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RAIDERS OF THE LOST WILL - PROVING DUE EXECUTION

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INTRODUCTION:

"All your life has been spent in pursuit of archaeological relics. Inside the Ark are treasures beyond your wildest aspirations." PAUL FREEMAN – *Belloq*

The thing about treasures is that they can only be bequeathed if the Will is valid. A Will can only be valid if it conforms to certain formalities prescribed by law. For a Will to be valid in the province of Ontario, it must be duly executed, meaning that it must be executed in accordance with the requirements set out in the *Succession Law Reform Act*.[1]

Historically, strict compliance with these formalities was required for a Will to be probated. However, several provinces in Canada have relaxed this requirement. Outside of Ontario, lawmakers have made accommodations through legislative provisions to recognize Wills that do not conform to these strict requirements. These are called substantial compliance provisions and they permit courts to probate Wills that substantially comply with the requirements of due execution.

Ontario's legislature has yet to adopt a substantial compliance provision. As such, to probate a Will in Ontario it must comply with the formalities set out in the *Succession Law Reform Act.* However, the COVID-19 pandemic has prompted several changes to accommodate restrictions related to the pandemic. Recently, the Attorney General of Ontario made an Order under the *Emergency Management and Civil Protection Act*[2] which relaxes the requirements of due execution.

[1] *Succession Law Reform Act*, RSO 1990, c S 26 [*SLRA*].
[2] *Emergency Management and Civil Protection Act*, RSO 1990, c E 9.

This Order, albeit temporary, permits virtual signing and witnessing of Wills. This comes as a sigh of relief to drafting solicitors who may prepare Wills and have them executed in a safe environment and free from the fear of not adhering to the strict requirements of the *SLRA*.

This paper will discuss the legal formalities of due execution, variations in the legislation of other jurisdictions, some applicable case law, and the recent modifications brought about by the COVID-19 pandemic.

PURPOSE OF DUE EXECUTION

The formalities of due execution are designed to perform functions that will assure that a testator's estate is distributed in accordance with his or her intentions.[3] In essence, they operate as a protective device to make sure that the transaction is intended by the testator and to provide evidence of that fact. They serve as probative safeguards because when a court is asked to implement a testator's intentions, he or she will inevitably be dead and unable to authenticate the declarations set out in his or her Will.[4]

To that end, there are several reasons why these formalities exist. First, there is “the evidentiary function,” the primary purpose of which, is to provide the court with reliable evidence of testamentary intent and certainty with respect to the terms of the Will.[5] Second, "the channeling function" in which the Will’s formal requirements offer uniformity in the organization, language, and content of the Wills.[6] This ensures that it is not left to

[3] John H. Langbein “Substantial Compliance with the Wills Act” (1975) 88 Harvard L. Rev 492 [Langbein].
[4] *Ibid*.
[5] *Ibid* at pp. 492-93.
[6] *Ibid* at p. 494.

the court to languish over the question of whether the document before it was meant to be a Will.[7] Third, there is a "protective" function, which guards the testator against undue influence or fraud. Because a Will does not become operative until the death of a testator, the formalities of due execution are meant to conclude the question of testamentary intent and to prevent the substitution of a surreptitious Will.[8]

DUE EXECUTION IN ONTARIO

In Ontario, a court will not probate a Will which does not comply with the formalities required under the *SLRA*. These formalities are set out in sections 3, 4, and 7 of the *SLRA* which provide as follows:

> 3 A will is valid only when it is in writing.[9]
>
> 4 (1) Subject to sections 5 and 6, a will is not valid unless,
>
> (a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;
>
> (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and
>
> (c) two or more of the attesting witnesses subscribe the will in the presence of the testator.[10]
>
> 7 (1) 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.
>
> (2) A will is not rendered invalid by the circumstance that,

[7] *Ibid*
[8] *Ibid* at p. 496.
[9] *SLRA,* section 3.
[10] *SLRA,* section 4.

(a) the signature does not follow or is not immediately after the end of the will;

(b) a blank space intervenes between the concluding words of the will and the signature;

(c) the signature,

(i) is placed among the words of a testimonium clause or of a clause of attestation,

(ii) follows or is after or under a clause of attestation either with or without a blank space intervening, or

(iii) follows or is after, under or beside the name of a subscribing witness;

(d) the signature is on a side, page or other portion of the paper or papers containing the will on which no clause, paragraph or disposing part of the will is written above the signature; or

(e) there appears to be sufficient space on or at the bottom of the preceding side, page, or other portion of the same paper on which the will is written to contain the signature.

(3) The generality of subsection (1) is not restricted by the enumeration of circumstances set out in subsection (2), but a signature in conformity with section 4, 5 or 6 or this section does not give effect to,

(a) a disposition or direction that is underneath the signature or that follows the signature; or

(b) a disposition or direction inserted after the signature was made.[11]

Under section 3 of the *SLRA*, a Will must be in writing. However, the exact form of that writing is not set out in the law. For example, in *Murray v. Haylow*,[12] the testator used quotation marks below a word in the Will to indicate its duplication. The court held that this sufficiently complied with the formalities.

[11] *SLRA*, section 7.
[12] *Murray v. Haylow,* (1927) 3 DLR 1036 (Ont CA) at p. 269.

Pursuant to section 4 of the *SLRA*, the testator must sign the Will in front of two witnesses who are present at the same time. Testators who are unable to physically sign the Will can direct other persons to do so on their behalf. However, the case law makes it clear that "in the presence of the testator" means that the witnesses must see the testator sign and the testator must see each of them sign while both are in his or her presence at the same time.[13]

Pursuant to section 7 of the *SLRA*, a testator's signature can be anywhere on the document. However, a disposition in a testamentary document located after the signature will not be valid unless the requirements under section 18 of the *SLRA* are met. Section 18 of the *SLRA* provides that these alterations are valid if the testator signs the Will "opposite or near" the alterations in the presence of two witnesses who must also validate these changes in or about the same location on the Will.[14]

In *Re White*,[15] the testator suffered a stroke. At the request of the testator's spouse, the drafting solicitor prepared the testator's Will and attended at his residence with two witnesses. The Will was read to the testator, but, his condition was such that he was unable to write his signature. The drafting solicitor assisted the testator in making his mark on the Will. The court, in this case, held that any assistance that the drafting solicitor offered to the testator was done in the presence of the witnesses and that "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."

[13] See, *e.g.*, *Chesline v. Hermiston,* [1928] 4 DLR 786, 62 OLR 575 (HC).
[14] *SLRA,* section 18.
[15] *Re White*, [1948] 1 DLR 572 (NSSC) at p. 271.

If a testator does not sign the Will in the presence of two witnesses, he or she must acknowledge his or her signature. This means that the witnesses must see the signature or have had the opportunity to see it. In *Chesline v. Hermiston*, a dispute arose as to the order in which the witnesses signed the testator's Will and whether one of them actually witnessed the testator's signature. The court held that the Will was invalid because a witness signed before the testator and as such, did not properly attest to the signing of the Will:

> 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 to 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 re-subscribed, the will does not comply with s. 12(1) of the Wills Act, and is therefore invalid.[16]

EXCEPTIONS TO DUE EXECUTION

The *SLRA* contains some notable exceptions to the requirements of due execution. Section 5 of the *SLRA* provides that military personnel on active service may make a Will in writing, or by a direction to a person in his or her presence "without any further formality or any requirement of the presence of or attestation or signature by a witness."[17]

Similarly, section 6 of the *SLRA* addresses the holograph Wills' provision, which allows for non-conforming Wills, or those in the testator's "own handwriting and signature" without witnesses.[18] That being said, some formalities are required, in order to have a

[16] *Chesline v. Hermiston,* [1928] 4 DLR 786, 62 OLR 575 (HC) at p. 286.
[17] *SLRA,* section 5(1).
[18] *SLRA*, section 6.

valid holograph Will. For instance, a holograph Will must comply with the fundamental requirement that represents the 'deliberate or fixed and final intention' of the testator to dispose of his or her assets.[19]

Furthermore, a holograph Will must wholly be in the handwriting of the testator. That means if portions of the Will are generated by means other than the testator's own handwriting, those portions may not be admitted as a holograph Will.[20]

PROVING DUE EXECUTION

The onus of proof regarding due execution falls to the propounder of the Will. Accordingly, the propounder must demonstrate that the Will conforms to the requisite formalities as set out in the relevant sections of the *SLRA*. Where a Will appears to be executed in accordance with the *SLRA*, it is presumed to be valid. As articulated in the case *CIBC Trust Corp. v. Horn*:

> A presumption of validity operates such that whenever a Will is regular on its face and duly executed, in the absence of evidence to the contrary, it is assumed that the requirements of the statute with reference to the formalities of execution have been complied with.[21]

However, where suspicious circumstances are shown to exist surrounding the preparation and execution of a Will, this presumption will be spent, and the propounder will be required to prove that the Will was duly executed.

[19] *Bennett v. Gray*, [1958] SCR 392, p. 295.
[20] *Re Forest*, (1981), 8 ETR 232 (Sask. CA), at p. 299.
[21] *CIBC Trust Corp. v. Horn*, 2008 CarswellOnt 4706, [2008] OJ No 3091 at para 12.

INTERPLAY WITH KNOWLEDGE AND APPROVAL

Upon establishing due execution of a Will, there is a corresponding presumption that the testator had knowledge of and approved of the contents of the Will. However, where suspicious circumstances are alleged or demonstrated, the propounder of the Will has the burden of proving, on a balance of probabilities, that the testator had knowledge and approved of the contents of the Will.

There is a presumption of knowledge and approval if the testator read the Will and appeared to comprehend it.[22] However, this presumption is rebuttable if the challenger of the Will successfully demonstrates that the testator did not understand the contents of the Will even after having read it.

LEGISLATION IN OTHER CANADIAN JURISDICTIONS - STRICT VS. SUBSTANTIAL COMPLIANCE

Historically, all jurisdictions of Canada were considered to be strict compliance jurisdictions. This meant that due execution of a Will was required for the Will to be probated. However, several provinces have relaxed this requirement and have made modifications to their legislation that enables a court to make an order declaring a document to be effective as a Will even though it has not fully complied with the statutory formalities. This legislation also applies to the revocation, alteration, and revival of a Will. Some examples read as follows:

Saskatchewan – *Wills Act*[23]

> 37 The court may, notwithstanding that a document or writing was not executed in compliance with all the formal requirements imposed by

[22] *Vout v. Hay* [1995] 2 SCR 876 at para 26.
[23] *The Wills Act*, Chapter W-14.1, 1996, Saskatchewan.

this Act, order that the document or writing be fully effective as though it had been properly executed as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, where a court, on application is satisfied that the document or writing embodies:

(a) the testamentary intentions of a deceased; or

(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will.

Manitoba – *Wills Act*[24]

23 Where, upon application, if the court is satisfied that a document or any writing on a document embodies

(a) the testamentary intentions of a deceased; or

(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;

the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

New Brunswick – *Wills Act*[25]

35.1 Where a court of competent jurisdiction is satisfied that a document or any writing on a document embodies

(a) the testamentary intentions of the deceased, or

(b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,

the court may, notwithstanding that the document or writing was not executed in compliance with the formal requirements imposed by this Act, order that the document or writing is valid and fully effective as if

[24] *The Wills Act*, CCSM, c W150.
[25] *The Wills Act*, RSNB 1973, c W-9.

it had been executed in compliance with the formal requirements imposed by this Act.

Prince Edward Island – *Probate Act*[26]

70. If on application to the Estates Section the court is satisfied,

(a) that a document was intended by the deceased to constitute his will and that the document embodies the testamentary intentions of the deceased; or

(b) that a document or writing on a document embodies the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,

the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act but provided that the document or writing is signed by the deceased, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

Nova Scotia – *Wills Act*[27]

8A. Where a court of competent jurisdiction is satisfied that a writing embodies,

(a) the testamentary intentions of the deceased; or

(b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,

the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.

[26] *Probate Act*, RSPEI 1988, c P-21.
[27] *Wills Act*, RSNS 1989, c 505.

British Columbia – *Wills Estates and Succession Act*[28]

> 58(3). Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made,
>
> (a) as the will or part of the will of the deceased person,
>
> (b) as a revocation, alteration or revival of a will of the deceased person, or
>
> (c) as the testamentary intention of the deceased person.

What these jurisdictions have in common is that if a testamentary document does not conform to the formalities of due execution, a court can attempt to determine whether sufficient evidence exists demonstrating that the testamentary intention of the deceased is evident in the document. In *Estate of Young,*[29] it was determined that a court may order that a non-compliant, "record or document or writing or marking on a will or document" to represent testamentary intentions, will be effective as a Will, or partial Will, or to revoke, alter, or revive a Will.

Similarly, in *Robitaille v. Robitaille Estate,*[30] the testator met with her lawyer to discuss a change to the appointed executor under her Will. The next day, the lawyer spoke to the testator by phone (recognizing her voice) to discuss making a change to add a clause imposing a protective trust for the bequest to her daughter similar to the clause that was in place for her son. Before the revised Will could be discussed and executed, the testator fell ill and was hospitalized. Another daughter phoned and asked the lawyer to email the

[28] *Wills Estates and Succession Act*, SBC 2009, c 13.
[29] *Estate of Young,* 2015 BCSC 182.
[30] *Robitaille v. Robitaille Estate*, 2011 NSSC 203.

Will to her so that it could be executed by the testator. The testator then signed the Will and died a few days later.

In this case, 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."[31] As such, the Will was deemed valid and fully effective as if it had been executed in compliance with the formal requirements of the *Wills Act*.[32]

Ontario has not adopted a substantial compliance provision and the jurisprudence demonstrates a consistent unwillingness to depart from the strict formalities set out in the *SLRA*.[33] Though there are few exceptions, Courts in Ontario are bound by these legislative formalities and as such, cannot cure a will that is deficient in its execution.

One such exception can be seen in the case of, *Sisson v. Park Street Baptist Church,*[34] where the court took a less strict approach to determine whether a Will had met the formal requirements needed to prove due execution. In this case, a lawyer prepared Wills for a husband and 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 in this instance, based on clear evidence that the Will was in accordance with the testator's instructions, could develop the common law to assist.

In *Sills v. Daley,*[35] The court rejected the doctrine of substantial compliance and the holding in *Sisson* on the basis that it could not ignore the clear provisions of the *SLRA*. In

[31] *Ibid* at para 31.
[32] *Ibid.*
[33] See, *e.g*. *William Grey v. Norman Boyd*, 2011 ONSC 7288 citing *Ettore Estate v. Ettore,* 2004 CanLII 22087 (ONSC).
[34] *Sisson v. Park Street Baptist Church*, (1998), 24 ETR (2d) 18 (Ont. Ct (Gen Div) [*Sisson*].
[35] *Sills v. Daley,* [2002] OJ No 5318 [*Sills*].

this case, the court refused to grant probate where a purported Will had been signed by only one witness who had signed before the testator. The court held that absent a provision allowing a court to admit a document to probate that does not meet the requirements under the *SLRA*, the Court had no discretion to do so.

Similarly, in *Papageorgiou v. Walstaff Estate*,[36] an estate trustee and sole beneficiary attempted to probate an unsigned and unwitnessed Will. The court held the Will to be invalid and stated as follows:

> There are no exceptions to the statutory requirement that the will must be signed. This requirement can be traced to the original English statute, the Wills Act 1837, (U.K.) 7 Will. 4 and I. Vict. C. 26, s. 9. The making of a will is an important and solemn act and the law requires that it must be confirmed by the signature of the testator, in the presence of at least two witnesses, who must also sign. The obvious purpose of this statutory requirement is to prevent fraud.[37]
>
> […]
>
> Even in those jurisdictions that permit "substantial compliance", there is conflicting jurisprudence as to whether a will can be admitted to probate where it does not contain a signature. In the Manitoba case of *Chersak Estate, Re*, [1995] M.J. No. 468, 99 Man. R. (2d) 169 (Man. Q.B.), it was held that a will which was not a holograph and did not contain the testator's signature, could not be admitted to probate, even under Manitoba's substantial compliance provision (The Wills Act, R.S.M. 1988, W150, s. 23).[38]

These decisions offer little certainty with respect to the strict formalities of due execution in Ontario. The unfortunate side effect of Ontario's strict compliance regime is that some wills which truly reflect the testamentary intentions of a testator may be rejected based on no more than a technicality.

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[36] *Papageorgiou v. Walstaff Estate,* 2008 CanLII 3205 (Ont SCJ).
[37] *Ibid* at para *29.*
[38] *Ibid* at para 40.

A NOTE ON EXECUTION OF A POWER OF ATTORNEY DOCUMENT

The legal requirements regarding the execution of power of attorney documents are set out in the *Substitute Decisions Act* ("***SDA***").[39] The requirements regarding the execution of a power of attorney document are much less restrictive. A power of attorney document need not be in any particular form, but must be executed in the presence of (and signed by) two witnesses, who are not:

1. The attorney or the attorney's spouse or partner;
2. The grantor's spouse or partner;
3. A child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child;
4. A person whose property is under guardianship or who has a guardian of the person; and,
5. A person who is less than eighteen years old.[40]

More than one person can be named as an attorney. However, the attorneys shall act jointly unless the document provides otherwise.[41] This means that, unless otherwise stated, one attorney cannot act without the consent of the other attorney(s).

If any of the above criteria are not complied with, a power of attorney document is not effective unless the court is satisfied, on any person's application, that it is in the interests of the grantor, or his or her dependants' to declare it to be effective.[42]

[39] *Substitute Decisions Act*, 1992, SO 1992, c 30.
[40] *SDA,* sections 10(2), 48(2).
[41] *SDA*, section 7(4).
[42] *SDA* sections 10 (4), 48 (4).

COVID-19 AND DUE EXECUTION

COVID-19 has brought about a unique set of circumstances concerning the execution of Wills in Ontario. As noted above, for a Will to be valid it must be signed by the testator in the presence of two witnesses. This means that the testator and two witnesses must be physically together in order for a Will to be valid.

Before the onset of the COVID-19 pandemic, it was standard practice for the testator to be in the same room as the witnesses when executing a Will. However, the introduction of social distancing restrictions has made this extremely difficult, and, without this ability, a Will cannot conform to the statutory formalities of due execution. In response to this concern, the Government of Ontario has issued an Emergency Order in Council under section 7.0.2(4) of the *Emergency Management and Civil Protection Act,*[43] permitting the virtual witnessing of Wills and Powers of Attorney for Property and Personal Care during the state of emergency arising from COVID-19 (the "Order").

The Order states that the making, or acknowledgment of a signature on a Will, or, the subscribing of a Will, "may be satisfied using audio-visual communication technology provided that at least one person who is providing services as a witness is a licensee within the meaning of the *Law Society Act* at the time of the making, acknowledging or subscribing." Notably, section 2 of the Order made similar provisions for the execution of powers of attorney.

Pursuant to the Order, the technology used must allow the participants to see, hear, and speak with each other in real-time and at least one of the witnesses must be a lawyer or

[43] *Emergency Management and Civil Protection Act,* RSO 1990, c E9.

a paralegal. The Order has since been amended to include a provision that permits the signing of a Will or power of attorney in counterpart. This means that complete identical copies of documents can be signed separately by the testator and the witnesses at the same time and each identical copy shall form a complete document.

CONCLUSION

Though the formalities of due execution and the corresponding legislative intent seeks to ensure that Wills are appropriately scrutinized to see that a testator's intentions are truly upheld, the rigid state of the law in Ontario raises questions of whether requiring strict compliance can in some instances do just the opposite. Most of Canada's provinces have recognized a need for a relaxed approach to probate, which, as the case law demonstrates, successfully upholds a testator's intentions in the face of a technical error.

The COVID-19 pandemic has brought about necessary changes to acclimate to current circumstances. Whether or not these changes inspire the appropriate, and much needed changes to the *SLRA* is unclear. Only time will tell.

And finally on Wills not duly executed, and in the wise words of Rene Belloq, "Dr. Jones. Again, we see there is nothing you can possess which I cannot take away."