

PROVING DUE EXECUTION

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Introduction

- Formalities of due execution have long been settled in law
- Function is to assure that a testator's estate is distributed in accordance with his/her intentions
- Requirements of due execution vary among Canada's Jurisdictions



Due Execution

- Traditionally, all jurisdictions were “strict compliance” jurisdictions
- Many provinces have since moved away from strict compliance in favour of **dispensing** or **validating provisions**

Proving Due Execution in Ontario

- **Ontario now has a validating provision in the *SLRA* at section 21.1**
- In order for a Will to be valid, it must be duly executed in accordance with section 3, 4, and 7 of the *Succession Law Reform Act*
 - *In writing;*
 - *Signed by the Testator; and*
 - *In the presence of two or more attesting witnesses.*

Signed by the Testator – *Re White*

- Testator suffered from complications of a stroke
- Testator's wife arranged for lawyer to prepare his Will
- Lawyer attended at Testator's home with 2 witnesses and reviewed Will with him
- When it came time to sign, testator could not do so
- Lawyer assisted testator in signing the Will
- Court held that any such assistance was done in the presence of the witnesses
- “was just the same as if he [the testator] signed it without any assistance”

In the Presence of Witnesses

Chesline v. Hemiston, [1928] 4 DLR 786

- Dispute regarding the order in which the witnesses signed the testator's Will and whether 1 of them actually witnesses the testator's signature
- Court determined that 1 witness signed before the testator and therefore Will did not comply with the formalities

Exceptions to Due Execution Requirements

- *SLRA*, section 5 – military personnel on active service

- *SLRA*, section 6 – Holograph Wills

Proving Due Execution

- Onus is on the propounder to demonstrate that the Will conforms to the formalities of the *SLRA*
- Where a Will appears on its face to be executed in accordance with the *SLRA*, it is presumed to be valid

CIBC Trust Corp. v. Horn

- Typewritten and properly executed Will
- Testator made subsequent handwritten alterations which were not dated or signed
- Court stressed that it did not have discretion to dispense with formal requirements
- Even if testator's intentions could be ascertained, the court did not have discretion to give effect to that intention in the absence of the formalities required by the *SLRA*

Dispensing or Validating Provisions

- Many Provinces have relaxed due execution requirements and have made modifications to legislation
- These modifications permit courts to declare Wills to be valid even if they do not fully comply with formalities

Robitaille v. Robitaille Estate

- Lawyer met with testator to discuss changes to her Will
- Before the Will could be executed, testator fell ill and was hospitalized
- Testator's daughter requested Will so that testator could sign
- Testator signed the Will and died a few days later
- The court held that the revised will represented a "deliberate or fixed and final expression of the testator's intention to dispose of her property on death"
- The Will was probated

Bishop Estate v. Sheardown, 2021

- S.58 – WESA – curative provision
- Unexecuted Will – final draft was prepared, not signed
- COVID-19 lockdown prevented testator from meeting lawyer to execute final draft; died 4 months later

Ontario's Validating Provision

- Ontario's new validating provision in section 21.1 of the *SLRA*:
 - 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: section 21.1(2) – *SLRA*

Sisson v. Park Street Baptist Church

- An exception to strict compliance
- Lawyer prepared Wills for a husband & wife but forgot to sign one of the Wills as a witness
- The Court held that although the *SLRA* does not contain a substantial compliance provision, the court could develop the common law to assist
- The Will was probated

Sills v. Daley

- Decision rejects substantial compliance and holding in *Sisson*
- Court refused to grant probate where a purported Will had been signed by only 1 witness
- Court held that absent a provision allowing a court to admit a document to probate that does not conform to the *SLRA*, it has no discretion

COVID-19 & Due Execution

- Emergency Order in Council – Bill 245 made permanent
- Making or acknowledgement of a signature on a Will may be satisfied using audio-visual communication technology
- At least 1 witness must be a licensee within the meaning of the *Law Society Act*
- Amended to permit execution in counterparts

THANK YOU!

