Wills & Estates
Fall Term 2022

Lecture Notes – No. 8

VII. FORMAL VALIDITY OF WILLS

Understanding 'formalities': regardless of context, form requirements operate both as a protective device to ensure that the transaction is as 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. <u>It is in fact a fallacy to seek a separate existence of the equitable beneficial interest in the assets during the period of administration.</u> [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) <u>All real and personal property</u> that is vested in a person without a right in any other person to take by survivorship, <u>on the person's death</u>, whether testate or intestate and despite any testamentary disposition, <u>devolves to and becomes vested in his or her personal representative</u> 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.

Will to be in writing

3 A will is valid only when it is in writing. R.S.O. 1990, c. S.26, s. 3.

Execution

4 (1) In this section,

"audio-visual communication technology" means any electronic method of communication which allows participants to see, hear and communicate with one another in real time. 2021, c. 4, Sched. 9, s. 1 (2).

Valid execution of will

(2) Subject to subsection (3) and 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. 2021, c. 4, Sched. 9, s. 1 (1).

Permitted use of audio-visual communication technology

(3) A requirement in clause (2) (b) or (c) that witnesses be in the presence of the testator or in one another's presence for the making or acknowledgment of a signature on a will or for the subscribing of a will may be satisfied through the use of audio-visual communication technology, if,

(a) at least one person who acts as a witness is a licensee within the meaning of the *Law Society Act* at the time;

(b) the making or acknowledgment of the signature and the subscribing of the will are contemporaneous; and

(c) the requirements specified by the regulations made under subsection (7), if any, are met. 2021, c. 4, Sched. 9, s. 1 (2).

Counterpart signing, subscribing

(4) For the purposes of clause (3) (b), signatures and subscriptions required to be made under clause (2) (b) or (c) may, subject to any requirements specified by the regulations made under subsection (7), be made by signing or subscribing complete, identical copies of the will in counterpart, which shall together constitute the will. 2021, c. 4, Sched. 9, s. 1 (2).

Same

(5) For the purposes of subsection (4), copies of a will are identical even if there are minor, non-substantive differences in format or layout between the copies. 2021, c. 4, Sched. 9, s. 1 (1).

No form of attestation

(6) Where witnesses are required by this section, no form of attestation is necessary. 2021, c. 4, Sched. 9, s. 1 (1).

Regulations

(7) The Minister responsible for the administration of this Act may make regulations providing for requirements that must be met under subsection (3) or (4). 2021, c. 4, Sched. 9, s. 1 (3).

ONTARIO IS NO LONGER A STRICT COMPLIANCE JURISDICTION

Since the creation of Upper Canada, Ontario had been a “strict compliance” jurisdiction, meaning that if a Will does not conform strictly to the formalities requirements of the statute, the Will is invalid. This changed on January 1, 2022:

Court-ordered validity

21.1 (1) **If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the will of the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it had been properly executed or made**. 2021, c. 4, Sched. 9, s. 5.

No electronic wills

(2) Subsection (1) is subject to section 31 of the Electronic Commerce Act, 2000. 2021, c. 4, Sched. 9, s. 5.

Transition

(3) Subsection (1) applies if the deceased died on or after the day section 5 of Schedule 9 to the Accelerating Access to Justice Act, 2021 came into force. 2021, c. 4, Sched. 9, s. 5.

The old law:

Sills v Daley
(2002), 64 O.R. (3d) 19 (S.C.J.); cb, p.343, note 15

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.

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.307

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.308

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.); cb, p.312

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.315

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.319

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.325**

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.329

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.331

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.334

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.

VIII. REVOCATION OF WILLS

The Succession Law Reform Act provides:

Revocation generally

15 A will or part of a will is revoked only by,

(a) marriage, subject to section 16;

Note: On January 1, 2022, the day named by proclamation of the Lieutenant Governor, clause 15 (a) of the Act is repealed. (See: 2021, c. 4, Sched. 9, s. 2)

(b) another will made in accordance with the provisions of this Part;

(c) a writing,

(i) declaring an intention to revoke, and

(ii) made in accordance with the provisions of this Part governing making of a will; or

(d) burning, tearing or otherwise destroying it by the testator or by some person in his or her presence and by his or her direction with the intention of revoking it. R.S.O. 1990, c. S.26, s. 15.

Revocation by marriage

16 A will is revoked by the marriage of the testator except where,

(a) there is a declaration in the will that it is made in contemplation of the marriage;

(b) the spouse of the testator elects to take under the will, by an instrument in writing signed by the spouse and filed within one year after the testator's death in the office of the Estate Registrar for Ontario; or

(c) the will is made in exercise of a power of appointment of property which

would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he or she died intestate. R.S.O. 1990, c. S.26, s. 16.

Note: On January 1, 2022, the day named by proclamation of the Lieutenant Governor, section 16 of the Act is repealed. (See: 2021, c. 4, Sched. 9, s. 3)

Revocation, change in circumstances

17 (1) Subject to subsection (2), a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

Note: On January 1, 2022, the day named by proclamation of the Lieutenant Governor, subsection 17 (1) of the Act is amended by striking out "Subject to subsection (2)" at the beginning and substituting "Except as otherwise provided in this section". (See: 2021, c. 4, Sched. 9, s. 4 (1))

Exception on termination of marriage

(2) Except when a contrary intention appears by the will, where, after the testator makes a will, his or her marriage is terminated by a judgment absolute of divorce or is declared a nullity,

(a) a devise or bequest of a beneficial interest in property to his or her former spouse;

(b) an appointment of his or her former spouse as executor or trustee; and

(c) the conferring of a general or special power of appointment on his or her former spouse,

are revoked and the will shall be construed as if the former spouse had predeceased the testator. R.S.O. 1990, c. S.26, s. 17.

Note: On January 1, 2022, the day named by proclamation of the Lieutenant Governor, section 17 of the Act is amended by adding the following subsections: (See: 2021, c. 4, Sched. 9, s. 4 (2))

Exception on separation

(3) Subsection (2) applies, with necessary modifications, on the death of the testator, if the spouses are separated at the time of the testator's death, as determined under subsection (4). 2021, c. 4, Sched. 9, s. 4 (2).

Same

(4) A spouse is considered to be separated from the testator at the time of the testator's death for the purposes of subsection (3), if,

(a) before the testator's death,

(i) they lived separate and apart as a result of the breakdown of their marriage for a period of three years, if the period immediately preceded the death,

(ii) they entered into an agreement that is a valid separation agreement under Part IV of the Family Law Act,

(iii) a court made an order with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage, or

(iv) a family arbitration award was made under the Arbitration Act, 1991 with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage; and

(b) at the time of the testator's death, they were living separate and apart as a result of the breakdown of their marriage. 2021, c. 4, Sched. 9, s. 4 (2).

Transition

(5) Subsection (3) applies in respect of a separation if an event referred to in clause (4) (a) occurs on or after the day subsection 4 (2) of Schedule 9 to the Accelerating Access to Justice Act, 2021 came into force, even if the will was made before that day, except that in the case of subclause (4) (a) (i), the spouses must also have begun to live separate and apart on or after that day. 2021, c. 4, Sched. 9, s. 4 (2).

This provision is repealed in respect of deaths after January 1, 2022:
s.15(a) Revocation by Operation of Law: Marriage

Traditionally, the orientation of the law was built on the recognition that marriage represents a fundamental change in one's life by which one acquires significant new rights and obligations based on social expectations which are recognized by law. Now, social circumstances are said to have presented a new problem that eclipses this traditional orientation to respond to the problems of "predatory marriages".

***Banton v Banton* (1998), 164 DLR (4th) 17 (Ont. Gen. Div.)*;* cb, p.363** is a well known case that demonstrates the problem that these amendments are said to cure. Here an elderly man married a second wife many years his junior in suspicious circumstances and then executed a new Will. Justice Cullity held that the man had capacity to marry but not capacity to make or revoke a new Will; however, as his existing Will was revoked by operation of law on the marriage, the result was that his second wife acquired inheritance rights in respect of his estate which would pass on an intestacy. Justice Cullity held:

> **It is well established that an individual will not have capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves. The burden of proof on this question is on those attacking the validity of the marriage and, in my judgment, it has not been discharged in this case. There is virtually nothing in the evidence to suggest that George Banton's mental deterioration had progressed to the extent that he was no longer able to pass this not**

particularly rigorous test. The medical evidence indicates his acceptance of the marriage and even in the last months of his life when he was at Village Park, he spoke of his wish to return to his wife -- albeit along with his then caregiver and companion, Ms. Yolanda Miranda.

…

While I believe that it may well be the case that a person who is incapable both with respect to personal care and with respect to property may be incapable of contracting marriage, I do not believe that incapacity of the latter kind should, by itself, have this effect. Marriage does, of course, have an effect on property rights and obligations, but to treat the ability to manage property as essential to the relationship would, I believe, be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate. Elderly married couples whose property is administered for them under a continuing power of attorney, or by a statutory guardian, may continue to live comfortably together. They may have capacity to make wills and give powers of attorney. I see no reason why this state of affairs should be confined to those who married before incapacity to manage property supervened.

[Emphasis added.]

Thus the problem became that where an elderly person with cognitive impairments had capacity to marry, the "predatory" partner would take the estate where the victim could not make a new Will. The victim, then, is the older adult (who acquires a spouse with potential *inter vivos* access to his or her assets) and his or her intended heirs (who would inherit a lesser sum or nothing at all given the newly acquired spouse's intestate rights). While attacking capacity to marry by seeking an order that the marriage is void *ab initio* on the question of capacity may be available on the facts, it is a steep hill to climb; *Hunt v. Worrod*, 2017 ONSC 7397 (S.C.J.); cf. *Tanti v. Tanti*, 2020 ONSC 8063 (S.C.J.).

<u>Revocation by Act of Testator</u>

15. A will or part of a will is revoked only by,

(c) a writing,

(i) declaring an intention to revoke, and
(ii) made in accordance with the provisions of this Part governing making of a will; or

(d) burning, tearing or otherwise destroying it by the testator or by some person in his or her presence and by his or her direction with the intention of revoking it.

Re Davies
[1928] Ch 24; cb, p.383

The Will may be revoked by an express declaration of revocation in a subsequent testamentary instrument - the declaration must evidence the intention to revoke but need

not be in any particular form of words. A declaration of complete or partial revocation can be implied in the wording of a later instrument. The entirety of the earlier Will need not be revoked in such circumstances.

In this case a farmer made a Will which gave 'all my farms and lands' in a certain parish in trust, and the residue of the estate in other trusts. He later bought additional land in the same parish and made a codicil to his will giving that land to his daughter for life, and then to his grandson – the codicil, however, didn't vest fee simple ownership in the land to anyone, merely established life interests. It was held that the provisions of the Will itself were not revoked, and that title went with the other lands into the established testamentary trust in respect of 'all my farms and lands' in the earlier instrument.

Leonard v Leonard
[1902] P 243; cb, p.387

The testator may evidence his intention to revoke the Will through a physical act of destruction of the Will itself. Like an express or implied revocation through a subsequent instrument, the revocation can be intended to be partial if the remaining part left un-destroyed is intelligible on its own.

Here the testator left a Will of 5 pages, but it was apparent that the first two pages were made after the last three pages (though attested to by the same witnesses) and included a general revocation of earlier instruments. Were the three pages of the earlier will revoked? Yes – the destruction of the first two pages was an act of revocation, notwithstanding that the last page still had a signature. Moreover, the three remaining pages were not intelligible on their own. Per Gorell Barnes J:

> This case is a remarkable illustration of the danger of testators meddling with their wills when once they have executed them properly.
>
> …
>
> **Applying the principles to be gathered from those cases, I am of opinion, from an examination of the last three sheets of this document, that they are practically unintelligible and unworkable as a testamentary document in the absence of the original sheets 1 and 2, and that the destruction of sheets 1 and 2 must be taken as having had the effect of destroying the validity of the whole will. The testator must be taken to have intended what his act would necessarily lead one to conclude as to his intention: having destroyed the earlier portions - pages 1 and 2 - he must have intended to revoke also the remaining portions - pages 3, 4, and 5. He did not intend these last three pages to be his operative will without doing something more. He intended to put two other sheets on to them. Up to that point the will was, in my opinion, legally revoked.**
>
> …
>
> It becomes, therefore, a question whether, at the time the deceased in the present case signed and caused the witnesses to put their signatures to these two pages (1 and 2), he did that as his will or part of his will, or simply to shew that they formed part of a will to which the signature at the end of the will was to give validity.
>
> In my opinion those signatures were only put on the two pages in question to identify them, and to make them valid if the will was valid at the end. That was,

> unfortunately, an abortive act. The later sheets had no effect by themselves, and they had no effect to render the sheets 1 and 2 operative.
>
> The result is that none of the sheets can be treated as a valid document of a testamentary character, and my judgment - unfortunate, I am afraid, for some of the parties - must be that this will must be pronounced against, and, if there is no other will, there will be an intestacy as to the whole of the deceased's estate.

Hayduk v. Gudz
2022 ONSC 2249 (Ont. S.C.J.).

A testator may designate a beneficiary to a RRSP or a RRIF in a Will, which will have the effect of revoking an earlier inconsistent designation. However the two designations may be able to operate in tandem. Revoking a Will in which a designation is made, however, would have the effect of revoking the designation in the Will itself.

Presumptive Revocation

Sugden v. Lord St. Leonards
(1876), 1 P.D. 154 (Eng. C.A.)

Edward Sugen was an eminent lawyer. A successful advocate, he was appointed King's Counsel, served as Lord Chancellor of Ireland and later as Lord Chancellor of Great Britain. It was odd that on his death in 1875 his will could not be located. Stranger still, Lord St. Leonards, as he was at his death, was said to be was in the habit of reading his will every night, and that his daughter Charlotte had to listen to it so many times over the years that she had memorized most of it. *Was the will revoked?*

In the appellate stage of the probate proceedings, Cockburn C.J. said '[i]t seems to me utterly impossible to suppose that... such a man as Lord St. Leonards would voluntarily have destroyed this will, whether for the purpose of revoking it, or making another, or for any other purpose that could be conceived. My mind revolts from arriving at any such conclusion, and I feel bound to reject it.' Charlotte's written recollection of the will was admitted to probate.

In Canada, *Sugden v. Lord St. Leonards* is still accepted for the proposition that the presumption of revocation is ''more or less strong' according to circumstances such as the character of the testator and his relation to the beneficiaries, the contents of the instrument, and the possibility of its loss being accounted for otherwise than by intentional destruction;' *Lefebvre v Major* [1930] SCR 252, 257 per Anglin C.J.C.

'Dependent Relative Revocation'

'Dependent Relative Revocation' is a term to describe conditional revocation of a Will on substitution by another Will. Thus, if the first Will is revoked on the condition that the second Will is effective, the first will remains effective if the second Will fails – however, this is a presumption that is rebuttable in respect of whether such a condition was in fact intended by the testator.

Thus, the testator must have considered the substitution of the second Will for the first will at the time of revocation (e.g. tearing up the first Will) – the act of destruction alone doesn’t allow the presumption to operate.

Re Bolton Estate
(1961), 29 D.L.R. (2d) 173 (Man. C.A.); cb, p.401

Freedman J.A.:

1 **On September 22, 1952, the testator, John Bolton, executed his will at the office of his solicitor, Mr. T. P. Hillhouse, Q.C. In October, 1958, he destroyed this will by burning it in the kitchen stove at the home of a distant relative**, one Ronna Lee Patton, where he was then staying. At or about the time of this act of destruction the testator, according to Mrs. Patton, expressed the intention of making a new will. **The petitioners, who are beneficiaries under the instrument that was destroyed, propounded a photostatic copy thereof for probate in solemn form** before Macdonell, Surr. Ct. J. **They contended that under the doctrine of dependent relative revocation the instrument dated September 22, 1952, is still to be regarded as the testator's last will and testament and that the photostat thereof accordingly qualifies for admission to probate. The administrator opposed the application, contending that the will had been destroyed *animo revocandi*, with a resulting intestacy.** The learned surrogate court judge found in favour of the administrator's contention. From his decision the petitioners now appeal, and this case accordingly presents us with a consideration of the doctrine of dependent relative revocation and of the proper limits of its application.

2 What is the doctrine? It is well described in the following language by Williams on Wills, vol. 1, at p. 100:

In particular, revocation may be relative to another disposition which has already been made or is intended to be made, and so dependent thereon that revocation is not intended unless that other disposition takes effect. Such a revocation is known as a dependent relative revocation, and if from any cause the other disposition fails to take effect, the will remains operative as it was before the revocation.

3 Although the doctrine has not given rise to an extensive jurisprudence in Canada, it has received consideration in several English cases. Among many that could be cited are Powell v. Powell (1866) LR 1 P & D 209, 35 LJP & M 100; and In re Botting Estate, [1951] 2 T.L.R. 1089, [1951] 2 All ER 997.

4 A review of the cases satisfies me that, although they differ in detail, they all have one thing in common, namely, that the act of revocation — by destruction or otherwise — is always "referable, wholly and solely, to the intention of setting up some other testamentary paper" (Powell v. Powell, supra, at p. 213). Unless the destruction is wholly and solely referable to such an intention, "and so dependent thereon that revocation is not intended unless that other disposition takes effect," the doctrine cannot successfully be invoked. Clearly the facts in each case will determine whether a particular act of revocation was conditional or absolute. In my view the facts in the present case compel the conclusion that the destruction of the will was done with the intention of revoking it absolutely; that it was not dependent upon the making of a new will or referable, wholly

and solely, thereto; and that accordingly the doctrine of dependent relative revocation does not apply.

5 At the time when the will was destroyed the testator was no longer living at the home of the petitioners. He had by then been living in Petersfield at the home of Mr. and Mrs. Patton for over a year. Such a change in circumstances could well have prompted the testator to put an end to the dispositions contained in his will. Those dispositions may not, in his view, have fitted the situation in which he then found himself. A conscious and deliberate act of burning the will hardly supports a conditional revocation. By itself it seems final and absolute enough. Indeed so it would be in this case, counsel for the petitioners admits, were it not for the testator's declaration that he intended to make a new will. But surely the court must be satisfied that the destruction of the will depended entirely upon the carrying out of such intention. The learned surrogate court judge was not satisfied that such was the case. I can only add that I agree. Indeed the facts strongly support a conclusion that the act of destruction of the will was performed deliberately and animo revocandi.

6 Events subsequent to the destruction appear to confirm this view. A testator who destroys a will only because he intends to replace it with a new one would normally be expected to be vigilant in implementing such intention. Here however the testator lived on for more than two years without making a new will, and without even — except in the most casual way — discussing the matter of a new will with his solicitor. Admittedly lapse of time is not alone decisive. But it is a circumstance entitled to some weight, especially so here in the **light of evidence relating to the testator's subsequent dealings with his solicitor. Some time after the burning of the will the testator was at Mr. Hillhouse's office. The evidence makes it plain that he did not go there for the purpose of discussing a will, but for another purpose. After leaving the office in company with two other men he returned and — as a kind of afterthought — said "that he had no will and wanted [Mr. Hillhouse] to draw one for him." This language strengthens the view that the testator believed he had no will; in other words, that its destruction had occurred animus *revocandi*.**

7 The evidence falls measurably short of establishing that the burning of the will was referable, wholly and solely, to an intention on the part of the testator to replace it by a new will. To look upon the destruction as conditional, without such evidence, would be to extend the doctrine of dependent relative revocation to an area where it does not properly belong. Testators who destroy an existing will often have in mind the subsequent making of a new will. They may even give expression to their thoughts. That does not mean, however, that a mere statement — no matter how vague or casual — of an intention to make a new will must automatically invest the deliberate destruction of an old will with a quality of conditional revocation. That the destruction depended upon the implementation of such intention must clearly appear, and it does not do so in the present case. We would be very unwilling to encourage the notion that the doctrine of dependent relative revocation could be applied in a case of this kind, where we have nothing more than that a testator when destroying his will contemplated the making of a new will.

8 The appeal must be dismissed, with costs.

Revival of Revoked Wills

The Succession Law Reform Act provides:

> 19.(1) A will or part of a will that has been in any manner revoked is revived only,
>
> (a) by a will made in accordance with the provisions of this Part; or
>
> (b) by a codicil that has been made in accordance with the provisions of this Part, that shows an intention to give effect to the will or part that was revoked, or,
>
> (c) by re-execution thereof with the required formalities, if any.
>
> (2) Except when a contrary intention is shown, when a will which has been partly revoked and afterward wholly revoked is revived, the revival does not extend to the part that was revoked before the revocation of the whole.
>
> 21. When a will has been revived in the manner described in section 19, the will shall be deemed to have been made at the time at which it was so revived.

Re Ott
[1972] 2 OR 5 (Surr Ct); cb, p.404

The deceased separated from his wife and made a second Will (revoking the first). The parties made a separation agreement including a clause renouncing all rights to the administration of each other's estate. The deceased sent a copy of his second Will to the wife saying that he would change it if she wished. She said she preferred the first Will. The deceased then destroyed the second Will believing the first Will would be revived. It was held that the deceased attempted to do what is not possible legally – to revoke a Will conditionally on an earlier and revoked Will becoming revived. The deceased should have executed the first Will again – though technically consistent with the statute and authority, the conclusion to the argument seems quite questionable on policy grounds given clear testamentary intent to give effect to a document properly attested to and without any allegation of fraud or undue influence.