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Bargain Wills?

Picking up the Pieces: The Rectification of Computer-Generated Documents



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The courts have tended to interpret the law of rectification of wills flexibly and they may continue to do so in these novel circumstances. The explanation of the process of computer-generation of wills and application of it to the law will assist the litigator and advisor.



1. Introduction

With the deregulation of will-writing in the UK, there are now a large number of low-cost online will-writing services of very variable quality. The risks are obvious. These wills may fail to give effect to the client's true intentions because of a defect in the computer program. The consequences are familiar and horrendous: families are put at loggerheads and money is wasted in bitter court battles.

The issue is insidious. It will take time before this problem becomes visible, because the problems will not emerge in real-life cases until the users of these services have begun to die in any number.

Because of the coronavirus pandemic, the public may be more tempted to use these services because of the possibility of falling ill and dying and to avoid going out to see a solicitor. This may substitute one risk for another. Moreover, because of its high mortality rate, the virus may also bring forward the time this issue begins to bite.

The government is [considering relaxing the formalities](#) required for the validity of wills during the pandemic. That is not the subject of this research. This research is complementary as it deals with the problems arising from another route around the traditional way of making a will.

2. Computer-Generation of Wills (and Other Documents)

Existing research has demonstrated the poor quality of many of these services. This new research looks to the next stage: picking up the pieces. That means the law of rectification.

The focus of the research is not whether the client has made a mistake and is at fault. That is not novel and there are well-established routes to deal with this issue. This research concerns where the client's mistake has been induced by

the defective program, or, more likely, the program itself has made an error.

The process is not as high-tech as one might think. It is not a case of 'smart contracts' or 'blockchain'. It is one of the computer application cutting and pasting – drafting – the will, which is then executed on paper as before. This means the circumstances, while novel, are not a huge distance from conventional ones.

3. The Present Law of Rectification

The present law of rectification of wills, set out in the Administration of Justice Act 1982, s 20, was designed in the 1970s and unsurprisingly its drafters did not contemplate these new circumstances. Before rectification of a will is permitted, one must show the mistake was the consequence of either a clerical error or a failure to understand the client's instructions. Then, given extrinsic evidence, the court can read in or remove words to reflect its true meaning.

There is a clear difficulty in applying these tests to computer-generated documents. Computers do not ordinarily make mistakes – people who

program computers make mistakes. The computer does not understand the client's instructions in a human way; it arguably does not understand anything at all and just follows a set of logical instructions. This means it is not certain that s 20 will apply to computer-generated wills at all.

For other types of documents, the law of rectification is judge-made and was updated by the Court of Appeal in 2019. The facts of the case meant that it did not consider the circumstances of computer-generation.



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4. Particular Errors found in Will-Writing Services

In order to further inform the analysis, dummy wills were purchased from 11 providers. Two problems were found.

1. 'Commorientes clauses' were often defective. These clauses are deployed when the client and partner wish to leave their wealth to each other, but, crucially, to a substitute person or persons if they die together in close proximity of time. If defective, the risk is that some or all of the wealth will go to the wrong person. Probate lawyers will recognise this as the problem in *Re Rowland*, but the computer-generated drafting is

even worse here. Even the more liberal approach to interpretation the courts employ nowadays may not be enough to save such wills. Rectification will be needed, but, as noted, may not be available.

2. A wholly ineffectual provision for allowing the client to specify a list of recipients for smaller items of property outside of the will was offered by one provider. This kind of provision is contrary to the policy of the Wills Act and it is unlikely rectification could render it enforceable. End-users relying on this provision will have been

5. Advice for Lawyers and Legislators

The [research article](#) contains a detailed explanation of this process of computerised drafting and the development of the law of rectification. The law represents a difficult balance between correcting mistakes and preventing people 'having a go' on poor evidence, thereby wasting money and the estate.

The research will assist legislators in creating amendments to the Administration of Justice Act 1982 such that these new circumstances can be unequivocally brought into the scope of the law while still preserving that difficult balance. For instance, the safeguards for admitting evidence could be altered to allow more readily the admission of computer logs.

The research also supplies arguments that could be used under the present law when seeking rectification in court. The courts have interpreted the Administration of Justice Act 1982, s 20 flexibly and they may continue to do so in these novel circumstances. The explanation of the process of computer-generation will assist the litigator in arguing that s 20 indeed applies.

The research also explains the weight the courts are likely to afford different kinds of evidence in these circumstances. This will enable litigators and advisors to assess the chance of success more easily.

For unilateral instruments, including wills, evidence of a mistake in the computer program will be convincing evidence for rectification. While the logs of the process itself will be valuable, there is a question over their admissibility because of the Act. However, if the mistake can be inferred by reproducing the defective output from correct input, the courts are likely to accept this. The difficulty of obtaining that evidence will, however, remain.

For bilateral instruments, such as contracts, obtaining rectification will be much more difficult. Even if there is convincing evidence of the mistake, or convincing evidence of a defect in the computer application, this will not be enough. The courts allow a person to rely on a final document ahead of intermediate negotiations and documentation. In practice it will be very hard to prove that the other side did not do so.



Recommendations

- ◆ Despite the existence of rectification, prevention is better than cure. People should be advised to avoid most of these online will-generating services.
- ◆ If a rectification case comes up, legal advisers and litigators can be forearmed with the knowledge in the research. This may prevent, shorten or reduce the cost of disputes.
- ◆ Legislators have a period of time in which to reform the Administration of Justice Act 1982, s 20 to improve the law of rectification and ensure it covers the novel circumstances of computer-generated wills.
- ◆ Legislators should also consider revisiting the decision to deregulate these services or regulating for the retention of computer logs for such services.

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