Wills & Estates
Winter Term 2025

Lecture Notes – No. 8

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 legally-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 suffice.

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 (and still the law in many jurisdictions):

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.

Salmon v. Rombough
2024 ONSC 1186 (Ont. S.C.J.)

Per Leroy J.:

> [1] Mr. Rombough, with assistance of counsel, made a properly executed and witnessed will on April 14, 2012.
>
> [2] Mr. Rombough died on January 15, 2022. The Applicant found a bound notebook in Mr. Rombough's desk drawer a week or so after his death. The Applicant contends that the content of this notebook is an authentic record of Mr. Rombough's deliberate fixed and final expression of intention as to the disposal of his property on death and applies for an order of this Court that this document is as valid and fully effective as the will of the deceased, as if it had been properly executed or made.

[3] The document propounded by the Applicant is comprised of excerpts from the 2012 will photocopied and pasted into the notebook together with handwritten annotations. This document is signed at the end and dated December 31, 2021. It does not comply with the required formalities of execution.

…

Caselaw in relation to s. 21.1

…

[36] The burden of proof that a non-compliant document embodies the deceased's testamentary intentions is a balance of probabilities. A wide range of factors may be relevant to establishing their existence in a particular case. Although context specific, these factors may include the presence of the deceased's signature, the deceased's handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests and the title of the document: Sawatzky at para. 21; Kuszak at para. 7; Martineau at para. 21.

[37] While imperfect or even non-compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements the harder it may be for the court to find it embodies the deceased's testamentary intention: George at para. 81.

[116] Justice Johnston had occasion to apply the curative authorizations contained in s. 21.1(1) in Gratton v. Gratton, unreported Brockville file number 22-0054. The deceased died on February 15, 2022 with one Applicant sibling and one Respondent nephew surviving. The evidence was that the deceased and nephew were estranged. The evidence is that the deceased and her brother remained very close through their lives.

[117] The deceased met with her lawyer to provide instructions for the preparation of her will. There were no other testamentary documents in play. The evidence is that the deceased intended to gift the entirety of her estate to her brother the Applicant. The lawyer sent the first draft to the deceased in PDF format. The deceased after review returned the draft with minor alterations including spelling and the corrected address of her home. There were no distributive alterations.

[118] Counsel confirmed that she would make the necessary corrections and left it to the deceased to schedule an appointment for formal signing. No appointment was made, and Ms. Gratton passed.

[119] At issue was whether the brother was entitled to a declaration and order that the unsigned will of the deceased is the valid and effective will as if it had been properly executed and witnessed.

[120] The Court noted that the analysis of whether the curative provision applies centres on two issues: first: whether the document is authentic and

second, does it represent the deceased deliberate, or fixed and final intentions regarding the disposal of her property upon death.

[121] The ruling cited two cases decided in British Columbia, namely Bishop Estate v. Sharedown (2021) and Gibb Estate (re), 2021 BCSC 2461 with similar facts – the deceased provided instructions to counsel for the completion of will. In Bishop, the instructions involved an office visit. In Gibb, the instructions were provided over the phone. Both fact circumstances involved constraints imposed by the Covid 19 pandemic. In both, the Court found that everything was settled but the executions with witnesses.

[122] Both Courts approved the unsigned documents as the fixed and final testamentary intentions notwithstanding the lack of signature.

[123] The Court in Gratton concluded the 15-day delay from the day she approved the document for signature did not raise concern for a change of mind regarding her testamentary intentions. It was further noted that the extrinsic evidence relating to the close relationship between the Applicant and deceased and the estranged relationship with her nephew bolstered the Court's confidence in the finality of the deceased's intentions. The Court approved the unsigned document.

[124] Authenticity and testamentary capacity were not challenged. Justice Johnston was satisfied that the deceased knew and approved of the contents of the document presented for probate.

[125] In Cruz v. PGT, 2023 ONSC 3629, the deceased had prepared his own will. It clearly expressed his testamentary intention in clear terms. He gave the document in a sealed envelope to his executor. He included a note to the executor asking the executor to get the will witnessed.

[126] Justice Myers accepted the authenticity of the document on the basis that the document was handed to the executor by the deceased and the executor swore to the authenticity and his continuity of possession of the will in a sealed envelope.

[127] In the context of the standard of proof as balance of probabilities, Justice Myers noted commentary calling for clear and convincing proof of authenticity and intention, he articulated that there is only one standard of proof. In the end, Justice Myers characterized the deficit in formality as – the deceased just blew the formalities.

[128] In Kertesz v. Kertesz, 2023 ONSC 7055 confirmed that the chain of possession of the subject will coupled with the lay witness recognition of the deceased's handwriting left no real doubt that the document was his and is authentic.

[129] In Vojska v. Ostrowski, 2023 ONSC 3894 Justice Myers was asked to validate a counsel prepared will in the circumstance that in the course of multiple document execution one witness signature was missing. At paragraph 12, he noted that "It is hard to imagine a more textbook

example of a case for which the new power to validate was intended."

[130] Justice Myers confirmed the fixed and final intentions analysis and balance of probabilities as the standard of proof.

[131] The facts in MacKinnon v. MacKinnon (2021) NSSC 272 are more closely aligned to those in the case at bar. The deceased completed a will with a lawyer in 2014. She was scheduled to meet with a lawyer to discuss her will in June 2019. She died the morning of the day of the appointment. The Applicant found two pages of notes unsigned, not dated or witnessed. Aside from the notes, the notepad was untouched. The notes appeared to relate to the disposition of her estate. The Applicant sought to prove the notes in solemn form. The Respondent contested and sought admission of the 2014 will into probate.

[132] The issue was whether the notes which lacked the formalities of formal execution embodied the testamentary intention of the deceased. The Court accepted that the notes were written by the deceased.

[133] The hearing involved viva voce evidence depicting the life circumstances of the deceased. The Court factored those relationships to conclude the intention depicted in the notes corresponded with her life experiences.

[134] Justice Gogan confirmed:

- that purport of the new authority in s. 21.1(1) is remedial and intended to give effect to testamentary intention not compliant with the formalities otherwise required;

- the onus is on the applicant to satisfy the requirements of the section on a balance of probabilities;

- discharging the onus requires substantial, complete and clear evidence relating the deceased's testamentary intention to the document; that said, note Justice Myers reminder there is only one burden of proof;

- Whether it is the deceased's own instrument or the notes of writing made by a third party, the crucial question to be answered is whether the document expresses/embodies the "animus testandi" of the deceased – a deliberate or fixed and final expression of the intention as to the disposal of his/her property on death.

[135] Justice Gogan adopted a non-exhaustive list of considerations that could bear on the intention determination:

- Degree of formality of the language of the document;

- Is it dated?

- Is it signed?

- Has it been sealed?

- Was it delivered to anyone with or without instructions as to what to do with it?

- Were there statements of the deceased in anticipation of death suggesting that the document was intended to reflect disposition after death?

- Certainty of the gifts set out in the document;

- How permanent was the document intended to be? Having the original document here allowed more confidence in assessing this consideration;

- Whether the document was on a fill in the blanks form or as in the notes at bar partially in Mr. Rombough's handwriting and partially cut and pasting from his 2012 will document.

> [136] In Estate of Harold Franklin Campbell (Re), 2023 ONSC 4315, Justice Chang observed that s. 21.1(1) does not confer on the Court "a license to read into testamentary documents or writings intentions that are not already set out in them or that are not clearly inferable from admissible extrinsic evidence." The Court resorted to a metaphor to make the point – the section cannot be used to create intention "out of a whole cloth."

[It is evident, then, that the new s.21.1 requires a comprehensive analysis of the surrounding circumstances to determine whether the purported Will meets the basic standard of representing the fixed and final testamentary intentions of the Deceased expressed in a document in circumstances that are consistent with such a determination.]

—

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.