned with just their names and addresses in capitals", and was unconvinced that she could find due execution in the absence of oral evidence giving "a further explanation of who put the capital letters there and[,] if it was…Mr Hogwood and Mr Gordon, [of whether] they did so intending to attest the will".[22] It appears that when Kim (a litigant in person) sought to introduce written evidence from the witnesses confirming their role, the judge held that this could be done only with opposing counsel's consent, which was not forthcoming, and "the matter was taken no further".[23] The result, in the judge's opinion, was that Kim had failed to discharge the burden of proof on her and the counter-claim would therefore be dismissed.

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[16] See, e.g., *Harris v Knight* (1890) 15 P.D. 170.

[17] *Payne* at [11].

[18] See, generally, B. Sloan, "Burdens, Presumptions and Confusion in the Law on Want of Knowledge and Approval" [2017] Conv. 440.

[19] Wills Act 1837, s. 15.

[20] C.P. 231 at [5.56]-[5.61]; See B. Sloan, "Wills, Marriage and Cohabitation: The Law Commission's Consultation Questions" [2017] Family Law 1026 for discussion.

[21] *Payne* at [12].

[22] *Payne* at [13].

[23] *Payne* at [18].

Court of Appeal Decision

In July 2017, Briggs LJ refused John permission to appeal the rejection of the 2012 will. Judge Faber had correctly directed herself on the strength of the presumption of due execution, and was thus entitled to conclude that it was displaced "by the manifest untrustworthiness of the claimant's witnesses".[24] It was not therefore open to the Court of Appeal to pronounce in favour of the 2012 will in 2018. But he granted Kim permission to appeal in relation to the 1998 will, considering it arguable that the judge was not entitled to find that the Wills Act requirements were unmet, since she had accepted Kim's evidence that she had seen the signing and the act of writing their names in block capitals must have constituted that process.

Significantly, Mr Gordon was allowed to give oral evidence at the appeal hearing. He gave an account of being asked by Kim on the telephone to "pop down" to her and the deceased's house, watching the deceased sign the will and filling in the form in the presence of the deceased and Kim and alongside Mr Hogwood (not previously known to him). Henderson LJ (who gave the only substantive judgment, with Flaux LJ simply agreeing) admitted this evidence, alongside affidavits and informal statements from Messrs Gordon and Hogwood, on the basis that it was necessary to pronounce on the validity of the will. It is significant that Henderson LJ did so, invoking "the overriding objective of enabling the court to deal with cases justly", notwithstanding his own admission that the case did not comply with the principles in *Ladd v Marshall*[25] because the relevant evidence could with reasonable diligence have been adduced at trial.[26]

On another evidential point, Henderson LJ described it as a "serious procedural irregularity that should never have been allowed to happen" that the judge lacked the original will or even a complete copy when making her decision,[27] even though Kim knew the original to be held by Winchester District Probate Registry. The absence was also in spite *inter alia* of the Civil Procedure Rules' clear instruction that "[a]ny testamentary document of the deceased person in the possession or control of any party must be lodged with the court".[28] Henderson LJ asserted that "the management of this case appears to have been

[24] *Payne* at [11].

[25] [1954] 1 W.L.R. 1489.

[26] *Payne* at [49].

[27] *Payne* at [33].

[28] Civil Procedure Rules 1998/3132, r. 57.5(1).

unsatisfactory, and everybody seems to have lost sight of the imperative need for [Kim] to comply with the requirements of CPR r 57.5".[29] She persisted in her failure even at the appeal hearing, and the Court of Appeal refused to give judgment until it had been produced. Henderson LJ's concern is understandable. Courts have sometimes taken the extreme step of allowing a will to be admitted to probate where the original cannot be found and the best evidence of its content is the recollection of a beneficiary.[30] There is nevertheless little excuse for relying on copies where an original is readily available in light of the will's inherent purpose in facilitating the expression of testamentary wishes while serving the evidentiary and anti-fraud purposes of formalities, i.e. attempting to ensure an accurate record of the existence and contents of the disposition and thus deter interested fraudsters from misrepresenting the disposition's nature.[31]

More substantively, Henderson LJ held that Mr Gordon's evidence gave "strong support" to Kim's account, in that:

> "The two witnesses were each present when the deceased signed the will, and by separately filling in their details in the specified places on the will form the natural inference to draw is that they thereby intended to write their names as witnesses of the deceased's signature".[32]

Henderson LJ was conscious that this was why they had been asked to go to the deceased's home, and held that there could be "no sensible reason to doubt that they were doing precisely what the printed attestation clause said they were doing, namely subscribing their names as witnesses".[33] In his view, the absence of a "conventional signature" was "hardly surprising" in light of the fact that the form had no specific place to put one.[34]

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[29] *Payne* at [37].

[30] *Sugden v Lord St Leonards* (1876) 1 P.D. 154.

[31] See S. Cooper, "*Sugden v Lord St Leonards* (1876): Probate of the Missing Will – Hamlet Without the Prince?" in B. Sloan (ed), *Landmark Cases in Succession Law* (Oxford: Hart Publishing, forthcoming 2019), drawing on L.L. Fuller, "Consideration and Form" (1941) 41 Columbia Law Review 799, A. Gulliver and C. Tilson, 'Classification of Gratuitous Transfers' (1941) 51 Yale Law Journal 1, J.H. Langbein, "Substantial Compliance with the Wills Act" (1975) 88 Harvard Law Review 489 and E Posner, "Norms, Formalities and the Statute of Frauds" (1996) 144 University of Pennsylvania Law Review 1971 *inter alia*.

[32] *Payne* at [27].

[33] *Payne* at [27].

[34] *Payne* at [28].

In considering the nature of the signature required, Henderson LJ did not think that the 1982 change of wording from "subscribe" to "sign" "was intended to be a change of any substance", and simply involved the substitution of a "modern" word for an "archaic" one.[35] He admitted, however, that the change "has the potential to cause confusion…if it is interpreted as suggesting that a 'signature' is required, in the sense of an identifiable and probably unique personal mark, as when signing a cheque or other formal document, rather than merely writing one's name with the intention that the act of writing it should operate as an attestation", the latter being conveyed by "subscribe".[36] He nevertheless found it "easy to understand how the judge may have been misled into thinking that a signature in the usual modern sense was required" in the light of the use of the old form.[37] He emphasised that the instructions on that form, which had not been before the judge, "drew no distinction between the reference to the attesting witnesses subscribing their names as witnesses (in the attestation clause) and the direction that they must 'sign their names and addresses against the attestation clause'".[38]

In concluding, Henderson LJ held that there were "significant grounds for concern about the judge's decision to reject the 1998 Will".[39] Judge Faber had "pronounced against it even though it appeared on its face to be validly executed, and there was no requirement in law for the witnesses to have 'signed' the will in the usual modern sense of that word, as opposed to writing their names with the intention of attesting it".[40] She had also reached her conclusion without the original or a full copy, and had not considered whether the interests of justice might require an adjournment of her own motion to allow the will to be obtained or allow at least one witness to give oral evidence. In particular, it was a requirement in the case law that "at least one attesting witness must be called, if available, in a defended [probate] case".[41] Finally, Judge Faber "appear[ed] to have completely ignored" a "further very relevant consideration": the "strong public interest in valid testamentary dispositions

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[35] *Payne* at [30].

[36] *Payne* at [31].

[37] *Payne* at [32].

[38] *Payne* at [41].

[39] *Payne* at [44].

[40] *Payne* at [44].

[41] *Payne* at [48], citing *Oakes v Uzzell* [1932] P. 19, *Bowman v Hodgson* (1867) 1 P. & D. 362, *Belbin v Skeats* 164 E.R. 669; (1858) 1 Sw. & Tr. 148.

being upheld".[42] Ultimately, Henderson LJ was "left in no doubt that the 1998 Will was validly executed",[43] and the Court of Appeal pronounced in favour of it.

The Signature Issue

The judge should be given sympathy given her inability to approve the transcript before medical retirement, but the approach to the signature question at both levels in *Payne* is interesting and sometimes open to criticism. It inevitably invites comparisons not simply with the popular notion of a "signature", but with the case law on the definition, whether for the purposes of a testator or a witness (not mentioned by Henderson LJ). The definition of a valid "subscription" formulated in *Hindmarsh v Charlton* requires that "there must either be the name or some mark which is intended to represent that name".[44] That definition was satisfied on the facts of *Payne* (since the names were present) even if neither of the witnesses thought that they were "signing". Even if they had made only a "mark" by writing their names in block capitals (a highly dubious suggestion), it would still have been intended to *represent* their names even if they had not intended to "sign" in accordance with the popular definition, and the question then becomes whether the change from "subscribe" to "sign" is key. Henderson LJ clearly thought that it was not, and he could have cited in support (in addition to the differing focus of the 1982 reforms) the application of the *Hindmarsh* test in relation to the *testator's signature* in, for example, *Re Chalcraft*[45] and *Re Colling* (albeit that it was not satisfied in the latter case because the testator did not complete what was intended before a witness).[46] Moreover, the words "sign" and "subscribe" were used interchangeably in *Re Colling*.

As regards the test for a valid signature for testators, despite the application of the *Hindmarsh* test in *Re Chalcraft*, in the latter case Willmer J also expressed the requirement as one that the relevant writing was "intended to be [the testatrix's] signature".[47] The application of this test to witnesses could have caused difficulty on the facts of *Payne* if intention to *sign* is required, since it is arguable that Messrs Gordon and Hogwood did not

[42] *Payne* at [45].

[43] *Payne* at [49].

[44] (1861) 8 H.L. Cas. 160, 167.

[45] [1948] P. 222. cf. A. Proferes, "Subscribe on the dotted line" (2018) 168(7802) N.L.J. 13, 14.

[46] [1972] 1 W.L.R. 1440.

[47] [1948] P. 222, 228.

intend to sign as such, given that they were not instructed to do so and used block capitals rather than (one assumes) their usual signatures. It is presumably on that basis that Matthew Roper asserts that the decision "give[s] the word 'sign' a different construction in subs.(a) and (d) of s.9".[48] Even for testators, however, the acceptance of "Your loving mother" as a valid signature in *In the Estate of Cook*[49] demonstrates that a valid signature need not *necessarily* be (as Henderson LJ put it) "an identifiable and probably unique personal mark, as when signing a cheque or other formal document".[50] *Williams, Mortimer & Sunnucks*' formulation is that the writing must be done "with the purpose of authenticating the document",[51] and the Court of Appeal found that the witnesses in *Payne* did so.

Amy Proferes emphasises that: (1) *Payne* should *not* be taken as authority that writing one's name in block capitals is a "signature"; and (2) according to *Payne* a "signature" is not required for a valid attestation.[52] But both of Proferes' propositions fly in the face of the wording of section 9, which expressly requires a signature. This is true despite the possibility that Judge Faber in her overturned first instance decision thought that writing one's name in block capitals was not a "signature". Even she could be interpreted as saying that writing one's name in capitals could be a signature if supported by evidence of intention to attest (seemingly stronger than what would be required where a witness used his usual signature), albeit that she was (dubiously) unconvinced that sufficient evidence existed. The better view is that the Court of Appeal's decision in *Payne* establishes that (at least in the case of witnesses) the notion of a "signature" for the purposes of section 9 is broad enough to include writing one's name in block capitals (when done with the intention of attesting). If that view is adopted, the outcome in *Payne* can easily be reconciled with the statutory requirements rather than appearing to flout them. The relationship between signature and attestation is considered immediately below.

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[48] M. Roper, "Succession: Payne v Payne: a legislative change of form not substance?" [2018] P.C.B. 172, 175.

[49] [1960] 1 W.L.R. 353.

[50] *Payne* at [31].

[51] A. Learmonth et al, *Williams, Mortimer & Sunnucks—Executors, Administrators and Probate*, 21st edn (London: Sweet & Maxwell, 2018) para.[9-10].

[52] Proferes, (2018) 168(7802) N.L.J. 13, 14.

The Nature and Importance of Attestation

It has been seen that Henderson LJ was convinced of the validity of the will because the witnesses wrote their names "with the intention of attesting it".[53] Although Judge Faber considered the will to be "unsigned" (suggesting that s 9(d) was self-evidently not fulfilled), we have seen that even she was open to being convinced that it was validly attested with further evidence. The difficult notion of "attestation" and its relationship with the apparently cumulative signature requirement must therefore be unpacked.

In a response to the Law Commission's *Making A Will* Paper composed for the Society of Legal Scholars, Simon Cooper identifies three "difficulties with the meaning of attestation".[54] First, on his analysis, "although it was originally understood as the observation by a person of the testator's carrying out of the solemnities required for a valid will, the word has undoubtedly shifted in meaning at least in legal circles to refer to the written record of that observation".[55] Some evidence can still be found for the first understanding. For example, according to the *Probate Practice Manual*, "[t]he attestation is the observance of the testator's signature (or the signature of the person signing on behalf of the testator) so that he can give evidence at a later stage of what he saw if required".[56] Moreover, it is arguably telling that in "Abolishing the Attestation Requirement for Wills", the US-based scholar James Lindgren appears to view abolishing the requirement for attestation as tantamount to abolishing the requirement for witnesses altogether, which supports the view that attestation relates to the witnessing itself, and also arguably adds weight to the notion that attestation itself has little independent meaning.[57] In a paper focusing on attestation in the context of deeds rather than wills, Martin Dray suggests that:

> "…since the very purpose (and beneficial effect) of attestation is to limit the scope for disputes as to whether the document was signed by its purported maker and the circumstances in which it was so signed, and to give some…protection to the other

[53] *Payne* at [44].

[54] S. Cooper, "Attestation" in "Law Commission Consultation C.P. 231 'Making a Will': A Response on Behalf of the Society of Legal Scholars Property & Trusts Law Section", *https://www.legalscholars.ac.uk/wp-content/uploads/2016/03/Making-A-Will-SLS-Response.pdf* [Accessed 15 April 2019], p.24.

[55] Ibid.

[56] C. Butcher (ed), *Probate Practice Manual* (London: Sweet & Maxwell, looseleaf), para.[BB.5].

[57] J. Lindgren, "Abolishing the Attestation Requirement for Wills" (1990) 68 North Carolina L.R. 541.

parties (who can have more confidence in the genuineness of the signature by reason of the attestation), it can be said that witnessing, rather than signing by the witness as a record of the same, is the essential ingredient for attestation".[58]

He ultimately concludes, however, that "the view that will most likely hold sway in the twenty-first century is that 'attest' is to be interpreted as obliging any witness not only to observe the maker's signature (and, if necessary, testify thereto) but also to record such observance through the witness's own signature on the document".[59] While Dray was writing in the context of the Law of Property (Miscellaneous Provisions) Act 1989 (which does not expressly require the witness to sign the deed),[60] his analysis is ultimately consistent with the "written record" view.

The notion of "intention to attest", key to *Payne* and also reflected in *Theobald on Wills*,[61] is arguably problematic for the "observation" view. Given that the signature *follows* the observance of formalities, it is difficult to see how intention to attest can be present when the witness has *already* observed the testator's signature. It fits more easily with the "written record" view, if the witness is understood to be saying that he has observed the signature and is willing to vouch for the fact that all proceeded properly. Henderson LJ's emphasis on "intention to attest" fits with the Law Commission's proposed reformulation involving an intention that the witness' signature "serve as clear evidence of the authenticity of the testator's signature", [62] which in turn fits with the function of formality requirements and is to be welcomed.

Secondly, Cooper identifies "the question whether in the statutory requirement to 'attest and sign the will', the person is attesting (without identifying a particular subject matter) or is attesting the will".[63] This aspect was not a prominent source of difficulty on the facts of *Payne* itself, since Messrs Hogwood and Gordon clearly knew that they were purporting to witness a will. But it has been in other cases: in *Re Whelen*, for example, one of the issues was that the witnesses had been asked to witness only one will and not the two

[58] M. Dray, "Deeds speaker louder than words. Attesting time for deeds?" [2013] Conv. 298, 304.

[59] Ibid, 304.

[60] Law of Property (Miscellaneous Provisions) Act 1989, s. 1(3)(a)(ii).

[61] J. Ross Martyn et al, *Theobald on Wills*, 18th edn (London: Sweet & Maxwell, 2018), para.[4-016].

[62] C.P. 231, Consultation Question 24.

[63] Cooper, "Attestation", p.24.

that they had signed.[64] In *Ashraf v Shah*,[65] while there were many problematic issues, one mentioned several times by the judge in the course of a short judgment was that the purported witness believed he was signing a lease when in fact he was signing a will.

In New South Wales, however, where the basic formality requirements are similar to those in the 1837 Act,[66] it is expressly provided that "[a] will that is executed in accordance with this Act is validly executed even if one or more witnesses to the will did not know that the document he or she attested and signed was a will".[67] This may suggest that it is possible to attest a signature without knowing the nature of the document, and it is certainly axiomatic that a witness need not know the *content* of a will.[68] But it is arguable that the value of a witness' evidence on the circumstances surrounding the will's execution (and therefore his assistance of the evidentiary and anti-fraud functions of formalities) would be compromised without some sort of understanding of the process in which he is engaged, since such ignorance could make it more difficult for him to say whether the testator really did what is claimed. This is true even if there is English authority (accepted in *Sherrington v Sherrington*, where a requirement simply to "attest" rather than "attest…the will" was preferred)[69] that a witness need not know that what is being signed is a will.[70] An "understanding" requirement included within the notion of "attestation" may militate against its removal from the statute, again in light of the centrality of "attention to attest" in *Payne*.

A third question raised by Cooper is: "does attestation (in the sense of a written record of an observation) add anything to the mere application of the observer's signature?"[71] *Payne* itself does not necessarily provide a clear answer to this question. On the one hand, it could be argued that the important notion of "intention to attest" would become meaningless if attestation were not a separate requirement, which would cast significant doubt on the wisdom of the Law Commission's suggested removal. On the other, there is a possible implication in *Payne* that there would have been no valid signature at all if there had been no

[64] [2015] EWHC 3301 (Ch).

[65] [2018] EWHC 1779 (Ch). Westlaw indicates that an appeal in this case is outstanding.

[66] Succession Act 2006, s. 6.

[67] Succession Act 2006, s. 7.

[68] *Payne* at [40].

[69] [2005] EWCA Civ 326, [2005] 3 F.C.R. 538 at [34].

[70] *Re Benjamin's Estate* (1934) 150 L.T. 417.

[71] Cooper, "Attestation", p.24.

intention to attest,[72] which *might* reduce the work that the separate attestation requirement has to do, but it could still be seen as supplying a vital ingredient of the witness's mental state when signing. As Cooper notes,[73] the English case law on the point (pre-dating *Payne*) is inconclusive. While in *Sherrington v Sherrington* it was held that "[a]s a matter of statutory construction it is plainly correct that meaning over and above 'signs the will' must be given to 'attests and'",[74] in *Re Selby-Bigge (deceased)* "the word 'attest' in its ordinry meaning" was considered "sufficiently wide in connection with a document such as a will to include the word 'subscribe,'" such that the attestation clause on the facts was sufficient to prevent the requiring of affidavit evidence even though it made no reference to the witnesses having "subscribed".[75]

Under the US Uniform Probate Code,[76] the basic principle is that a witnessed will must be "signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will…or the testator's acknowledgment of that signature or acknowledgement of the will".[77] Significantly, a witness who complies with the obligation of signing within a reasonable time after witnessing the signing of the will etc is described as an attesting witness elsewhere in the Code,[78] again minimising the extent to which attestation is seen as a requirement separate to signing. The witnesses, however, must sign "for the purpose of attesting the instrument as subscribing witnesses".[79]

It must be conceded that "attestation" is not a universal requirement in English Law, since section 9 expressly permits a witness to acknowledge his signature in the testator's

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[72] *Payne* at [31] and [44].

[73] Cooper, "Attestation", pp.24-26.

[74] *Sherrington* [2005] EWCA Civ 326 at [37].

[75] [1950] 1 All E.R. 1009, 1012.

[76] National Conference of Commissioners on Uniform State Laws, "Uniform Probate Code" (Uniform Law Commission, Last Amended or Revised in 2010) ("U.P.C.")

[77] U.P.C., s. 2-502(a)(3)(A). It must be noted, however, that there are also important exceptions to any requirement for witnesses. The testator can "acknowledge[ ]" the will "before a notary public or other individual authorized by law to take acknowledgements" (s. 2-502(a)(3)(B)). In addition, there is provision for the validity of holographic will, in that a will is valid, "whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting" (s. 2-502(b)). There is also a dispensing power based on a principle of "harmless error" (s. 2-503).

[78] U.P.C., p.144.

[79] *Mossler v Johnson*, 565 S.W.2d 952 (Tex. Civ. App. 1978), 957; see further U.P.C., p.141.

presence,[80] something that the Law Commission proposes to rectify if the requirement is retained.[81] If attestation, and particularly intention to attest following *Payne*, is important, it stands to reason that it should be extended. Conversely, the fact that attestation is not currently a requirement in all cases does not mean that it should be abolished if it has value.

Even though its proposed reformulation of attestation *encompasses* signature, it is to be presumed that the Law Commission does not intend to remove the signature requirement together with that of attestation if attestation is removed. If the requirement to sign is retained but attestation removed, a clarification of the definition of signature may be required. It has been seen that the requirement that a *testator* signs and by his signature intends to give effect to the will are cumulative. If a witness is required only to sign, there is the risk that Messrs Hogwood and Gordon's participation in *Payne* would have been valid even if they had no idea (contrary to the actual facts) that they were engaged in the process of ensuring that the deceased's signature was authentic, which is the very purpose of the requirement and is particularly important in the context of a vulnerable testator. Cooper accepts this possibility of over-validity, but argues that "a statutory reform requiring the witness merely to sign would not lead to an abolition of the requirement that the witness possess the requisite mental state", since the witness is expressly referred to as a witness.[82] But it is not clear what is to be gained from potentially opening the door to questions about how much a witness needs to have turned his mind to the matter. Cooper supports his view by analogising with the fact that "[t]he very requirement that the testator sign the will is subject to an implied requirement that the testator possesses an intention to execute the will", but of course that intention is an *express* (albeit apparently separate) feature of the Act by virtue of the requirement that by his signature the testator intends to give effect to the will,[83] and the Commission has not provisionally recommended *its* removal. If the broadly equivalent express reference to attestation is removed, that mental element (so key to the acceptance of the attestation process in *Payne*) could be weakened, particularly in circumstances where a form such as the one used by the deceased is utilised in preference to a professionally drawn will. It should also be noted that this limited mental element of intending to vouch for the authenticity of the execution is important whether or not it is thought necessary that the witness should know he is observing the signing of a will per se.

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[80] Wills Act 1837, s. 9(d)(ii).

[81] C.P. 231, Consultation Question 24.

[82] Cooper, "Attestation", p.26.

[83] See Sloan, *Borkowski's Law of Succession*, pp.115-117 for discussion.

If the Commission proceeds with the removal of attestation, it will also have to think carefully about the impact on presumptions. While the burden of proof in *Payne* was initially on Kim as propounder of the 1998 will,[84] with the judge convinced that it remained there and unconvinced that she had discharged it, the implication from the Court of Appeal seems to be that it had shifted on the basis that the will appeared to be validly executed, as evidenced *inter alia* by an attestation clause. Although the Law Commission emphasised that "[a] presumption of due execution is still applied where the will is informal and contains no attestation clause, as long as there is no evidence that the will has not been duly executed",[85] and it is true that "no form of attestation shall be necessary", there is a risk that attestation clauses, and therefore potentially the presumption of due execution, will become less frequent if the statute makes no reference to attestation, with profound implications for what Henderson LJ termed the "strong public interest in valid testamentary dispositions being upheld". Under the Non-Contentious Probate Rules, significantly, affidavit evidence is required to establish due execution before granting probate in common form "where a will contains no attestation clause or the attestation clause is insufficient".[86]

In an overall sense, while the implications of *Payne* for the future of the "attest and sign" requirement are not necessarily clear-cut, it arguably lends weight to the Commission's provisionally proposed reformulation of attestation but militates against the alternatively proposed deletion of attestation.

Conclusion

The result in *Payne* is highly supportable. There were apparently cogent reasons to be suspicious about the 2012 will. But while the presence of a beneficiary such as Kate in the room while a will is being executed is not ideal, there was no strong reason of policy to hold the 1998 will invalid simply because the witnesses wrote their names in block capitals provided they did so with an intention to attest. This is particularly true in light of the flexibility about the nature of signatures generally shown by the judiciary, albeit that Henderson LJ did not directly consider that flexibility, and the fact that what the witnesses' actions could thus be brought within existing understandings of section 9's requirements.

[84] Sloan, [2017] Conv. 440, 441-2.

[85] C.P. 231 at [5.12], citing *Salmon v Williams-Reid* [2010] EWHC 1315 (Ch).

[86] Non-Contentious Probate Rules 1987/2024, r. 12.

The Court of Appeal was justified in overturning a first instance judgment that, with respect to Judge Faber, was not apparently wholly coherent or procedurally sound.

It remains to be seen in how many more reported cases the current "attest and sign" requirement will be applied. The view taken in this note is that a reformulation of attestation would be preferable to its removal, whatever the difficulties relating to its definition and even though the Uniform Probate Code (for example) does not require attestation as such on its face. The reason why a witness is signing the will, i.e. that he is intending to vouch for the authenticity of the execution, should be clear if the requirement is properly to fulfil the evidentiary and anti-fraud functions of formalities.

As a final point, the Commission's provisional recommendation of a "dispensing power", meaning that a will could in particular circumstances be admitted without full formality compliance, obviously has the potential profoundly to reduce the effect of any change to the default formality requirements.[87] It could be argued that if a retained notion of "attestation" did ever jeopardise the validity of a propounded will, the effect could be ameliorated with a dispensing power such that abolition is even more undesirable. In any event, it seems as though section 9 of the Wills Act 1837 could remain unreformed for some time to come, in light of the fact that, at the time of writing, "[t]he timetable for the wills project is being reviewed as the Government has asked the Commission to consider the law relating to how and where couples can be married".[88]

[87] C.P. 231 at [5.81]-[5.105]. See B. Sloan, "The English Law Commission on Electronic Wills" in W. Pintens and C. Declerck (eds), *Patrimonium 2017* (Bruges: die Kieure, 2017) and J. Brook, "Succession: to dispense or not to dispense? A comparison of dispensing powers and their judicial application" [2018] P.C.B. 205 and [2019] P.C.B. 9 and 50 for discussion.

[88] Law Commission, "Wills", *https://www.lawcom.gov.uk/project/wills/* [Accessed 14 April 2019].