Wills & Estates
Winter Term 2024

Lecture Notes – No. 9

VII. FORMAL VALIDITY OF WILLS

"Formalities":
regardless of context, requirements respecting the form of legal instruments operate as a protective device to ensure that the transaction is as intended by the parties (rather than fraudulent) and to provide evidence of those intentions in a legal enforceable form.

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.

Please note that there was a major change in the Ontario legislation respecting formalities, as below.

THE WRITING REQUIREMENT

Succession Law Reform Act, RSO 1990, c S.26, s.3

3. A will is valid only when it is in writing.

Interpretation Act, R.S.O. 1990, c. I.11, s.29(1)

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;

Thus, a Will must be in writing, but the exact form of that writing is not set by law. In other words, any language and tangible medium will suffiuce.

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

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.

> **Succession Law Reform Act, RSO 1990, c S.26, ss. 4(2), (6)**
>
> 4. (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.
>
> …
>
> 6 A testator may make a valid will wholly by his or her own handwriting **and signature**, without formality, and without the presence, attestation or signature of a witness.

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.

ATTESTED WILLS

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.

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**:

> **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**.
>
> No electronic wills
>
> (2) Subsection (1) is subject to section 31 of the Electronic Commerce Act, 2000.
>
> 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.

Groskopf v. Rogers
2023 ONSC 5312 (Ont. S.C.J.)

Per A.D. Hilliard J.:

> **Background**
>
> [4] Ms. Liscombe died on February 11, 2022. She had no spouse and no children. Ms. Liscombe was survived by three siblings: Judith Rogers, David Liscombe, and Michael Liscombe, and was predeceased by one: Sharon O'Hoski.
>
> **[5] Sometime in 2004, Ms. Liscombe completed a fill-in-the blanks style document in her own handwriting. In pre-printed text, the document begins "This is the Last Will and Testament". The document is signed but not dated. There is a space for two witnesses to sign but those are blank. The document names an Executrix – Annette Grospkopf, and an**

alternate, Judy Rogers. Specific bequests are set out and provision is made for the residue of the estate to be divided between Ms. Grospkopf and her sister, Sarah Rogers. The document also makes provisions for her dogs to be cared for, although Ms. Liscombe's dogs ultimately predeceased her.

[6] The alleged will was found in a lock box in the home where Ms. Liscombe was living at the time of her death. Along with this document, other handwritten notes were found, including instructions to Ms. Grospkopf on how to deal with the distribution of the estate. There was also a document entitled "Estate Planning & Inventory" that is another fill-in-the-blanks form that has Ms. Liscombe's handwritten notations.

…

The Law

…

[12] There are only a handful of cases that have interpreted section 21.1 of the SLRA.

[13] In the unreported decision of *Grattan v Grattan* (22-0054, February 1, 2023 (Belleville)), Justice Johnston validates an unsigned document prepared by a lawyer on the instructions of the deceased. Adopting the approach of Courts in British Columbia and Manitoba, Justice Johnston finds that the unsigned document represented the fixed and final intentions of the deceased and there was no evidence that she had changed her mind in the period between when instructions were provided and her death. It is notable, however, that the intervening period in that case was a mere fifteen (15) days between when final instructions regarding changes were communicated to the lawyer and the death of the testator.

[14] In *Cruz v Public Guardian and Trustee*, [2023] O.J. No. 2671, at para 9., the first of a trilogy of decisions written and released by Justice Myers, the deceased prepared and signed a will, but failed to get it witnessed. In determining that the will should be validated pursuant to section 21.1, Justice Myers wrote, "[t]he deceased just blew the formalities. Fixing this type of mistake is precisely what s. 21.1 seems to be for." Justice Myers also adopted the fixed and final intentions analysis, setting out that the standard of proof is the balance of probabilities.

[15] The second of the three cases decided by Justice Myers involved an application for disclosure of a solicitor's file, rather than an application seeking validation of a purported will; *White v White Estate*, [2023] O.J. No. 2800. Although he was not ruling on the validity of a draft will, Justice Myers did express some reservations about whether section 21.1 could be used to validate the draft on the facts before him. Justice Myers again indicated that the test is whether the document records the fixed and final intentions of the testator.

[16] Finally, in *Vojska Estate v. Ostrowski*, Justice Myers again uses section 21.1 to find that a will prepared by and signed in the presence of a lawyer, but not signed by the lawyer, was indeed valid. Justice Myers states: "It is hard to imagine a more textbook example of a case for which the new power was intended;" [2023] O.J. No. 2934 at para. 12. In that case, the will was in the lawyer's possession at the time of the death of the testator and there was no evidence that the will was ever revoked or changed. Justice Myers does note, however, that the mistake about formalities rested with the lawyer in that case and not the deceased.

[17] I would note that in all four (4) of the above cases, the Respondents were not contesting the request to validate the purported will. The issue was simply what is the test under the new section and could the document be validated by the Court pursuant to s. 21.1.

Analysis

…

[21] **Examining first the alleged will itself, I find that the document does not appear to be a draft. An executrix and alternate are appointed. The document addresses the entirety of Ms. Liscombe's estate and it is signed.** The lack of an alternate caregiver for her dogs and a small handwritten correction that is not initialed, does not, in my view, support a finding that the document is a draft.

[22**]** **In determining whether the alleged will represents Ms. Liscombe's fixed and final intentions, I have considered the document filled out by Ms. Liscombe entitled "Estate Planning & Inventory" found in the lock box with the alleged will. In that other document, in Ms. Liscombe's handwriting, she indicates "YES" beside the question, "Have you made a Will?" Ms. Liscombe's answer about whether she had made a will is evidence that Ms. Liscombe herself was of the view that the document she prepared was her will, representing her fixed and final testamentary intentions.** Additionally, Ms. Liscombe notes that the will is located in the lock box. That document corroborates Ms. Grospkopf's evidence that Ms. Liscombe had made a will and had stored it in a lock box for safe keeping. Furthermore, there is no evidence to contradict Ms. Grospkopf's assertion that she found the purported will in the lock box, just where Ms. Liscombe said it would be.

[23] In the alternative, Mr. Liscombe argues that the document should not be validated as Ms. Liscombe's will as his reconciliation with Ms. Liscombe proves that it could not have been Ms. Liscombe's fixed and final intention that Mr. Liscombe be eliminated as a beneficiary of the estate. In support of that alternative argument, Mr. Liscombe cites a decision from the British Columbia Court of Appeal wherein that Court held that the material time for determining testamentary intentions may vary depending on the circumstances.[5]

[24] In assessing whether the passage of time should be considered in

making a determination of validity under section 21.1, other sections of the SLRA provide context and guidance.

…

[27] Considering the issue of timing in the context of sections 17 and 22 of the SLRA, **I find that the relevant time for determining whether the document created represented Ms. Liscombe's fixed and final testamentary intentions was at the time the document was made. The reconciliation of Ms. Liscombe and Mr. Liscombe is insufficient evidence to find that the intentions set out in the alleged will were vitiated with the passage of time. Moreover, there is no evidence that Ms. Liscombe intended to change her will to include Mr. Liscombe as a beneficiary.**

[28] Even though I find that Ms. Liscombe spoke to Ms. Grospkopf about possibly changing her will, there is no evidence that Ms. Liscombe took any further steps in that regard and there was no document found that purports to be a codicil or revocation. Ultimately, there is no evidence upon which I could conclude that even when Ms. Liscombe had been contemplating changes to her will that those changes were to include Mr. Liscombe as a beneficiary.

Conclusion

[29] The evidence of Ms. Grospkopf, which I accept, corroborated by the documentary evidence reviewed above, convinces me on a balance of probabilities that the handwritten fill-in-the-blanks document prepared by Ms. Liscombe meets the test under s. 21.1 of the SLRA. I find that the document should therefore be validated as the last will and testament of Carol Liscombe.

Is this case correctly decided?

—

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…

—

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.

'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.

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.

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.