Wills & Estates
Winter Term 2019

Lecture Notes – No. 7

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.

Re Milne Estate
2019 ONSC 579 (Ont. Div. Ct.)

This recently decided case had an odd beginning and a traditional ending, but left important questions unanswered. Here, a married couple each died testate having made mirror Primary and Secondary Wills. Each Primary Will was submitted for probate. Each Primary Will included a provision granting a power to the Estate Trustees to allocate assets as between the Primary and Secondary estates. The provision read in part:

> THIS IS THE PRIMARY WILL of me… with respect to the disposition of all property owned by me at the time of my death EXCEPT:
>
> …
>
> **(f) any other assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for the transfer or realization thereof**
>
> as to which I am making my Secondary Will on the same date as this Primary Will. With the exception of the said Secondary Will, I revoke all previous wills.
>
> [Emphasis added.]

The probate applications were reviewed by a Judge. After calling for and considering submissions by the Estate Trustees, the Application Judge held that both probate applications should be denied on two grounds both of which appear to be wholly novel:

a) The "three certainties" required for a valid express trust are applicable to the Wills, with the consequence that the discretionary Allocation Clause set out above results in uncertainty of subject-matter in each Primary Estate;

b) The inquisitorial jurisdiction of the Court in matters probate allows for a declaration of invalidity to be made in such circumstances.

The Divisional Court allowed the appeal. Marrocco A.C.J.S.C. held:

> [20] The validity of the use of multiple wills, i.e. Primary and Secondary Wills, was confirmed by Justice Greer in Granovsky Estate v. Ontario (1998), 1998 CanLII 14913 (ON SC), 156 D.L.R. (4th) 557, [1998] O.J. No. 508 (S.C.J.).
>
> [21] The use of Primary and Secondary Wills is often used to reduce tax payable pursuant to the Estate Administration Tax Act, 1998, S.O. 1998, c. 34, to avoid the delay associated with obtaining a Certificate of Appointment or preserve privacy in respect of certain assets.
>
> [22] Because a testator often executes their Last Will and Testament several years in advance of death, it is often not practical to provide a definitive list of assets which will require or do not require a Certificate of Appointment to be transferred or realized at the time the Primary and Secondary Wills are executed. To overcome this practical problem, estate planning lawyers often provide estate trustees with the power to determine whether a particular asset requires a Certificate of Appointment upon administering the will. These clauses are often referred to as allocation clauses. The use of allocation clauses is a common estate planning technique. See Martin Rochwerg, Miller Thomson on Estate Planning, (Toronto: Thomson Reuters Canada, 2018), at p. 2-57.
>
> [23] The position taken by the Application Judge in the Order therefore has a significant and wide-ranging adverse impact upon the use of such clauses in multiple wills, thereby affecting the estate plans of many individuals in Ontario. For this reasons, the Toronto Lawyers Association sought and was granted Intervenor status in these appeals.
>
> …
>
> A WILL IS NOT A TRUST
>
> [32] At paragraph 14 of the Application Judge's Reasons, he states as follows:
>
> A will is a form of trust. In order to be valid, a will must create a valid trust and must satisfy the formal requirements of the Succession Law Reform Act, R.S.O. 1990, c. S.26. There is no issue here regarding compliance with the formal requirements of the SLRA.
>
> [33] The Application Judge cited no authority in support of the statement that a will is a trust. I agree with Mr Justice Penny that this is an error of law.
>
> [34] A will is an instrument by which a person disposes of property upon death. See Albert H. Oosterhoff et al., Oosterhoff on Wills, 8th ed. (Toronto: Thomson Reuters, 2016) at p. 107. There are of course formalities of execution, but they are not raised in this appeal.
>
> [35] A will may contain a trust, but this is not a requirement for a valid will.
>
> [36] The definition of a "will" in s. 1(1) of the Succession Law Reform Act does not state that a will is a trust. Section 1(1) provides that:

"will" includes,

(a) a testament,

(b) a codicil,

(c) an appointment by will or by writing in the nature of a will in

exercise of a power, and

(d) any other testamentary disposition.

[37] Further, the nature of a beneficiary under a will confirms that a will is not a trust. See C.H. Sherrin et al., Williams on Wills, 9th ed. (London, U.K.: LexisNexis Butterworths, 2010) at para. 1.8:

> Although the title to the assets vests in the personal representative …the property comprised in residue is not held in trust for the beneficiary under the will so as to invest any equitable interest in him. It is in fact a fallacy to seek a separate existence of the equitable beneficial interest in the assets during the period of administration. [Emphasis added]

[38] In Commissioner of Stamp Duties (Queensland) v. Livingston (1964), [1965] A.C. 694, [1964] 3 All E.R. 692 (Australia P.C.) at 712, Viscount Radcliffe makes the same observation:

> When the whole right of property is in a person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property, any more than there is for the property of a full beneficial owner. What matters is that the court will control the executor in the use of his rights over assets that come to him in that capacity: but it will do it by the enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets.

[39] Section 2(1) of the Estates Administration Act vests all real and personal property of a person who has died in the deceased's personal representative, which is precisely the situation contemplated by Viscount Radcliffe.

[40] Specifically, section 2(1) provides as follows:

> 2(1) All real and personal property that is vested in a person without a right in any other person to take by survivorship, on the person's death, whether testate or intestate and despite any testamentary disposition, devolves to and becomes vested in his or her personal representative from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of the person's debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of. [Emphasis added]

[41] I appreciate that section 2(1) states that the deceased person's property is vested in the personal representative "as trustee". Waters' Law of Trusts in Canada,

4th ed., at 3.II.A.3 provides a helpful explanation of why executors seem to have been conflated with trustees which I accept:

> However, there is also an historical reason for the similarity of the rules applicable to trustees and personal representatives. The administration of deceaseds' estates was originally handled in England by the ecclesiastical courts. For a short time, the common law courts took over this task, and then in the eighteenth century the Court of Chancery assumed control. The law of trusts was still in its early formative stage at this time, and therefore the law governing both trusts and the administration of deceaseds' estates developed together from that point in the same court. There were and there remain distinctions between the two, a good example of which exists in the personal right of the legatee to trace the deceased's assets into the hands of third parties, a right which the trust beneficiary may not have to the same extent. But by and large, though nineteenth and twentieth century statutes have now drawn some further small distinctions, for example, as to the powers of personal representatives, Jessel M.R.'s words still remain true: “In modern times the Courts have not distinguished between … executors and trustees, but they have put them all together and considered that they are all liable under the same principles.” It is with regard to the liabilities of the two that the offices so closely approximate today. (citations omitted)

[42] In conclusion, the Application Judge erred in finding that the will was a trust.

[43] However, even if section 2(1) creates a trust in favour of those persons beneficially entitled to the deceased person’s property by law, the trust is created by statute not by the will. Indeed, section 2(1) applies whether or not the deceased left a will.

[44] Finally, if section 2(1) creates a trust, that trust is statutory and not subject to the “three certainties.”

Thus, while *Milne* confirms that a Will is not a trust, the requirements respecting an “allocation clause” will have to await a more suitable case for resolution.

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.
>
> …

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 …
>
> 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

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.

'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:

1. 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**.

2. 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).]

3. 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.

4. 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.