Wills & Estates
Winter Term 2018

Lecture Notes – No. 6

UNDUE INFLUENCE

Undue influence is an important equitable doctrine that applies to testamentary instruments as well as to *inter vivos* transactions such as gifts and contracts.

In the testamentary context, undue influence is not presumed (based on the power differential inherent in the nature of the relationship between the parties); **actual undue influence must be proven on the normal civil standard**.

Thus, where it is proven that the testator made the Will, or certain dispositions in the Will, and acted based coercion, threats, or exploitation of special vulnerabilities, the Will or disposition as the case may be will be set aside**.**

It has been said that '**undue influence is only one of the instances of fraud**;' *Symons v Williams* (1875), 1 VLR (Eq) 199, 206 (Vict Ct Eq). While courts of equity and law have for some time had concurrent jurisdiction to deal with actual fraud in the sense of dishonest acts, the equitable jurisdiction pre-dates the common law jurisdiction (for example, in the form of the action of deceit) and is a wider concept. The concept of *equitable fraud* or *constructive fraud* allowed a court of equity to relieve against an act that was neither intended as dishonest or committed recklessly. Lord Haldane LC said in *Nocton v Lord Ashburton* [1914] AC 932, 954 (HL):

> … it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a court of Equity imposes upon him. His fault is that he has violated however innocently because of his ignorance, an obligation which he must be taken by the court to have known, and his conduct has in that sense always been called fraudulent…

The concept of equitable fraud is rooted in a pragmatic view of equity as being able to respond to an infinite variety of offensive acts and has accordingly been left as a fluid rather than rigidly defined concept as a matter of judicial policy. Lord Macnaghten once said that '[f]raud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it;' *Reddaway v Banham* [1896] AC 199, 221 (HL).

Undue influence reflects the law's general distrust of gifting in suspicious circumstances. Wilson J once said that 'it seems to make sense that the process leading up to the gifting should be subject to judicial scrutiny because there is something so completely repugnant about the judicial enforcement of coerced or fraudulently induced generosity;' *Geffen v. Goodman Estate,* [1991] 2 SCR 353, 376. In this case, the Supreme Court of

Canada reviewed the operation of the *presumption of undue influence* in the context of an Alberta case respecting a mentally ill woman who conveyed property in trust on certain terms. Though there were three concurring judgements in the case, the common theme that was adopted was that presumptive undue influence continues to operate as a doctrine that seeks to protect a person who is vulnerable against manipulation. Thus it is the *potential for domination that inheres in the relationship gives rise to the operation of the presumption*, rather than the relationship per se, and such matters as the absence of independent legal advice in matters where the mental disability of a parent who is party to a transaction with a child has been isolated as particularly important in the past. This is a traditional view based on the special tenderness that the court may feel for an aged or infirm person. Please note that the presumption does not operate in a testamentary context.

Undue influence in the testamentary context connotes something akin to coercion and not merely persuasion or the ability to persuade. See the dicta in **Wingrove v. Wingrove (1885), 11 P.D. 81, 82 (Eng. Prob. Ct.); cb, p.233** which is approved and seemingly applied in all the cases below:

> We are all familiar with the use of the word "influence"; we may say that one person has an unbounded influence over another, and we speak of evil influences and good influences, but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against these contingencies. A man may be the companion of another, may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favour. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence. **To be undue influence in the eyes of the law there must be -- to sum it up in a word -- coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of it being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.**

Re Marsh Estate
(1991), 41 ETR 225 (NSSC – AD)

Here the Will was held invalid seemingly out of deference to the trial judge's findings in circumstances where the testatrix felt compelled to leave a gift in the Will to her sister lest her brother-in-law cease to help her with her physical needs and in managing her financial affairs. Chipman JA (in an oral judgement) held:

> In early November 1988, word reached Frank Fryer by way of Raymond McGill of the provision in Mrs. Marsh's will regarding her residence. He confronted her about it and, with her agreement, contacted the Royal Trust Corporation regarding a change in the will.
>
> The record is silent as to whether Mrs. Marsh or Mr. Fryer informed the trust company of the desired change, but Jane Holmes, a barrister, received instructions from David Green of Royal Trust to prepare a codicil changing the devise of the home from the respondents to Hilda Fryer. Solicitor Holmes was asked to make sure that there was no undue influence involved, and she attended upon Mrs. Marsh, explained the effect of the codicil, and oversaw its execution. On that occasion, Mrs. Marsh told solicitor Holmes that her brother-in-law, Mr. Fryer, had been very good to her and had done her banking and come once a month for this purpose. Solicitor Holmes was satisfied that Mrs. Marsh had testamentary capacity. Solicitor Holmes was accompanied by her then articled clerk, Elizabeth Whelton. Both Ms. Holmes and Ms. Whelton prepared memoranda of the meeting with Mrs. Marsh. Ms. Whelton made particular note of the fact that Mrs. Marsh had told them that she was making the change because her brother-in-law did so much for her.
>
> Frank Fryer testified that on learning of the devise of the house to the respondents, he told Mrs. Marsh that he was not happy about it. He said that since she had left the property to the respondents she had better get the respondent Ronald Harris to make up a power of attorney and let him do the work that he, Fryer, had been doing, that she should let him go to City Hall and fight with them about her taxes, and fight with the federal government about her pensions and so forth. According to Mr. Fryer, she thereupon said that she needed him and could not do without him, that she had to have his services. She said she wished to change her will, whereupon Mr. Fryer contacted the trust company and left the matter in its hands.
>
> **Mr. Fryer was confronted with previous discovery examination wherein he said that if she wished Ronald Harris to inherit, that he should do the work, and that he, Mr. Fryer, would not be doing it. He denied having said that.**

Judge Bateman found that there was testamentary capacity at the time of the execution of the codicil, but that the respondent Frank Fryer had exerted undue influence on the testatrix. The codicil was set aside.

The finding of testamentary capacity is not disputed, and there is no question as to the relevant principles governing undue influence as a ground for setting aside a testamentary devise. Influence, to be undue influence, must amount to coercion. What is coercion in any given case depends on the circumstances. The burden of establishing undue influence rests upon those who attack the impugned transaction. See *Wingrove v. Wingrove* (1885), 11 P.D. 81; *Re Harmes; Harmes and Custodian of Enemy Property v. Hinkson*, [1946] 2 W.W.R. 433, [1946] 3 D.L.R. 497 (P.C.). After expressing concern as to Frank Fryer's credibility, Judge Bateman said [at p. 232, 99 N.S.R. (2d)]:

There is no question that Mr. Fryer exerted influence, nor any question that the exercising of that influence resulted in the change in bequest consistent with Mr. Fryer's wishes. The question is whether the influence was undue in this case.

Mr. Fryer presents as a very opinionated, confident and outspoken man. He clearly felt that Reverend Harris had inappropriately procured the bequest and thus was justified in speaking strongly against it. Had he only spoken against the bequest to the Reverend Harris I would have had more difficulty in finding undue influence. On the facts before me, however, Mr. Fryer went farther than that. He implicitly, if not expressly, threatened to withdraw his assistance from Mrs. Marsh if the Will was not changed. In Mrs. Marsh's poor physical situation resulting in her complete dependence on Mr. Fryer for her business affairs and her minimal contact with other support systems, I find that the influence exercised by Mr. Fryer was undue, even accepting his version of the exchange between him and Mrs. Marsh.

Having reviewed the record, consisting of exhibits and the testimony of the witnesses, we are satisfied that there was no palpable error made by Judge Bateman in her finding that undue influence exerted by Frank Fryer brought about the execution of the codicil. This is so, even though her finding that Mr. Fryer gave specific instructions as to the change in the will is not supported by direct evidence. **The evidence, particularly that of Mr. McGill, Mr. Fryer, and Ms. Whelton supports the conclusion that the testatrix was dependent upon Frank Fryer, and that there was an implied, if not expressed threat by him to withdraw the assistance that he had been giving her. His testimony, as well as that of the other witnesses, must be considered in the context of an unwell, elderly lady who was dependent upon her brother-in-law for the assistance which he had been giving her. All the evidence supports the finding of a threat to withdraw assistance, which in the circumstances amounted to coercion.**

Pascu v. Benke
2005 CanLII 1086 (Ont Sup Ct)

Here the testator had 3 step-sons. He had a previous Will in favour of one of them (Kurt Benke) He had no 'relationship with the other two. The testator's wife died in 1997 and he met an older couple (Mr & Mrs Mechicis) with whom he became friendly – they were all of Romanian heritage and birth, and the couple was very helpful to the testator. A second Will was prepared in their favour in 2002. Day J held:

Undue influence is another ground which may be applied to invalidate a will. To constitute undue influence in the eyes of law, there must be *coercion*. The burden of proof of undue influence is on the attackers of the will to prove that the mind of the testator was overborne by the influence exerted by another person or persons such that there was no voluntary approval of the contents of the will. The burden is the civil burden on the balance of probabilities. Undue influence sufficient to invalidate a will extends a considerable distance beyond an exercise of significant influence or persuasion on a testator; as indicated above, coercion is required. Essentially, the testator must have been put in such a condition of mind that if he could speak he would say, "This is not my wish, but I must do it." A testamentary disposition will not be set aside on the ground of undue influence unless it is established on a balance of probabilities that the influence imposed by some other person or persons on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased testator. Further, it is not sufficient to simply establish that the benefiting party had the power to coerce the testator, it must be shown that the overbearing power was actually exercised and
because of its exercise the will was made. References: Mackenzie, James in *Feeney's Canadian Law of Wills*, 4th ed. (Butterworths Canada Ltd., 2000), at paras. 3.1.3; 3.5; 3.6; 3.7 and 3.13; *Mitchell v. Mitchell* (2001), 57
O.R. (3d) 259 (Ont. S.C.J.); *Banton v. Banton* (1998), 164 D.L.R. (4th) 176
(Ont. Gen. Div.); and *Vout v. Hay* (1995), 7 E.T.R. (2d) 209 (S.C.C.).

Wingrove, *supra*, illustrates what the court means by coercion. Clearly, in the present facts, the Mechicis curried favour with Mr. Boghici. They succeeded in obtaining substantial financial favours from him during his lifetime and, in my view, succeeded in persuading him to leave his estate to them. It could well have been that he did not want them to know that his previous will was in favour of his stepson, Kurt, which, if so, would reinforce the conclusion that Mr. Boghici purposely refrained from advising Mr. Pascu of its existence at the time he gave instructions for the subject will.

Basically, Mr. Boghici used his estate to attract the help, comforts and tenderness of the Mechicis in his old age; he used it to influence their behaviour toward him and to obtain the support he wanted in his remaining years. **As the evidence indicates, this was consistent with his behaviour towards others; he offered up his estate to at least three other people in hopes of securing that same kind of support and comfort. Specifically, he named Kurt as beneficiary of his 1997 will presumably on the basis that Kurt would take care of him for the rest of his life. He asked Kurt's spouse, Bogda Detembel, to move in and then he would leave her his "testament". He offered his estate to Elizabeth Silva, a neighbour who looked after him following his wife's death, if she would come and live with him. Mr. Boghici offered another neighbour, Wytold Kowalski, his home**

if he would agree to take care of him.

The deceased constantly undertook to offer his assets to those who would look after him. Without question, the Mechicis gave him more care and companionship than anyone else in his late years and he rewarded them. This is not to say that Kurt was anything less than completely dutiful to his stepfather, but he lived in Midland and did not have the capability of spending the amount of time with Mr. Boghici that the Mechicis were able to do.

The foregoing indicates the pattern followed by the deceased in offering his assets to those who cared for him. In terms of remembering the persons who might be expected to benefit under his will, I do not conclude that he had forgotten about Kurt. Rather, the indications are that he went with those who had been looking after him most completely at the late part of his life. I would expect that Mr. Boghici's motivation was not so much to be good to those who were good to him, but rather to improve his own life.

In such circumstances, the Mechicis did not unduly influence Mr. Boghici to leave his estate to them in the sense that there is no evidence of coercion by them. It would appear that there is good evidence to indicate persuasion, but that is not sufficient to vitiate the will. It is only undue influence that will catch the interest of the court. As indicated above, it is clear in the case law that undue influence is more than just an influence or persuasion; it must amount to actual coercion. Therefore, the fact that the Mechicis were currying favour with the deceased in order to benefit from his will is of no consequence because it simply does not amount to coercion.

The case law also makes clear that the burden lies on Kurt Benke to prove on a balance of probabilities that Mr. and Mrs. Mechici unduly influenced the deceased to the point of coercion. I conclude there is no evidence of coercion and that there is, therefore, no undue influence.

In this case, the estate was offered rather than demanded but there still remains an issue as to undue influence and the propriety of demanding favours for care. Traditionally the law has not interfered in such circumstances and in that sense **Re Marsh** seems somewhat over-protective of the testatrix's estate.

FORMAL VALIDITY OF WILLS

Understanding 'formalities':

Regardless of context, form requirements operate both as a protective device to ensure that the transaction is intended by the parties and to provide evidence of that fact. At the same time, compliance with formalities minimizes the opportunities for fraud or forgery, and, more controversially, may require that a party consult with a lawyer before completing the transaction.

In the context of Wills, these two policies – *protection against fraud* and *support for access to legal forms that allow for the exercise of testamentary freedom* - must be carefully balanced else only wealthy individuals will be able to create enforceable wills.

Attested Wills

Attestation = affirmed to be true; i.e. witnessed.

> **Succession Law Reform Act**
>
> **Will to be in writing**
>
> 3. A will is valid only when it is in writing.
>
> Execution
>
> 4. (1) Subject to sections 5 and 6, a will is not valid unless,
>
> (a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;
>
> (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and
>
> (c) two or more of the attesting witnesses subscribe the will in the presence of the testator.
>
> (2) Where witnesses are required by this section, no form of attestation is necessary.

[nb: s.4(2) means that no *specific form* of attestation is required.]

No Dispensing Power Where Compliance with Formalities Lacks

Please note that Ontario statutes **do not** provide a court with jurisdiction to allow for a will to be enforced absent compliance with formalities. Some jurisdictions do provide the court with such a curative jurisdiction – in Canada: Manitoba, Saskatchewan, New Brunswick, Quebec, and Prince Edward Island. Moreover, Ontario jurisprudence supports the proposition that there is no common law power to admit a will to probate absent compliance with formalities.

Sills v Daley
(2002), 64 O.R. (3d) 19 (S.C.J.); cb, p.320, fn. 9

Here the court refused to recognize a jurisdiction to by-pass the statute based on substantial compliance and affirmed the vitality of a strict approach.

Per O'Flynn J.

> On or about August 15th, 2000, while in her room at the Kingston General Hospital awaiting surgery for a brain tumor, Leah Camilla Janice Daley signed a document prepared by Linda Ryan and witnessed by Linda Ryan.
>
> This document was written by Linda Ryan who then signed the document and thereafter presented it to the deceased for her signature.
>
> Present in the room at the time this document was signed, was Carole Ebbers, the sister of the deceased who was asked to be a witness but who refused to sign as a witness.
>
> …
>
> The deceased in this case appeared to know there had to be two witnesses as she had made a previous Will on June 1st, 1994 and further, had asked Carole Ebbers, her sister, present at that time, to be a witness. Carole Ebbers did not intend to be a witness and refused to sign as a witness.
>
> To declare the Will as valid, would be to by-pass the clear provision of the Act and to create a discretion in this Court which is not found in the Act.
>
> …
>
> 46 I conclude that the document dated August 15th, 2000 is not a valid testamentary document of the deceased, Leah Camilla Janice Daley and should not be admitted for Probate.

Papageorgiou v. Walstaff Estate
2008 CanLII 32305 (Ont. S.C.J.), cb, p.320, fn. 9
[Appeal dismissed, 2009 ONCA 136]

Per Strathy J.:

> [1] Peter Papageorgiou claims to be the estate trustee and the sole beneficiary of an unsigned and unwitnessed will, dated June 25, 1990 (the "1990 Draft Will"), of his friend, the late Eva Walstaff.
>
> ...
>
> There are no exceptions to the statutory requirement that the will must be signed. This requirement can be traced to the original English statute, the Wills Act 1837, (U.K.) 7 Will. 4 and I. Vict. C. 26, s. 9. The making of a will is an important and solemn act and the law requires that it must be confirmed by the signature of the testator, in the presence of at least two witnesses, who must also sign. The obvious purpose of this statutory requirement is to prevent fraud.
>
> Unlike some other provinces, including Manitoba, New Brunswick, Prince Edward Island and Saskatchewan, Ontario has no statutory provision that allows a will to be proven if there is "substantial compliance" with the statutory requirements...
>
> ...
>
> The case law in Ontario indicates that formal defects, less serious than the absence of the testator's signature, will be fatal to the document's validity. In *Sills v. Daley*, [2002] O.J. No. 5318 (S.C.J.), Mr. Justice O'Flynn considered whether an Ontario court has discretion to admit a document to probate on the basis that there has been "substantial compliance" with the Wills Act...
>
> **In *Sills v. Daley*, Justice O'Flynn held that the document before him was not a valid testamentary document and that it should not be admitted to probate. "To declare the Will as valid", he said at para. 44, "would be to by-pass the clear provisions of the Act and to create a discretion in the Court which is not found in the Act."** He noted that unlike the Sissons case, the error was not made through inadvertence. The testatrix knew that two witnesses were required.
>
> The decision of Mr. Justice O'Flynn in ***Sills v. Daley*** **was followed by Mr. Justice Cullity in *Re Ettore Estate***, above. A motion was brought to declare a will invalid because the two witnesses had not been "present at the same time" as required by s. 4(1)(b) of the Succession Law Reform Act. One of the arguments of the respondent was that, since both witnesses had signed the will, this defect could be cured as there had been substantial compliance with the requirement. Mr. Justice Cullity stated at para. 37:

> ... while there is always the possibility that the law with respect to due execution may develop in directions - and to an extent - that would require some of the older authorities to be discarded, I would be reluctant to apply the principle of substantial compliance in the absence of a legislative mandate, or its endorsement by an appellate court. To do so would be to depart radically from the interpretation that section 4 and its predecessors in the Wills Act R.S.O. 1970, c. 499 and the Wills Act, 1837 (UK) have received in the past and introduce uncertainty and, thereby, encourage even more litigation in a context in which it is notoriously endemic. In this connection, I am in respectful agreement with the analysis of O'Flynn J. in Sills et al v. Daley …
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> Even in those jurisdictions that permit "substantial compliance", there is conflicting jurisprudence as to whether a will can be admitted to probate where it does not contain a signature...
>
> ...
>
> [43] The overarching question in substantial compliance jurisdictions such as Manitoba and New Brunswick appears to be whether the testamentary document accurately reflects the intentions of the testator. If there is reliable evidence which tends to show that it does, then it may be admitted to probate even though it bears none of the hallmarks of proper execution.
>
> ...
>
> [45] In this case, there never was a signed will. Mr. Papageorgiou recognizes the legal obstacle in his way and asks me to make new law. I have no authority to do so. An Ontario will is not valid unless it is signed by the testatrix. The 1990 Draft Will is not a will. It is a piece of paper with no legal effect.

[In the *Walstaff Estate* case it would appear that the will would not be admissible to probate even in jurisdictions with a substantial compliance doctrine as it was unsigned. The prospect for fraud is too high and the practical result would be to encourage unmeritorious litigation.]

The Writing Requirement

> **Interpretation Act, R.S.O. 1990, c. I.11**
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> s. 29(1) In every Act, unless the context otherwise requires,
>
> "writing", "written", or any term of like import, includes words printed, painted, engraved, lithographed, photographed, or represented or reproduced by any other mode in a visible form;
>
> A Will must be in writing, but the exact form of that writing is not set by law.

Murray v Haylow
(1927), 3 D.L.R. 1036 (Ont. C.A.); cb, p.269

The common punctuation mark " under a word to indicate its duplication on the subsequent line complied with the formalities requirements.

The Signature Requirement

Please, do everyone a favour...

Don't send the Will out to be executed by the testator or testatrix by himself or herself.

Signatures on documents of various types have been required for centuries. There is much case law on all variations of expected problems – the form of the mark, illiterate persons, the use of personal stamps, etc. The validity question is not one that is unique to the law of wills and the utility of any particular mark said to comply with some requirement is a question of fact – the objective of the requirement is to ensure that the testator intended to give effect to the will.

Re White
[1948] 1 D.L.R. 572 (N.S.S.C.- A.D.); cb, p. 287

Where the testator had a stroke and two witnesses were called and the Will was read to him and he made utterances which the witnesses regarded as assent and one of them assisted the testator in making a mark on the document, the signature was valid.

Per Doull J:

> The appellant argues that in this case the testator did not himself sign, but that Binet signed for him, and that in such a case it must be shown by the proponents of the will that there was a "direction" by the testator or an acknowledgment. I do not think that the cases cited in the appellant's factum mean more than this that where the signature is by "direction" of the testator, the direction is as much a part of the signature as the making of the signature and the "direction" must be given in the presence of the witnesses or the signature "acknowledged" in the presence of the witnesses.
>
> In the present case whatever happened was all in the presence of the witnesses and even if it were held to be a directed signature, I would say that it was sufficiently directed. In my opinion, however, this is not such a case. **I think that the testator himself signed and none the less if he**

were assisted by Binet even to a considerable extent.

> The old case of *Wilson v. Beddard* (1841), 12 Sim. 28, 59 E.R. 1041, has always been cited in books of evidence as an authority. There the signature was made by a mark and a guided hand. The Vice-Chancellor (Sir L. Shadwell) said in part:
>
> 'Next, it was contended that what the learned Judge said with reference to the testator's hand being guided when he made his mark to his will was not law. **The Judge said that it was necessary that the will should be signed by the testator, not with his name, for his mark was sufficient if made by his hand, though that hand might be guided by another person; and, in my opinion, that proposition is correct in point of law.** For the *Statute of Frauds* requires that a will should be signed by the testator or by some other person in his presence and by his direction; and I wish to know if a dumb man, who could not write, were to hold out his hand for some person to guide it, and were then to make his mark, whether that would not be a sufficient signature of his will. In order to constitute a direction, it is not necessary that anything should be said. If a testator, in making his mark, is assisted by some other person and acquiesces and adopts it; it is just the same as if he had made it without any assistance.'
>
> I regard this case as one where the testator was trying to make a mark but could not effectively do it and received assistance. 'It is just the same as if he had made it without any assistance.'

—

Many provisions of the contemporary Canadian law of Wills can be traced back to English statutes. The *Wills Act 1837* (UK) required that the testator's signature be 'at the foot or end' of the Will. Though the statutory words developed over time, the essence of the requirement is the same – the Court must be convinced that the signature shows that the whole document was written before the signatures were made and that the signatures represent assent.

Yen Estate v Yen-Zimmerman
2013 BCCA 423 (B.C.C.A.)

The Latin maxim *omnia praesumuntur rite esse acta* ('all things are presumed to have been done correctly'), is the basis of the presumption of regularity. In this case the BBCA affirmed that the presumption remains good law.

Tysoe J:

> As Mr. Yen's testamentary capacity was not challenged on appeal, the facts relevant to the appeal can be stated very briefly.
>
> The putative will contained the following attestation clause:

SIGNED, PUBLISHED AND DECLARED by the above-named Testator, CHESTER HUGH YEN, as and for his Last Will and Testament, in the presence of us, both present at the same time, who at his request, in his presence, and in the presence of each other have hereunto subscribed our names as witnesses:

It bore a signature purporting to be the signature of Mr. Yen and the signatures of two witnesses with the names Ethel Strachan and Frank G. McGinley.

The trial judge was satisfied that the putative will had been signed by Mr. Yen because one of his daughters identified his signature and there was evidence that Mr. Yen wrote a letter dated August 13, 1973 to one of his other daughters advising her that he had his will prepared and put in his safety deposit box. The trial judge was also satisfied that the signature of Frank G. McGinley was proven. Mr. McGinley was a lawyer who died in 2006, but the plaintiff was able to prove his signature by way of a certificate from the Law Society.

There was no direct evidence at the trial with respect to the signature of Ethel Strachan, whose identity was unknown. There was also no direct evidence as to whether the witnesses were present together and saw Mr. Yen sign the document, nor any direct evidence that Mr. Yen was aware of and approved the contents of the document.

…

As they did before the trial judge, the appellants rely on the following passage from the decision of *Vout v. Hay,* 1995 CanLII 105 (SCC), [1995] 2 S.C.R. 876, 125 D.L.R. (4th) 431 at para. 26, for their position that the requisite formalities must be proven without the use of the presumption of due execution:

Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.

The trial judge rejected this argument for the following reasons (2012 BCSC 1620 (CanLII)):

I am unable to agree that Vout does away with the presumptions summarized and explained in Laxer. I reach that conclusion for several reasons. First, the case does not say that the presumptions are no longer valid. It says that “upon proof” of due execution and that the will was read over by the testator who appeared to understand it, certain consequences follow. It does not say anything about what the proof may or may not consist of.

> Second, the issue of due execution and whether the will was read over by the deceased arose only tangentially in Vout. The witnesses to the will both testified at trial. Although their evidence was inconsistent in some respects, they both said that they were present when the deceased signed the will. Given that evidence, there was no need to have recourse to any presumptions and, not surprisingly, they were not mentioned either at trial or in the brief endorsement by the Ontario Court of Appeal, or by the Supreme Court of Canada. As Lindley L.J. put it "[t]he maxim is not wanted where such observance is proved".
>
> Third, I am not prepared to conclude that the Supreme Court of Canada cast aside long standing propositions without mentioning them or explaining why they were doing so, particularly when it was unnecessary to resolve the issue before them.
>
> I respectfully agree with the judge's reasoning.

'Duly Executed': Attestation

Though it seems somewhat absurd, the execution of a will can be quite a ceremony. Indeed, like many a bad wedding, will-signing ceremonies are sometimes recorded for posterity by solicitors. Luckily, will signing ceremonies don't tend to capture drunken bad behaviour.

In any case, in respect of having a client sign his or her will, best practice would be to do as follows:

1. Gather the testator or testatrix and the two witnesses into a room.

2. Identify the witnesses and ascertain their identities and relationship, if any, to the testator/testatrix. Make a note of this.
3. Inform all parties that the testator/testatrix will be signing his or her will (or an important legal document).

4. Remove the witnesses to another room. Show the testator/testatrix the will and ensure that he or she has seen it before and has had legal advice. Read the will out to the testator or testatrix and have him or her initial the front and each page of the will including the penultimate page and sign the last page. Make notes of the procedure that you followed.

5. Bring the two witnesses back into the room. Have the testator/testatrix initial and sign the will. Each witness, in the presence of the testator/testatrix and each other, should initial the front and each page of the will including the penultimate page and sign the last page.

6. **Only one document setting out the will should be signed.** [if there are multiple originals and not all can be traced, it may be that the court will presume that the will was revoked by the testator or testatrix]

7. Have each witness swear an affidavit to having witnessed the signing of the will (in Form 74.8 of the Rules of Civil Procedure).

8. Date and sign your notes.

9. The will, your notes, the recording (recommended in unusual cases in which will challenges are expected), and the affidavits should be all placed in secure storage. The will is required for administration of the estate; the rest is evidence.

10. The testator/testatrix should be provided with one copy (or more if requested) of the will with your reporting letter which will explain the will and estate plan.

Chesline v Hermiston
[1928] 4 D.L.R. 786 (Ont. H.C.J.); cb, p. 295

Here there was a dispute as to the order in which witnesses signed and whether one of them actually saw the deceased place any mark on the document purporting to be a will.

Per Logie J:

> The cases are clear, moreover, that the signature of the testator must be written or acknowledged by the testator in the actual visual presence of both witnesses together before either of them attests and subscribes the will.
>
> The law has been so well settled that I can find no recent case exactly on all fours with the case at bar either in Canada or in England, but it is quite clear that, Elliott having signed first, then the testator and lastly Petrie, and Elliott not having resubscribed, the will does not comply with s. 12(1) of the Wills Act, and is therefore invalid.
>
> There will be a declaration accordingly…

Duly Executed: Acknowledgement

If the testator does not sign the Will in the presence of witnesses, he or she must acknowledge his or her signature – the witnesses must see the signature or have had the opportunity of seeing it. The testator must acknowledge his or her signature by words or conduct (including gestures). The witnesses must be physically present, together.

Re Gunstan
(1882), 7 P.D. 102 (Eng CA); cb, p.298

Neither of the witnesses saw the testatrix sign her name. On their entering the room, the testatrix was laying down her pen. Neither of the witnesses (the testatrix's sister and servant) knew what they were wanted for, or that the document on which they were writing their names was a will. Moreover, neither of them could see the signature of the testatrix as a piece of blotting-paper covered her signature.

Per Jessel MR:

> What is in law a sufficient acknowledgment under the statute? What I take to be the law is correctly laid down in *Jarman on Wills*, 4th ed. p. 108, in the following terms: "There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will"; and I may add, in my opinion, it is not sufficient even if the testator were to say, "My signature is inside the paper," unless the witnesses were able to see the signature.

Holograph Wills

A holograph Will is a Will wholly in the handwriting of, and bears the signature, of the testator. It 'is admissible to probate' (i.e. it is a valid Will) notwithstanding that it is not compliant with the ordinary requirements of 'due execution'. It is a valid Will on its own merits as set out in s.6 – that doesn't mean, however, that there aren't *any* formalities requirements (and that they aren't strictly enforced) or that the court will take a more relaxed attitude to ensuring that it represents the final intention of the testator.

There are arguments both for such Wills – on the one hand, the writing by hand of the Will evidences the testator's settled intention, but on the other it is difficult to protect against fraud, forgery, undue influence, etc without formalities requirements in respect of attestation. Most Canadian provinces allow for such testamentary instruments.

One recurring problem is whether the document purported to be a holograph Will is in fact a *draft* of a conventional Will rather than a *final instrument* and often such disputes turn on questions of fact rather than law – they are rather less common now in the courts as these sorts of cases are eminently suited to mediation.

A broad treatment of doctrine:

The holograph Will must still comply with the fundamental requirement that it represents the 'deliberate or fixed and final intention' of the testator to dispose of his or her assets as set out in the will.

See ***Bennett v Gray*** **[1958] S.C.R. 392; cb, p.304**.

The holograph will must be wholly in the handwriting of the testator.

Re Forest
(1981), 8 E.T.R. 232 (Sask. C.A.); cb, p. 308

Where the testator uses a stationer's form, only the handwriting of the testator is admissible as a holograph Will – dispositive words as printed on the form may be not admitted as a holograph Will. The statute is applied strictly, consistent with the authorities.

[If the handwritten portions are capable of being construed on their own as a Will aside from the 'superfluous' pre-printed parts, then the document may be admitted to probate. One such case is *Re Smith Estate* (2000), 36 E.T.R. (2d) 303 (PEISC).]

The signature requirement must be met.

> **Succession Law Reform Act, s.7:**
>
> 7(1) Position of signature
>
> **In so far as the position of the signature is concerned, a will, whether holograph or not, is valid if the signature of the testator made either by him or her or the person signing for him or her is placed at, after, following, under or beside or opposite to the end of the will** so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will.

Re Clarke
(1982), 39 O.R. (2d) 392 (Surr. Ct.); cb, p. 311

It is sometimes said that one canon of construction is that 'the law leans against intestacy'; thus, an interpretation of the provisions or application of a statute to the Will should favour validity and admission to probate. This, however, will not save a holograph Will that is unsigned and where the testator has printed his name at the top of the Will – s.7(3) specifically renders such a Will invalid.

After reviewing some Canadian authorities that would regard holograph Wills as not subject to the same formalities requirements as conventional Wills based on the provisions of specific legislation in other provinces, Judge Scott held:

> In blunt terms I see no way of adopting these authorities in view of the explicit wording of s. 7 of the *Succession Law Reform Act* which specifically states that the formalities respecting the position of the signature apply to holograph wills; and, of course, of more particular importance is s. 7(3) of the Ontario Act from which it logically follows that the only interpretation is that a signature in an alleged holograph will (complying with s. 6) cannot give any effect to a disposition or direction that is underneath or after the signature.
>
> The result here is that even if I recognized the signature all the directions and dispositions are underneath the signature and the only obvious and logical inference is that they were inserted after.

The holograph instrument can be incorporated into a formal Will and may amend a formal Will as well.

Re Dixon-Marsden Estate
(1985), 21 E.T.R. 216 (Ont. Surr. Ct.); cb, p. 306

At issue here was a document that was a single sheet of paper typed by the deceased. Each paragraph was initialled by the deceased. He dated the sheet (at the top) and signed it at the bottom (and wrote the words 'the above-mentioned are in short those to whom my estate is left' above the signature). Notwithstanding, the document was not admitted to probate on the basis that the hand-written statement incorporated the typewritten section by reference as there were not really two documents, and, neither qualified as a valid holograph or formal Will.

Judge Misener held:

> **In the first place, the document ought not to be viewed as two documents**. The probability is that Mr. Dixon-Marsden typed or caused to be typed the typewritten portions of the document, and then proceeded, as essentially one act, to initial the clauses, put in the date, write in the handwritten statement, and sign and print his name. Viewed in that light, there is simply no room for the doctrine of incorporation by reference. It is one document, not two, even though I would be the first to agree with Mr. Thompson that the doctrine of incorporation by reference does not require two separate sheets of paper. See Doe d. Williams v. Evans (1832), 1 C & R 42. If, therefore, it is right to categorize it as one document, how can one escape from the consequences of the Succession Law Reform Act, R.S.O. 1980, c. 488? Leaving aside the case of seamen and armed service personnel, that Act declares, in effect, that a will is not valid unless signed by the testator in the presence of two witnesses who also sign, or unless made "wholly by his own handwriting and signature". **The one document here, tendered as a holograph will, is not "wholly" in the handwriting of the testator. I am aware of the proposition that one document partly written and partly typed may well qualify as a holograph will, but it is only the handwritten portions that qualify, and only if those handwritten portions fully contain the testamentary wishes of the testator in the sense that the typewritten portions are irrelevant to the dispositive nature of the document**.
>
> **In the second place, I have always understood that the doctrine of incorporation by reference contemplates the existence of a testamentary document that qualifies for probate, independent of the document sought to be incorporated.** If that is so, the condition precedent to the argument that a typewritten document is incorporated is the tendering of a document wholly in the handwriting of the testator and bearing his signature that can be admitted to probate all by itself. Therefore, on the facts of this case, the handwritten words "the above-mentioned are in short those to whom my estate is left" must be capable of admission to probate. If I am

> right in that, the question as to whether or not those written words constitute a testamentary instrument must first be answered, and if the answer is no, then that is the end of the matter.
>
> I am satisfied that the answer is no on the basis of both common sense and authority. At the very least, one would think, as a matter of common sense, that a document, in order to qualify as a testamentary instrument, must have something in it relating in some way to events that are to happen after the death of the maker of the document. The words in question here have no such reference. Authority compels that requirement and more. In the first edition of *Jarman on Wills*, a will was defined as "an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life". Later texts tend generally to eschew definition, but any that I have read at least lay down the requirement that the document not only evince an intention on the part of the maker that it is to be operative only at death but as well that it deals with something over which the testator has some control.

The International Will

See Succession Law Reform Act, s.42.

The *Washington Convention on the Form of the International Will* (extracts are in the casebook) is available online at:

http://www.unidroit.org/english/conventions/1973wills/1973wills-e.htm

Basically, the Convention provides for certain minimum requirements for a Will which, if met, will allow probate in any country that has ratified the Convention:

The Will must be in writing, but can be in any language;

The person making the Will must declare in front of an ‘authorized person’ (that is, a lawyer or a notary) and two witnesses that it is their Will and they are aware of its contents;

The testator must sign and number each page of the Will in the presence of an authorized person and two witnesses, who must sign the final page of the document;

The authorized person must add the time and date of the signing, which becomes the date of the Will;

The authorized person must attach a special certificate to the Will which gives details of where the Will is to be kept.

The Convention was ratified by Canada in 1977.