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Will Formalities during the Pandemic: A Comparative Study of Malaysia and Selected Jurisdictions

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Abstract: Most countries around the world have entered the endemic stage of the novel coronavirus after 2 years of battling with the soaring rise of infections among the people. As of 1 April 2022, Malaysia, a country which has one of the highest rates of infection per capita in Southeast Asia, has entered the endemic phase of Covid-19. For a will to be valid in Malaysia, the formalities in the Wills Act 1959 (Revised 1998) must be strictly conformed to. A slight deviation from the formalities would render invalid the will that conveys the testamentary intention of the testator. The Covid-19 pandemic has raised several issues including issue of mobility, making wills difficult to be validly executed in accordance with the Wills Act 1959. Even though Malaysia has moved on to the endemic stage, the pandemic of Covid-19 has clearly shown the inadequacy of Wills Act 1959 to serve in the changed and ever-changing world. This paper adopts the doctrinal legal research method by analysing the existing laws in Malaysia and comparing with other jurisdictions such as Australia, United Kingdom, and the United States of America, in considering the necessary reforms in order to uphold the testamentary intention of the will despite the need for formalities, to cope with future unprecedented events. This includes allowing remote execution, adopting electronic wills and electronic signatures in the execution of wills, and introducing dispensing powers. Reforms to the Wills Act are necessary due to the challenges encountered in the new norm and also in light of the rapid technological advancements that the world has undergone.

Keywords: COVID-19; Testamentary; Execution of Wills; Formalities; Reforms

1. Introduction

Following the outbreak of the coronavirus cases (Covid-19) since early 2020, many countries have to implement lockdowns or what is known as the Movement Control Order (MCO) in Malaysia, to reduce social contacts and thus, limiting the spread of this infectious disease. Even though the order has been gradually relaxed over time, people, in general, are still taking precautions especially since the Omicron BA.5 sub-variant cases have been detected and a new wave of Covid-19 is expected to hit the country.[1]

[1] Hana Naz Harun. "Malaysia Entering New Covid-19 Wave as Omicron BA.5 Variant Hits.", New Straits Times, July 8, 2022, https://www.nst.com.my/news/nation/2022/07/811841/malaysia-entering-new-covid-19-wave-omicron-ba5-variant-hits.

This unprecedented phenomenon has posed challenges to law and legal practices especially the process of preparing and executing wills which requires the strict compliance of formalities, particularly the physical presence of the testator and the witnesses. Will writing is an important aspect in almost everyone's life. It signifies that a person has a say on how his or her estate will be distributed after his or her demise.

Section 5 of the Malaysian Wills Act 1959 (Wills Act)[2] requires the wills to be in writing, signed by the testator (or by some other persons in the presence and by the direction of the testator), be witnessed by at least two persons who must be present at the same time; and the witnesses must sign as witnesses in the presence of the testator. There are four traditional functions of formalities in relation to wills, namely, the "cautionary" function; the protective function; the evidentiary function; and the channelling function.[3] It is undeniable that formalities in the preparation of wills under section 5 do serve important purposes.

However, there is a high probability of inadvertent non-compliance to formalities as laid down in the legislation rendering invalid the documents that were obviously meant to be wills that conveyed the testamentary wishes of the deceased.[4] This Covid-19 pandemic has raised the awareness of people for estate planning as anyone might face sickness and death anytime.[5] There might be challenges in wills writing especially the formalities compliance that have to be considered. The requirements of the formalities in the Wills Act create unprecedented obstacles to a valid will in the presence of MCO and strict SOPs. Review of the strict rules under section 5 is necessary to cater to the pandemic and post-pandemic situation.

It is remarkable how promptly legislators in some jurisdictions, for example in the UK, modified will-making regulations to meet the needs of the pandemic period, given the longevity of conventional wills formalities. A thorough literature review was done, and significant findings showed that there were numerous articles from other nations suggesting to their lawmakers to adopt the changes made to the United Kingdom's Wills

[2] Act 346 (Revised 1988).

[3] John H. Langbein. "Substantial Compliance with The Wills Act", Harvard Law Review 88, no. 3 (1975): 489, doi:10.2307/1340322.

[4] John H. Langbein. "Substantial Compliance with The Wills Act", Harvard Law Review 88, no. 3 (1975): 489, doi:10.2307/1340322 Nicola Peart. Review of Testamentary Formalities in Australia and New Zealand. In Comparative Succession Law: Volume I: Testamentary Formalities, 329–355. Comparative Succession Law (2012). doi: 10.1093/acprof:oso/9780199696802.003.0014.

[5] As of 18th of August 2022, Malaysia recorded a total death toll of 36,117. Following the escalation of coronavirus death, a surge of in the will-making can be seen to prepare for the uncertainties during the pandemic: "COVIDNOW In Malaysia", COVIDNOW, 2022, https://covidnow.moh.gov.my/deaths.

Act 1837, [6] the dispensing power of Australia[7] and also the electronic wills legislation and harmless error doctrine in United States of America.[8] However, there were only limited

[6] Barbara Rich, "Succession: Honora Jenkins and her legacy: coronavirus and the validity of wills in England and Wales", Private Client Business, no. 4 (2020): 182-188; John Kerrigan, "Electronic and digital wills," Scots Law Times, no. 7, (2021): 25-28; Marko Stilinovic, "Testamentary Dispositions in the Context of Global Pandemic," EU and Comparative Law Issues and Challenges Series 5, no. 1 (2021): 501-528; Naman Anand; Dikshi Arora, "Where There Is a Will, There Is No Way: COVID-19 and a Case for the Recognition of E-Wills in India and Other Common Law Jurisdictions," ILSA Journal of International and Comparative Law 27, no. 1 (Fall 2020): 77-94; Richard Hedlund, "Digital wills as the future of Anglo-American succession law," Conveyancer and Property Lawyer, no. 3 (2020): 230-245; John H. Langbein. "Substantial Compliance with The Wills Act", Harvard Law Review 88, no. 3 (1975): 489, doi:10.2307/1340322.

[7] J. W. A. Biemans, "Will Requirements for Last Wills Remain as They Are? The 'Physical Presence Requirement' of Witnesses and Notaries in the Light of the COVID-19 Interim Measures and the EU Freedom of (Notarial) Services," Utrecht Law Review 17, no. 3 (2021): 51-64; Bridget J. Crawford; Kelly Purser; Tina Cockburn, "Wills Formalities in a Post-Pandemic World: A Research Agenda," University of Chicago Legal Forum 2021 (2021): 93-126; John Kerrigan, "Electronic and digital wills," Scots Law Times, no. 7, (2021): 25-28; J. W. A. Biemans, "Will Requirements for Last Wills Remain as They Are? The 'Physical Presence Requirement' of Witnesses and Notaries in the Light of the COVID-19 Interim Measures and the EU Freedom of (Notarial) Services," Utrecht Law Review 17, no. 3 (2021): 51-64; Marko Stilinovic, "Testamentary Dispositions in the Context of Global Pandemic," EU and Comparative Law Issues and Challenges Series 5, no. 1 (2021): 501-528; Naman Anand; Dikshi Arora, "Where There Is a Will, There Is No Way: COVID-19 and a Case for the Recognition of E-Wills in India and Other Common Law Jurisdictions," ILSA Journal of International and Comparative Law 27, no. 1 (Fall 2020): 77-94; Kelly Purser; Tina Cockburn; Bridget J. Crawford, "Wills Formalities beyond COVID-19: An Australian-United States Perspective," University of New South Wales Law Journal Forum 2020 (2020): 1-14.

[8] Alexander James Anselment, "New York Executive Order 202.14: A Temporary Fix to a Temporary Problem, or a Framework to Change Estate Planning Document Execution? " Albany Law Journal of Science & Technology 32, no. 1 (2021-2022): 99-vi; J. W. A. Biemans, "Will Requirements for Last Wills Remain as They Are? The 'Physical Presence Requirement' of Witnesses and Notaries in the Light of the COVID-19 Interim Measures and the EU Freedom of (Notarial) Services," Utrecht Law Review 17, no. 3 (2021): 51-64; Birney Brayton; Krystle Somers, "Let the Author Do the Talking: Why Wyoming's Holographic Will Statute Does Not Currently Give the Testator Final Say," Wyoming Law Review 21, no. 2 (2021): 371-410; Callie Moss Shearer, "Strict Adherence to the Wills Act Formalities in Alabama: When Did Dead Hand Control Die?" Journal of the Legal Profession 46, no. 2 (2022): 341-358; Constantin Willems, "Managing Crises by Way of Ritualization and Exception in Roman Testamentary Succession Law," Roman Legal Tradition 18 (2022): 1-22; Bridget J. Crawford; Kelly Purser; Tina Cockburn, "Wills Formalities in a Post-Pandemic World: A Research Agenda," University of Chicago Legal Forum 2021 (2021): 93-126; Crystal L. Collins, "The Future of Electronic Wills in Rhode Island after COVID-19," Roger Williams University Law Review 27, no. 3 (2022): 423-447; Jacob C. Wilson, "Electronic Wills: Why Would Georgia Choose to Delay the Inevitable?," Mercer Law Review 73, no. 1 (Fall 2021): 337-364; Jessie Daniel Rankin, "Socially Distant Signing: Why Georgia Should Adopt Remote Will Execution in the Post-COVID World," Georgia Law Review 56, no. 1 (2021): 391-422; Olivia Visconti, "The Wills of COVID-19: The Technological Push for Change in New York Trusts and Estates Law," St. John's Law Review 95, no. 3 (2021): 951-976; Kelly Purser; Tina Cockburn; Bridget J. Crawford, "Wills Formalities beyond COVID-19: An Australian-United States Perspective," University of New South Wales Law Journal Forum 2020 (2020): 1-14; Richard F. Storrow, "Legacies of a Pandemic: Remote Attestation and Electronic Wills," Mitchell Hamline Law Review 48, no. 4 (2022): 826-862; Richard Hedlund, "Digital wills as the future of Anglo-American succession law," Conveyancer and Property Lawyer, no. 3 (2020): 230-245; Ronald J. Scalise Jr., "Will Formalities in Louisiana: Yesterday, Today, and Tomorrow," Louisiana Law Review 80, no. 4 (Summer 2020): 1331-1436; Spencer Riegelman, "Conveying Estate Planning to the 21st Century: Adoption of Electronic Wills Legislation," University of St. Thomas Law Journal 18, no. 1 (Spring 2022): 208-228; Francesca Torres, "Electronic Wills: COVID-19 Relief or Inevitable Trouble for California?," University of the Pacific Law Review 52, no. 2 (2021): 435-456.

articles in Malaysia suggesting for such reforms from other jurisdictions to be adopted in Malaysia with regards to the issue of strict formalities. To illustrate this, Venetia Wong in the article of "Law on Witnessing Signatures Via Video Conferencing in the New Norm"[9] only focused on the reforms on virtual witnessing while the authors in the article of "Will Execution during COVID-19: Legal Challenges in Malaysia"[10] covered solutions like using remote communication technology and digital wills. In another article of a Will's Voyage into the Digital Era,[11] the author made several jurisdiction comparisons but focused on the dispensing the strict formalities using digital and electronic method. Our research analyses different methods adopted by different jurisdictions and provided an all-rounded reforms that Malaysia and other countries or nations that are still adhering to strict formalities to adopt.

While strict formalities may seem like a good idea, they are unlikely to work out fully in reality. This scenario is mirrored not just in Malaysia, but also in other nations where legal formalities surrounding the execution of a valid will are still strictly adhered to. To better serve the testator's purpose and guarantee the testator's objectives are carried out, the approaches employed in other countries may be utilised as a model. Covid-19 or no Covid-19, the law must consider the synthesis of technological progress. Since the fourth industrial revolution is well underway, digital transformation is urgently required.[12] This research encourages us to view COVID-19 as the catalyst to move on to a new era in which strict adherence to legal requirements need not be the major culprit to invalid a will that would otherwise have been valid.

The research of reviewing strict formalities in Malaysia is significant as it demonstrates that a simple diversion from the requirements as laid down under the Wills Act would tarnish the intention of the testator. In addition, the issue of strict formalities is not only reflected in Malaysia but also in other countries such as Italy. Like Malaysia, for a will to be valid, rigid formalities as laid down in the Civil Code ought to be followed.[13] Considering this, a clear and concise discussion has been made by comparing the laws in jurisdictions such as the United Kingdom, Australia, and the United States of America. A reference is made to the United Kingdom because the Wills Act is modelled on the United Kingdom Wills Act 1837 (UK Wills Act 1837).[14] Despite several amendments made to the UK Wills Act 1837 in previous years, the Malaysian Parliament has not made amendments to the Wills Act.

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[9] Venetia Wong Shin Yee, "Law on Witnessing Signatures Via Video Conferencing In the New Norm," Legal Network Series, no.1 (2021): cxvii.

[10] Nor Azlina Mohd Noor and Ahmad Shamsul Abd Aziz. "Will Execution During Covid-19: Legal Challenges In Malaysia", International Journal Of Law, Government And Communication 6, no. 22 (2021): 206-214, doi:10.35631/ijlgc.6220020.

[11] Nishantel Kaur a/p Balvinder Singh. "A Will's Voyage into the Digital Era", Malayan Law Journal, (2022): 253.

[12] *Supra* n 9.

[13] Irma Sasso. "Will Formalities in the Digital Age: Some Comparative Remarks," Italian Law Journal 4, no. 1 (2018): 169-194, Law Journal Library.

[14] 1 Vict. C 26.

On the other hand, Australia initially developed their legal framework based on the United Kingdom,[15] hence some similarities with the laws that we have in Malaysia. However, Australia has somehow strayed away from the strict compliance of following formalities under several circumstances which will be discussed below and inspires us to ponder on whether the Malaysian laws on formalities can be reformed based on the Australian laws.

This paper further makes references to the United States of America because the United States of America was the first country in the world to adopt electronic wills legislation before the onset of the Covid-19 pandemic.[16] This is particularly another area of reform Malaysia can consider in the will-making process so that distance would no longer be an obstacle that may fail a will.[17] Hence, this article focuses on the following research questions; whether strict compliance of formalities in the Wills Act ought to defeat the intention of the testator in times of an unprecedented event or circumstances and if so, what are the other ways that the Wills Act can be reformed by referring to the reforms made by other jurisdictions to adapt to the new norms?

2. Method

The research methodology adopted is doctrinal legal research in which analysis of the laws of different jurisdictions is done to determine the needs to alleviate the strict formalities in executing a valid will in Malaysia and other reforms for a better execution of valid wills.

3. Characteristics of the Malaysian Wills Act 1959

3.1. The Rigidity of Formalities

The Wills Act is applicable to Peninsular Malaysia,[18] while Sabah has her own Sabah Wills Ordinance.[19] Both statutes are similar in nature, and both do not apply to Muslims.[20] In the case of Sarawak, the applicable law is the UK Wills Act 1837.[21] The minimum age to write a will is 18 years old under the Wills Act. However, in Sabah, the minimum age to write a will is 21 years old in accordance with the Sabah Wills Ordinance.[22]

There are two limbs under section 5 to be fulfilled. The first limb is that wills must be in written form, and the second limb is that wills must be executed in the manner prescribed under section 5(2). It must be signed by the testator or by some other person and the

[15] Alexander Cuthbert Castles. "The Reception and Status of English Law in Australia", Adelaide Law Review, 1963; 2(1): 1-32.

[16] Ronald Joseph Scalise Jr., "Will Formalities in Louisiana: Yesterday, Today, and Tomorrow," Louisiana Law Review 80, no. 4 (Summer 2020): 1331-1436.

[17] Nishantel Kaur a/p Balvinder Singh. "A Will's Voyage into the Digital Era", Malayan Law Journal, (2022): 253.

[18] Wills Act, s. 1(1).

[19] Cap 158.

[20] Wills Act, s. 2(2); Sabah Wills Ordinance, s. 1(2).

[21] *Re Ee Tiang Lok* (1947) SCR 1.

[22] Sabah Wills Ordinance, s. 4.

signature must be made or acknowledged by the testator in the presence of at least two witnesses.[23]

Section 5 lays down a chronological order of events that must be adhered to. The testator must first finish signing or acknowledging his signature in the presence of at least two witnesses simultaneously. If a witness were to sign the will before the testator has completed the first stage, the will is invalid.[24]

Section 5(2) of Wills Act also allows acknowledgement of the testator's signature.[25] Hence, if the testator does not sign in the presence of the witnesses, the testator can acknowledge the signature to his will in their presence. In *Hudson v Parker*,[26] the testator must show that he accepts or recognises the signature as his own.

Section 5 requires that the testator's signature be made in the mental and physical presence of at least two witnesses. The principle laid down in the case of *Hudson v Parker*[27] is that the witnesses should see and be conscious of the act done by the testator. For mental presence, the witnesses must be conscious of the act done. For example, in *Brown v Skirrow*,[28] witnesses need only be conscious that there is an act of writing by the testator. And for physical presence, the witnesses must see or be able to see the act of signing.

The strict imposition of the MCO, may not pose much problem for the mental presence test. However, there may be difficulties in satisfying the physical presence test. As required by formalities, physical presence means that the witnesses must have either seen the act of signing by the testator, or they must have the opportunity to see the testator signing. In the case of *Kevin Peter Schmider v Nadja Geb Schmider Poignee & Anor*,[29] the witness witnessed the signing of the will in the absence of the testator and thus the court held that this does not meet the requirement of section 5 of the Wills Act. Another formality under section 5(2) is that two or more witnesses must be present at the same time when the testator signs or acknowledges the signature in his will. In the case of *Re Groffman*,[30] it was held that the will was not valid because simultaneous presence of witnesses was lacking.

After the testator finishes signing or acknowledging the signature to his will, the witnesses must subscribe to the will, meaning to attest and to sign. In the case of *Goods of Sperling*,[31] the witness must make a mark intended to be his signature. However, the witness must sign personally. In the case of *Goods of Lewis*,[32] a witness is not allowed to authorise others to sign on his behalf, unlike the position of the testator. Section 5

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23 Wills Act, s. 5.

24 *Wyatt v Berry* [1893] P 5, 68 LT 416; *Re Davies* [1893] P 5, 68 LT 416.

25 The testator's signature includes the signature by some other person (on his behalf) in his presence and by his direction: Wills Act, s. 5(2).

26 *Hudson v Parker* (1844) 1 Rob Eccl 14, 8 Jur 786, 163 ER 948, 3 Notes of Cases 236.

27 *Ibid.*

28 *Brown v Skirrow* [1902] P 3, 85 LT 645.

29 *Kevin Peter Schmider v Nadja Geb Schmider Poignee & Anor* [2019] 12 MLJ 248.

30 *Re Groffman* [1969] 2 All ER 108, [1969] 1 WLR 733.

31 *Goods of Sperling* (1863) 27 JP 777, 9 LT 348.

32 *Goods of Lewis* (1850) 163 ER 1270.

requires the testator to be mentally and physically present, similar to the signing in the presence of witnesses. The testator must be conscious of the act done by the witnesses. Thus, in the case of *Right v Price*,[33] the will fails if the testator loses consciousness before the witnesses completed their signing of the will.

Besides mental presence, a testator must also be physically present. Testator must have seen or had the opportunity of seeing the witnesses signing the will. In the case of *Norton v Bazett*,[34] the opportunity to see means that the testator must have been able to see, if he had chosen to look from the actual position he was in when the attestation occurred. As for the simultaneous presence of witnesses when the witnesses are signing, the Wills Act is silent, thus the will is valid as long as it was signed in front of the testator.[35]

The formalities listed under section 5 of the Wills Act (the compliance of physical and mental presence of both the testator and witnesses) are intended to protect the last will of the deceased from fraud or undue influence.[36] However, the physical gathering of the testator and the witnesses at the same place and time to execute a valid will may not be feasible during the pandemic where there are restrictions to movement or is undesirable due to concerns of physical contact. There are some aspects of the Wills Act that are too rigid and harsh especially during the pandemic that should be reformed.

3.2. Judges have no dispensing power

For a will to be valid, it must adhere to the technical or formal statutory requirements of section 5 of Wills Act. The rigid application of the need for formalities may thwart the intentions of the testator as even a small or minor harmless error can invalidate a will. The English case of *Re Groffman*[37] is a good example to illustrate the effect of complying to the strict formalities. In that case, the court found that the testator's signature was not acknowledged to both witnesses present at the same time. Hence, the will did not comply with the formalities that were set in the UK Wills Act 1837. Even though the judge was satisfied that the document was meant to be the testator's last will, His Lordship nevertheless proceeded to invalidate the will. In this instance, while formalities under the UK Wills Act 1837 are intended to carry out the intention of the testator, they too carry the power to defeat such intention.

As established in the Malaysian case of *Khaw Cheng Bok & Ors v Khaw Cheng Poon*,[38] formalities must be complied with for a will to be valid. The will must be signed by the testator himself or signed by a person who was authorised by the testator, and it should be signed in the presence of the testator. The signature of the testator must be signed or

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[33] *Right v Price* (1779) 1 Doug. K.B 241.

[34] *Norton v Bazett* (1856) Dea & Sw 259, 3 Jur NS 1084, 4 WR 830, 164 ER 569, 27 LTOS 289.

[35] *Dr. Shanmuganathan (Suing by his Attorney Dr. A. Puraviappan) v Periasamy s/o Sithambaram Pillai [1994] 2 CLJ 225.*

[36] *Tho Yow Pew & Anor v Chua Kooi Hean* [2001] 5 MLJ 578. The deceased's typewritten will had failed as there were elements of fraud.; *Hall v Hall* [1868] LR1 P&D 481, where the deceased's will failed as the testamentary intentions were not clearly expressed in the will.

[37] *Supra,* n 30.

[38] *Khaw Cheng Bok & Ors v Khaw Cheng Poon* [2005] 3 CLJ 753.

affixed in the presence of two witnesses at the same time; and the due execution of the will must be made without doubt.

In Malaysia, the strict formalities are based on four justifications. Firstly, evidentiary function. This is to provide the court evidence that the testator intended the document to be his last and final will. Secondly, channelling function. The formalities serve as a purpose for the testator to enable the personal representative, courts, and other relevant parties to recognise that he intended the document to be his last and final will. Thirdly, cautionary function. It guarantees that the testator takes the procedure seriously and knows that the document is final and binding. Fourthly, protective function. It helps to protect the testator against undue influence, fraud, and coercion.

John Langbein further explained that formalities serve an objective but are not necessary in themselves in creating a valid will.[39] However, the position in Malaysia is that if formalities are not complied with, the will would be deemed invalid. Hence, judges in Malaysia have no dispensing power.

4. Challenges Faced Due to the Covid-19 Pandemic

4.1. Restricted From Getting Professional Advice on Formalities

As we know, the Covid-19 pandemic has increased public awareness on the importance of having a will to manage or distribute their wealth upon death.[40] Unfortunately, it may lead to an increase in the number of people making homemade or 'DIY' wills which might lead to disputes later. People may be discouraged to seek professional assistance to make wills since they will need social contact with people which may put themselves at risk. This is a natural reaction during the Covid-19 pandemic, and it may continue post-pandemic as more people are considering managing their affairs, in preparation for the worst-case scenario.

The court in the case of *Chenna Gounder a/l Kandasamy v Angamah a/p Sunappan*[41] reaffirmed that there is no legal requirement that a will must be prepared, or even witnessed by lawyers. However, laymen might not correctly interpret the formalities required under section 5, for example the requirement for the chronological order of events. They might not know that witnesses can only sign after the testator has completed the first stage. As a result, the will shall be invalid like in the case of *Wyatt v Berry*[42] and *Re Davies*.[43] Formalities might defeat the will.

Moreover, the witnesses must make sure that they are attesting the correct signature that is the testator's operative signature to the will. If the witnesses attest to the wrong

[39] John H. Langbein. "Substantial Compliance With The Wills Act", Harvard Law Review 88, no. 3 (1975): 489, doi:10.2307/1340322.

[40] As of 18th of August 2022, Malaysia recorded a total death toll of 36,117. Following the escalation of coronavirus death, a surge of in the will-making can be seen to prepare for the uncertainties during the pandemic: "COVIDNOW In Malaysia", COVIDNOW, 2022, https://covidnow.moh.gov.my/deaths.

[41] *Chenna Gounder a/l Kandasamy v Angamah a/p Sunappan* [2017] 10 MLJ 387.

[42] *Wyatt v Berry* [1893] P 5, 68 LT 416.

[43] *Re Davies* [1892] 3 Ch 63, [1891-4] All ER Rep 498, 67 LT 548.

signature, even though the signatures are on the same document, the will would be invalid as decided in the case of *Estate of Bercovitz.*[44] The witnesses attested to the correct document but attested on the wrong signature. The will was deemed invalid.[45]

The formalities are also harsh on the position of the signature. The testator cannot sign above the disposition clauses in the will. This is not friendly to laypeople, and it will defeat the last wish of the deceased testator. Besides, according to the case of *Re Groffman*, a testator must sign or acknowledge his signature in the presence of two or more witnesses who must be present at the same time and failing to do so will defeat the will.[46] This is indeed unfavourable especially during the Covid-19 pandemic, as it will be difficult for the testator to get both witnesses together. Thus, it is better for the testator to have a professional to guide them in executing the will. Lawyers can determine and evaluate the capacity and the intention of the testator in making the will and the lawyers will also exclude any possibility of suspicious circumstances, for example the beneficiary is the one who prepares the will.

4.2. Physically Present

The word "presence" under section 5 of Wills Act includes both mental presence and physical presence of the testator and witnesses. Problems may not arise as far as the mental presence of the testator or witnesses is concerned in relation to the pandemic. Problems with presence during the pandemic may however arise in satisfying the requirements of the physical presence.

During the pandemic, people are either not allowed or not encouraged to travel or to leave the house and gatherings are prohibited. The restrictions promoted by the government to curb the pandemic has made it impossible for a will to be legally executed due to the requirement of "physical presence" under section 5 of the Wills Act. In the case of *Tribe v Tribe*,[47] the court held that there must be physical presence whereby the testator or the witnesses must either see or was able to see the act of signing. Otherwise, the will is invalid even though there is no undue influence nor fraud.

The court in *Brown v Skirrow*[48] held that the witnesses must have a clear line of sight and presence must mean 'visual presence'. However, in the case of *Casson v Dade*,[49] the court ruled that if the circumstances were sufficient to meet the requirement for witnessing, there will be a physical presence and thus it is a valid will. This case was referred to by the judge in *Re Clarke*[50] when a lasting power of attorney was ruled to have been validly executed where the donor was in a room and the witnesses were in a different room that was divided by a glass door. Also, in the case of *Couser v Couser*,[51] the court is of the

[44] *Estate of Bercovitz* [1962] 1 All ER 552.
[45] *Ibid.*
[46] *Supra,* n 30.
[47] *Tribe v Tribe* (1849) 1 Rob Ecc 775; 163 ER 1219.
[48] *Brown v Skirrow* [1902] P 3.
[49] *Casson v Dade* (1781) 21 ER 399.
[50] *Re Clarke* (2011) COP 19/9/11.
[51] *Couser v Couser* [1996] 1 W.L.R 1301.

opinion that the Wills Act 1837 requires that there must be at least possible visual contact.

The main aim of the principles in these cases are to ensure that the witnesses can ascertain that the document is the true will of the testator. Also, the line-of-sight test is always regarded as a requirement for there to be physical presence.[52] However, in Malaysia, the court in the case of *Sawinder Kaur Fauja Singh v Charnjit Singh Thakar Singh*[53] ruled that section 5(2) Wills Act is equivocal in its terms and the operative words are clearly of a peremptory nature. This means that only visual presence as in physical presence and not through any screen will be considered as physical presence. For this, Malaysia is still not ready to include video-conferencing for executing wills.

4.3. Hard to Execute a Valid Will

The formalities as stated in section 5 of the Wills Act make it difficult for people who have contracted Covid-19, or people who are currently undergoing lockdown or quarantine to comply with the legal requirements. Thus, in accordance with the Wills Act, it is not possible to execute an electronic will or to execute the will electronically.

As section 5(1) of the Will Act states that the will must be in writing, the idea of an electronic will may not be acceptable from the beginning. Although section 3 of the Interpretation Acts 1948 and 1967[54] stipulates that "writing" includes electronic storage, it should be noted that the Electronic Commerce Act 2006[55] which governs the commerce transactions using electronic means has expressly excluded its application to the creation of wills and codicils. This indicates that Malaysia is not ready for such reforms and is hesitant in accepting electronic signatures on a will.

With reference to the Circular No. 084/2020 dated 1 April 2020, the Bar Council Conveyancing Practice Committee has mentioned that the law on witnessing a signature through video conferencing is unclear, and there are no guidelines on whether such witnessing is permissible. Hence, the Bar Council has taken the view that video conferencing should not be used to witness signatures.[56] With all these, it is safe to say that electronic wills and electronic signatures in wills are not applicable here in Malaysia, even though the urge of having them is stronger than ever in times of Covid-19. To add on, the Singapore Court in the case of *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd*[57] held that the Singapore Wills Act 1966,[58] which is in *pari materia* with the provision under the Malaysian Wills Act, also precludes electronic wills. By taking into consideration the movement restriction, it is hard to execute a valid will when Malaysia is still bound by the traditional ways of executing a will.

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[52] Nor Azlina Mohd Noor and Ahmad Shamsul Abd Aziz. "Will Execution During Covid-19: Legal Challenges In Malaysia", International Journal Of Law, Government And Communication 6, no. 22 (2021): 206-214, doi:10.35631/ijlgc.6220020.

[53] *Sawinder Kaur Fauja Singh v Charnjit Singh Thakar Singh* [1998] 1 CLJ Supp 402.

[54] Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989), Act 388.

[55] Act 658.

[56] "Conveyancing Transactions During the MCO Period", April 1, 2020, https://www.malaysianbar.org.my/cms/upload_files/document/Circular%20No%20084-2020.pdf.

[57] *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] SGHC 58.

[58] Chapter 352.

5. Reforms in Other Jurisdictions

This part of discussion will focus on selected jurisdictions such as the United Kingdom, Australia, and the United States of America to see how they handle the formalities for a valid will during this pandemic.

5.1. United Kingdom

In view of the new norms, and to overcome the practical problems in any pandemic situation that may require restriction of movement, the United Kingdom made reforms to section 9 of the UK Wills Act 1837. On 28 of September 2020, the Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 ("the UK Order 2020") came into force. It amended section 9 of the UK Wills Act 1837, particularly on its definition of "presence", by adding the following:

> *"…in relation to wills made on or after 31 January 2020 and on or before 31 January 2022 "presence" includes presence by means of videoconference or other visual transmission."*[59]

By amending this, the testator may now execute a will or codicil in front of two or more witnesses via video conferencing services such as Zoom, Google Meet, WhatsApp Video Call, and others. Similarly, witnesses can also attest the will remotely through the audio-visual platforms.

The UK Order 2020 only sanctions the video witnessing of wills.[60] This requires at least two separate video conferences. First, the witnessing of the testator signing the will. Second, the attestation of the will by witnesses. This relaxation of the requirement for "presence" is limited to witnessing a will and not applicable to the people authorised by the testator to sign the will in the presence of the testator. This limitation is done consciously and intentionally to prevent the possibility of fraud that may arise if the will was not in the hands of the testator.

This UK Order 2020 applies retrospectively since it is backdated to 31 January 2020, whereby wills executed as early as January 2020 through video conferencing would be considered to fulfil the requirements of physical presence. It also precisely shows the ways video conferencing may help to overcome the challenges faced during Covid-19.[61] However, it must be noted that this UK Order 2020 is not a permanent one since it will only be effective until 31 January 2024 for now. Moreover, this new definition of presence is limited to witnessing the will only and thus not applicable to situations where someone other than the testator signs the will in the testator's presence and by their direction which is under section 9(1)(a) of the UK Wills Act 1873.[62]

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[59] Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020, 2020 No.952.

[60] Nicholas Bevan. "The Video Will Execution Regime: A Half Measure?", New Law Journal, October 27, 2020, https://www.newlawjournal.co.uk/content/the-video-will-execution-regime-a-half-measure-.

[61] "STEP Briefing Note: Execution Of Wills Using Video Witnessing (E&W)", STEP, July 25, 2021, https://www.step.org/sites/default/files/inline-files/Briefing%20note%20on%20execution%20of%20wills%20(E&W).pdf.

[62] "Explanatory Memorandum To The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020", The Law Society, 2020,

This new UK Order 2020 not only allows the usage of video conferencing facilities for the due execution of wills, but also other forms of 'visual transmission'. This is vague and ambiguous since what is included as 'visual transmission' can be ambiguous. The government of the United Kingdom issued a guideline to clarify that such relaxation will include videoconference and visual transmission is limited to Skype, Zoom, WhatsApp video call, FaceTime and other video calling services.[63] This clarification is vital as a precaution to stop any persons who may be creative and may argue that taking a photo or video of the act of witnessing can be considered as 'visual transmission', and thus there is physical presence.[64]

5.2. Australia

The provisions of allowing the Court to provide relief for failing to comply with formalities, usually known as "dispensing powers", exist in each Australian State and Territory.[65] The dispensing power was introduced before the outbreak of the Covid-19 pandemic. For example, in 1975, the Wills Act Amendment Act (SA), which modified section 12(2) of the Wills Act of 1936, was adopted in South Australia (SA). Under section 12(2) of the Wills Act 1936, if the evidence in the proceedings persuades the Court that the document was meant to be its final will, the Supreme Court may recognise a testament in which requirements in that Wills Act were not complied with.[66] As a result, as long as the lowered judicial standard of intent is fulfilled, the South Australian dispensing power may be utilised to remedy any deficiency.[67]

Similarly, to avoid the substantial concept of compliance, Queensland modified its section 18 of the Succession Act 1981 (QLD), in a system where courts may in certain instances dispense of formalities. For section 18 to be applied, the courts shall assess if an informal will is a document or part of it; purports to express the wills of the deceased; and has not been signed in conformity with Part 2 of the Succession Act 1981 (QLD). The informal will shall not be exercised.[68]

In addition, New South Wales has similarly modified section 8 of the Succession Act 2006 (NSW) to allow the Court to dispense with execution, alteration, and revocation.[69] Furthermore, section 10 of the Wills Act 2000 (NT) has also been modified in Northern Australia to provide the Court the authority to dispense with these formal criteria.[70]

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https://communities.lawsociety.org.uk/download?ac=93720.

[63] "Guidance On Making Wills Using Video-Conferencing". GOV.UK, July 25, 2020. https://www.gov.uk/guidance/guidance-on-making-wills-using-video-conferencing.

[64] Elisabeth Squires. "How Has COVID-19 Affected The Wills Act 1837?". Britton & Time Solicitors, October 20, 2020, https://brittontime.com/2020/10/20/how-has-covid-19-affected-the-wills-act-1837.

[65] Wills Act 1936 (South Australia) (No.2302), s. 12(2); Succession Act 1981 (Queensland) (Act 69 of 1981), s. 18; Wills Act 2000 (Northern Territory) (No.59 of 2000), s. 10; Succession Act 2006 (New South Wales) (No.80), s. 8.

[66] Wills Act 1936 (SA) (No.2302), s. 12(2).

[67] Nicola Peart. Review of Testamentary Formalities in Australia and New Zealand. In Comparative Succession Law: Volume I: Testamentary Formalities, 329–355. Comparative Succession Law (2012). doi: 10.1093/acprof:oso/9780199696802.003.0014.

[68] Succession Act 1981 (Queensland) (Act 69 of 1981), s. 18.

[69] Succession Act 2006 (New South Wales) (No.80), s. 8.

[70] Wills Act 2000 (Northern Territory) (No.59 of 2000), s. 10.

Hence, it can be seen from the above states that the courts can dispense with the strict formalities required under the Wills Act (of the respective States) if there is clear and convincing evidence for the remedy. According to the Law Commission, judicial examination of evidence to determine testamentary intention may provide greater protection than adherence to a specific form.[71]

In *Alan Yazbek v Ghosn Yazbek & Anor*,[72] the Supreme Court of New South Wales exercised its dispensing power under s 8 of the Succession Act and held that a Microsoft Word document created and stored on the deceased's laptop computer was the deceased's will. In a recent case in Queensland, an unsent text (SMS) message was found to constitute a valid will. In the case of *Re Nichol*,[73] the court ruled that the unsent text message constituted a 'document' and included the necessary intention.

The question will no doubt be as to how much of a dispensing power a judge should be able or allowed to exercise. Does it mean that judges can have dispensing powers in all given situations and can exercise this discretion under all circumstances? To answer the above questions, we refer to the guidance given by Powell JA in his series of questions as set out in the case of *Hatsatouris v Hatsatouris*,[74] to establish if the dispensing power can be used in an informal will.

There are 3 questions. Firstly, whether there is a document. Secondly, whether such a document contained the testator's intention. Thirdly, whether the court is satisfied with the evidence provided that the document was intended to be the testator's last will. If the court can answer these questions in the affirmative, the court may exercise its dispensing powers in upholding wills that were not properly executed in accordance with the formalities required. Furthermore, in response to the Covid-19 pandemic, Australian states and territories have responded in different ways. For instance, Queensland has adopted the Covid-19 Emergency Response Act 2020 (Queensland), which permits the remote witnessing of wills through audio-visual devices on a temporary basis.

Justice Legislation (Covid-19 Emergency Response - Wills and Enduring Document) Regulation 2020 (Queensland) provides rigorous criteria and process for the execution, alteration, revocation, and revival of a will. The Queensland Regulations had specified that only a specific group of people mentioned in the regulation are fit to become a witness.

Section 10(5) of the Succession Act 1981 (Queensland) is not applicable to wills executed under the Queensland Regulations. Section 10(5) of the said act states that witnesses need not know that the document that they have attested and signed is a will.[75] On the other hand, the Queensland Regulation requires that witnesses take reasonable efforts to ascertain the identification of the testator and that the testator's name corresponds to the name of the testator stated on the document.[76]

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[71] "Making A Will", Law Commission, 2017, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/empirical_research_090610.pdf.

[72] *Alan Yazbek v Ghosn Yazbek & Anor* [2012] NSW SC 594.

[73] *Re Nichol* [2017] QSC 220.

[74] *Hatsatouris v Hatsatouris* [2001] NSWCA 408.

[75] Succession Act 1981 (Queensland) (No.69 of 1981), s. 10(5).

[76] Justice Legislation (Covid-19) Emergency Response – Wills and Enduring Document) Regulation 2020

Justice Legislation (Covid-19 Emergency Response - Wills and Enduring Document) Regulations 2020 (Queensland) now comes under a new name of Justice Legislation (Covid-19 Emergency Response - Documents and Oath) Regulation 2020. Under section 27 of the Regulation, it will expire on the Covid-19 legislation expiry day.[77] The Covid-19 legislation expiry day is explicitly state under section 4A of the Covid-19 Emergency Response Act 2020 to mean earlier of the 30th of April 2022.[78] Hence, it is no longer in effect.

5.3. United States of America

The United States of America was the only nation with jurisdictions that adopted electronic wills legislations before the onset of the Covid-19 pandemic. But just a few states in the United States have made specific efforts to permit electronic wills in their laws.[79] For example, Nevada adopted electronic wills in 2001The law permits electronic wills, if they meet one of these requirements. Firstly, the voice will have an "authentic feature" of the testator such as biometrics, or video recording. Secondly, the will is digitally signed and bears an electronic notary public seal. Thirdly, the will consists of the electronic signatures of two or more witnesses. The witnesses are regarded as "present", when witnessing the testator's signature even through audio-visual communication.[80] Nevada, however, does not accept the self-proving of e-will unless it is kept with a "qualified custodian".[81]

The second example is Florida. The electronic wills statute in Florida came into effect in 2020 and was to enable electronic wills.[82] It also offers remote online witnessing.[83] Online witnessing will never be accessible if the testator is influenced by drugs or alcohol or has a long-term impairment that affects everyday life or needs daily help to protect vulnerable people.[84] The Uniform Electronic Wills Act recognises the validity of an electronic will and permits the execution and attestation of the will in the electronic presence of the testator and witnesses. States that adopt this model such as Utah and Colorado enable the presence of witnesses "electronically"[85] and allow self-proving wills without onerous custody requirements.[86]

Another frequent dispute concerning electronic wills is seen in the case of *Re Estate of Castro*.[87] The Court found that the testator had signed the will and intended the electronic document to be his final will, before two or more witnesses and executed the

(Queensland), s. 15.

[77] Justice Legislation (Covid-19 Emergency Response - Documents and Oaths) Regulation 2020, s. 27.

[78] Covid-19 Emergency Response Act 2020 (Queensland) (A2020-11), s. 4A.

[79] Francesca Torres, "Electronic Wills: COVID-19 Relief or Inevitable Trouble for California?" University of the Pacific Law Review 52, no. 2 (2021): 435-456.

[80] Nevada Revised Statutes Chapter 133 – Wills, N.R.S § 133.085.

[81] *Ibid*, N.R.S § 133.300.

[82] The 2020 Florida Statutes Chapter 732 Probate Code: Intestate Succession and Wills, F.S.A § 732.521.

[83] *Ibid*, F.S.A § 732.522(2).

[84] *Ibid*, F.S.A § 117.285.

[85] Uniform Electronic Wills Act 2019, s. 2(2).

[86] *Ibid*, s. 8.

[87] Re Estate of Castro No. 2013ES00140 (2013).

document. Based on this evidence, the Ohio Probate Court admitted the will to probate. In the effort of flattening the curve of Covid-19, several other states temporarily relieved the witnessing requirements for wills. To provide a clearer picture of the status of states that have adopted such relieve of requirements, a temporary list of emergency remote notarisation and witnessing was published by the American College of Trust and Estate Counsel.[88]

Furthermore, in 1990, the Uniform Law Commission introduced to the Uniform Probate Code ("UPC") a harmless error provision. UPC § 2-503 requires clear and compelling evidence to establish the testator's intention.[89] The official comments to UPC § 2 -502 indicate the assumption that a harmless error would be utilised to remedy several frequent issues which include a faulty attestation and to modify a will that was executed without formalities. The harmless error doctrine focuses on the intention of the testator and the writing of the will must prove that purpose with clear and persuasive evidence.[90] It stands to reason that because of this liberation process, more wills that could have been deemed invalid are now being admitted to probate. The goal of this method is not to encourage carelessness or trickery, but rather to eliminate procedural misdemeanours as a hurdle to probate.[91]

The case *Re Estate of Horton*[92] illustrated how an electronic will was accepted by the Court of Appeals in Michigan under the harmless error doctrine. The testator's "Last Note" was only available in electronic form with his name written in the base of the Evernote phone application. The mother of the testator argued that her son's will did not satisfy the requirements of a holographic will. In the end, Michigan Court found the note of the testator to be lawful under the harmless error doctrine of the State. Hence, the use of dispensing power and the application of the doctrine of harmless errors signify a shift from the formalist approach that requires strict compliance with the will formalities to a functionalist or intention-based approach.[93]

As a result, it is important to remember that testamentary formalities are merely stages toward an objective, rather than the objective itself. The courts had shifted away from requiring strict adherence to the legislation and instead concentrated in determining on

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[88] "2020 Emergency Remote Notarization and Remote Witness Orders By State", The American College of Trust and Estate Counsel, 2020, https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders/.

[89] Uniform Probate Code, § 2-503.

[90] Susan Gary. "When Is an Execution Error Harmless: Electronic Wills Raise New Harmless Error Issues", American Bar Association, 2019, https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2019/november-december/when-an-execution-error-harmless-electronic-wills-raise-new-harmless-error-issues/.

[91] Ronald J Scalise Jr. Review of Testamentary Formalities in United States of America. In Comparative Succession Law: Volume I: Testamentary Formalities, 357–379. Oxford University Press (2012). doi: 10.1093/acprof:oso/9780199696802.003.0015.

[92] *Re Estate of Horton* No. 339737, 2018 WL 3443383 (Mich. Ct. App. July 17, 2018).

[93] Bridget J Crawford, Kelly Purser and Tina Cockburn. "Wills Formalities in a Post-Pandemic World: A Research Agenda." U. Chi. Legal F. (2021): 93.

the issue of whether the facts surrounding the execution of a will fulfilled the evidentiary ritual, channelling, and protective purposes.[94]

6. The Need for Relaxation and Suggestions for Reforms

The reforms in the above three jurisdictions namely, the United Kingdom, Australia and the United States of America, have shown some ideas and solutions to Malaysian authority on how to handle the similar scenarios during the Covid-19 on the following aspects.

6.1. Remote Execution

During this pandemic, there are many restrictions to our movements due to the MCO and the various SOPs that are put in place to curb the spread of the virus which makes it hard for the witnesses and the testator to have any forms of actual physical meetings. In the case of *Sawinder Kaur Fauja Singh v Charnjit Singh Thakar Singh*,[95] the court held that the testator must acknowledge his signature in the actual, visual presence of two or more witnesses. Therefore, remote, or virtual witnessing would have failed to satisfy the will formalities in Malaysia.

There are also opinions that there might be risks which may come along with any reforms done to the UK Wills Act 1837 in relation to the need for strict compliance of the formalities. There is a prediction that the number of disputes relating to the validity of wills might increase tremendously following any relaxation of the requirement for actual physical presence. The reason is that due to the relaxation, wills now have new avenues to be challenged. There would be risks involved during the journey such as the unexpected death of a testator, loss of wills, unauthorised modification of wills and so on. The guidance by the government of the United Kingdom has stated that the wills must be delivered to the witnesses within 24 hours of the testator signing the will. This is clearly a challenging task considering the implementation of the movement restriction order.[96]

Besides, there is also the issue with video conference witnessing, in which the witnesses might not be able to see who is behind the screen of the testator. There might be a risk that the testator was unduly influenced or coerced by the person behind the camera to sign the will. Even though the reforms of the UK Wills Act 1837 would most probably raise some thought-provoking legal issues or challenges, the risks of having homemade wills or no wills at all would be much alarming. We must respect the last wishes of the deceased. We should not resist any attempts for the law to be improvised to cater to the current needs of society due to the minor risks that may not even happen at the end of the day.

What we should do is to produce a more comprehensive guideline for witnessing through video conferences. For example, to avoid the possibility that there could be someone

[94] David Horton. "Partial Harmless Error for Wills: Evidence from California." Iowa Law Review 103 (5) (2018): 2027-2068.

[95] *Sawinder Kaur Fauja Singh v Charnjit Singh Thakar Singh* [1998] 1 CLJ Supp 402.

[96] Brian Sloan. "Witnessing Law Reform In The Coronavirus Era". Law Faculty Blogs University Of Oxford, August 8, 2020, https://www.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2020/08/witnessing-law-reform-coronavirus-era.

behind the camera that might be coercing the testator, the testator should be in the room alone and should show the witnesses a 360-degrees view of the room to ensure that no one is there to influence him. It is better to solve the problem rather than to just ignore the problem.

In fact, the reforms in relation to relaxing the rules of formalities for the validity of wills may be necessary, not only during the pandemic, but should also be considered post-pandemic and should become a permanent feature in the execution of wills since technology has advanced tremendously since the original Wills Act of 1837 was enacted. To keep up with the changing circumstances in the society, laws must change. The formalities under section 5 of the UK Wills Act 1837 were enacted to suit the society approximately 200 years back. Though formalities are still very much relevant and useful in the modern world, the question is whether they serve the society best now considering our changed and ever-changing circumstances?

6.2. Electronic Wills and Electronic Signatures in the Execution of Wills

The MCO was implemented by the Malaysian government to limit mobility, in view of the outbreak of the Covid-19. Since face-to-face interactions need to be minimised, getting a wet-ink signature may be difficult over time. As such, reforms, particularly in the execution of a will, is certainly necessary.

In Malaysia, even though the Electronic Commerce Act 2006 provides for legal recognition of electronic signatures, it does not apply to the creation of wills and codicils. The use of electronic signatures on a will and electronic wills may lead to disputes on issues, such as the lack of mental capacity for the testator to sign a will and the possibility of undue influence and coercion in writing a will. However, in many countries, particularly during this uncertain period of Covid-19, electronic wills and electronic signatures have become a reality.

These issues may be resolved if there is an adequate legal framework in our country like some of the states in the United States of America. In reference to the Florida Electronic Wills Act, remote online witnesses are not an option when the testator is under the influence of drugs or alcohol or have a long-term disability which affects their daily lives. If we incorporate such provisions into our Wills Act, the risk of abuse in using electronic signatures in wills and electronic wills will be reduced.

Covid-19 restrictions on self-isolation render the statutory requirements ineffective, risky and in some instances impossible to meet. The current Covid-19 pandemic puts elderly individuals and those with basic health problems at significant danger. To see them face to face, to receive instructions for a new will, or to sign a voluntary will or a codicil may be inappropriate or even hazardous. In view of the uncertainty about how long the Covid-19 pandemic lasts, it is not encouraged to delay the act of drafting a will but to make full use of technology in will-writing.

The crisis has shown that legal change is necessary, particularly the use of contemporary technologies in the execution of a will. Eventually, laws should be amended to enable the usage of electronic wills and electronic signatures in the will. As indicated in Electronic Commerce Act 2006, electronic signatures now function in a context where the

signatory's consent to specific actions is completely acknowledged. If a person can use electronic signatures to transfer money and to sign a contract, why not extend this possibility to the execution of wills?

The recognition of electronic wills is proposed to make it simpler for testators to execute wills and for the better safekeeping of wills and shall provide greater security from the accidental destruction, damage of loss of the wills. Giving effect to electronic wills will not remove all statutory requirements in executing a will. The necessary capacity and intention, including knowledge and approval will still be mandatory Hence, the statutory protection is still there to prevent any risks of abuse, making no practical difference between executing a conventional and electronic will.[97]

In reference to the United States of America and Australia, it was proven that electronic signatures and electronic wills are a viable alternative in times of Covid-19. Since the advantages outweigh the negative impacts of the execution of electronic wills and digital signing on wills, an amendment to the existing section 5 of the Wills Act to include electronic wills and signing by electronic signature should not only be introduced to deal with issues of movement restriction caused by Covid-19, but to make will-making accessible to more people in the future.

6.3. Dispensing Powers

Although the laws of some countries have given dispensing powers to the courts to allow the courts to accept wills that do not meet the formalities required to establish a will, there are still numerous jurisdictions that do not allow judges to dispense with formalities. For example, Malaysia and the UK.

Israel was the first country to adopt dispensing powers in 1965, followed by South Australia in 1975.[98] It is therefore recommended that a dispensing power be added to the Wills Act to allow any written, signed documents to be declared valid if the court is convinced that the contents was as agreed by a testator with the necessary mental capacity to execute a will and with his or her knowledge and approval and done with the required animus testandi, without the probability of any forms of undue influence or fraud, and the testamentary effect was intended.

Experience in Australia clearly supports the opinion that dispensing powers does not lead to more litigation. In fact, dispensing powers "actually prevents many unnecessary litigations", as the Israeli judge reported to the British Columbia Law Reform Commission, because it eliminates disputes concerning the lapse of technology and limits the dispute to the functional question whether the instrument properly expresses the intent of the testator.[99] In his comprehensive study on South Australia, Professor Langbein ends by stating that the lawsuit numbers were surprisingly low.[100]

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[97] Kimberley Martin. "Technology and Wills – The Dawn of a New Era (COVID-19 Special Edition)", STEP, August, 2020, https://www.step.org/system/files/media/files/2020-08/Technology-and-Wills_The-Dawn-of-a-New-Era.pdf.

[98] *Ibid*.

[99] J. Rodney Johnson. "Dispensing with Wills' Act Formalities for Substantively Valid Wills." Virginia Bar Association Journal 18, no. 1 (1992): 10.

[100] John H Langbein. "Excusing Harmless Errors in the Execution of Wills: A Report on Australia's

A problematic element of the will execution that should be removed is the current practice of demanding strict conformity with formalities of status of will. It is said that the only practical answer to this issue is dispensing power and that the Malaysian courts can be trusted to exercise such power similar to the discretion currently exercised in the many other cases in which the lives, freedom, and fortunes of people are involved.

Taking the example of Australia, the dispensing powers were introduced before the Covid-19 pandemic and were shown to be beneficial during Covid-19 times. Malaysia too, should adopt such a statutory dispensing power in the age of Covid 19, not only temporarily, but in the long term to sustain the testamentary intention of the will either in an alternative format or a will that is not in accordance with all the formal requirements, but where the intentions of the testator are clear.

7. Conclusion

The worldwide coronavirus pandemic has exposed the inadequacy of the laws in relation to the valid execution of wills in Malaysia. The Wills Act demands that the strict traditional formalities of executing a will be followed under all circumstances unless the testator is a privileged testator. However, electronic wills, remote witnessing, and the introduction of dispensing powers of the court are developments that are unavoidable in view of the new challenges faced by the society and the rapid technological advancements that have changed our lives in the past decades. Some of the reforms in Australia and the United States of America were implemented before the Covid-19 pandemic while some reforms in Australia and the United Kingdom were introduced during Covid-19 to respond to the challenges faced. These reforms have been exceptionally useful and helpful to circumvent the problems of social distancing and movement restrictions imposed to curb the spread of the virus.

Considering the technological proliferation in our lives, these reforms would bring much needed improvements and modernisation to the law of succession, both during and after the pandemic. The Covid-19 pandemic increased the urgency behind these measures and led to their swift acceptance in the United Kingdom, Australia, and the United States of America, placing us at the brink of transformation. It is hoped that legislators in Malaysia would be able to consider the advantages and deficiencies of the implementation of a more relaxed regime as adopted in other jurisdictions and to implement changes to the existing Wills Act for the betterment of the laws in relation to the execution of wills and to enable the courts to uphold the final wishes of the deceased person.

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