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Finally we acknowledge the drafting assistance of Earl Evaniew, from the Department of Legislative Counsel, who helped create the proposed legislation.

A full statement of all the contributors is contained in Appendix

A. We thank them for their contribution to these law reform proposals.

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I EXECUTIVE SUMMARY

In this report we recommend that Alberta courts be given power to admit to probate a will or an alteration, revocation or revival of a will which does not comply with the formalities prescribed by the *Wills Act*. This power is generally referred to as a "dispensing power". The power could be exercised only if a court is satisfied by clear and convincing evidence that the testator intended to adopt the document as a will, alteration, revocation or revival. In extreme cases, a court could even admit to probate a document which, for inadvertence or other good reason, a testator fails to sign. The only formal requirement that could not be dispensed with in a proper case would be writing. Electronic records could not be admitted to probate.

The *Wills Act* says that a will is not valid unless certain prescribed formalities are strictly complied with. A formal will is not valid unless the testator signs or acknowledges his or her signature in the presence of two witnesses who are present at the same time and who sign in the presence of the testator. A holograph will is not valid unless it is wholly in the handwriting of the testator, so that an unwitnessed will form the blanks of which are filled in by a testator is not valid unless the handwritten parts happen by chance to be enough to state testamentary intentions by themselves without reference to the printed words.

Testators sometimes fail to comply with these prescribed formalities because of ignorance or inadvertence. The number of such cases is small in comparison with the number of wills that comply with the formalities, but it is substantial in absolute terms. In the course of the shuffling of paper attendant on the execution of a will or a pair of wills, a witness, or even a testator, may fail to sign, or

a husband and wife may inadvertently sign each other's wills. A testator who has already signed may fail to utter words of acknowledgment in the presence of both witnesses. A testator may be unable to raise his or her head to see the witnesses sign, so that the witnesses do not sign in the testator's "presence". The strict-compliance rule invalidates wills in such cases. The substance of the matter is that a testator has adopted a document as his or her will. That substance may be

defeated because of a failure of form, that is, a failure to comply strictly with the statutory formalities.

The invalidation of wills because of failures to comply strictly with formalities has been seen in many places as unjust. Manitoba, Saskatchewan, Quebec, New Brunswick, and Prince Edward Island have given dispensing powers to their courts. So have five of the six Australian states (the sixth having adopted a more restricted remedy). In the United States, the *Restatement of the Law Third* and the *Uniform Probate Code* contain provisions to much the same effect as dispensing powers, though differently worded, and several of the American states have adopted the *Uniform Probate Code* provision. Some of the Canadian and Australian dispensing powers have been in force for 20 or 25 years, apparently with beneficial results.

Strict compliance with the formalities helps to show that a will is an authentic expression of a testator's testamentary wishes. It is not, however, the only way in which authenticity can be shown. Attempted compliance may be just as good evidence as strict compliance. Other expressions of a testator's intention to adopt a document as a will may be equally valid. A requirement of "clear and convincing evidence" will give at least as much assurance that a testator intended to adopt a document as a will as does apparent strict compliance with the formalities.

This report recommends the enactment of a dispensing power provision because the existence of such a power will enable courts to give effect to testators' wishes in cases in which they must now refuse to do so. The requirement of clear and convincing evidence will prevent the admission to probate of dubious documents.

A dispensing power will not cure all cases. A testator may have intended to adopt a document as a will, but there may be no clear and convincing evidence that he or she did so. However, the requirement of clear and convincing evidence for the exercise of the dispensing power is necessary to ensure that only authentic wills are admitted to probate.

Testators will still have good reason to comply strictly with the formalities. A failure to comply strictly will expose a testator's estate to substantial additional legal costs. A failure to comply strictly will also increase the risk that a will will be rejected.

This report deals with one additional subject. Under the *Wills Act*, a will is invalidated by the subsequent marriage of the testator unless there is a declaration in the will that it is made in contemplation of that marriage. The requirement that the declaration be in the will is another formal requirement which is likely to defeat the wishes of a testator who intends a will to have effect despite the marriage or even makes the will because of the expectation of marriage. The report recommends that the *Wills Act* be amended to provide that a will is not revoked by marriage if there is clear and convincing evidence that the testator made it in contemplation of the marriage.

LIST OF CONCLUSIONS

LIST OF RECOMMENDATIONS

III REPORT

1. INTRODUCTION

A. Reasons for project

[1] The *Wills Act*[1] prescribes certain formal procedures that must be followed in the execution of a will. If the formalities are not strictly complied with, the will cannot be admitted to probate and the testator's property will not be distributed in accordance with the will.

[2] Lawyers, judges, academic commentators and law reform agencies have expressed the view that the strict-compliance rule sometimes defeats the intentions of testators. In order to meet those concerns, several legislatures in Canada, Australia and the United States have amended their wills legislation to allow some wills to be admitted to probate despite lack of strict compliance with the formalities. The Alberta Law Reform Institute has undertaken a project to decide whether a similar amendment to the *Wills Act* should be adopted in Alberta. The conduct of ALRI's project is described briefly in Appendix A. This report is the result of the project.

B. Plan of report

[3] In this Part III of this report, we will first describe the formalities prescribed by the *Wills Act* and the reasons for prescribing them. Then we will examine cases in which documents which clearly express the testamentary intentions of testators have been excluded from probate because they have not been executed in strict compliance with the prescribed formalities. We will then consider the practicable

[1] The relevant provisions of the *Wills Act* appear in Appendix B.

provisions that might be made to allow some non-complying documents to be admitted to probate and the safeguards that might be adopted in order to ensure that any such provision will not allow documents to be admitted to probate which do not reflect testamentary intention. Then we will state conclusions and make formal recommendations.

[4] In Part IV we provide a draft of an amendment to the *Wills Act* which would give effect to our conclusions and recommendations. Then in appendices we provide a good deal of background information which is referred to in the text and which readers may wish to consult.

[5] Throughout most of this report we will for convenience refer only to wills. In Chapter 7 we will suggest that our recommendations should apply not only to wills but also to alterations of wills and to documentary revocations and revivals of wills.

C. Summary of recommendations

[6] Our ultimate recommendation is that the courts should have a "dispensing power", that is, a court should have power to admit a document to probate despite a failure to comply strictly with the formalities. However, we will recommend a court should have that power only if it is shown by clear and convincing evidence that the testator intended the document to be a will. We will recommend that the dispensing power, subject to a similar safeguard, should apply to alterations made in wills and to documentary revocations and revivals of wills.

[7] This report does not suggest that any change be made in the formalities themselves. The formalities will continue in force, and wills which are executed in strict compliance with the formalities will continue to be admitted readily to probate. The purpose of the project is to make available an alternative way of obtaining probate

of documents which testators intend to be wills despite the fact that the testamentary intention is not expressed in the prescribed form or accordingly to the prescribed procedure.

[8] We will also recommend that the courts should be given power to accept clear and convincing evidence that a testator made a will in contemplation of marriage, although no declaration to that effect appears in the will itself, with the result that the will will not be revoked by the contemplated marriage.

D. Results of consultation

[9] The consultation we have engaged in is described in Appendix A. Included were two meetings, one in Edmonton and one in Calgary, participated in by practitioners with experience in the area of wills. We also received letters from a number of Queen's Bench judges, including a committee of four judges who were invited by the Chief Justice to comment. Some of the comments received will be referred to individually in this report.

[10] Of those who attended our consultative meetings, one participant thought that a dispensing power would cause too much inconvenience to be justified, and another thought that a "substantial compliance" provision is as far as the law should go, given the latitude already given by the holograph will and given also the desirability of minimizing litigation and the desirability of certainty for testators and courts. The rest thought that a dispensing power should be adopted. A majority thought that even a signature might be dispensed with in appropriate circumstances, though the predominance of view was not as great. A majority also thought that there should be a rebuttable presumption that a non-compliant will is invalid and a somewhat differently-composed majority thought that a non-compliant will should be admitted to probate only if there is clear and convincing evidence

that the testator intended to adopt it as a will.

[11] The committee of four judges of the Court of Queen's Bench agreed that there should be a dispensing power, but thought that it should not allow the court to dispense with witnesses (in the case of a formal will) or with a signature (in the case of either a formal will or a holograph will). This proposal would allow for flexibility in the positioning of a signature and for dispensing with the requirement that the testator and witnesses be together, but would not go further. The judges may have had in mind problems of authenticity, but the danger they cited was that a broad dispensing power might encourage sloppy practice and the use of self-help wills. Other members of the Queen's Bench who commented were broadly supportive of a dispensing power.

[12] Other commentators, with one exception, were broadly supportive of proposals for a dispensing power. Again, a power to dispense with a signature received majority support, though a lesser majority.

2. REQUIRED FORMALITIES

A. Purpose of formalities

[13] Everyone is entitled to dispose of his or her property on death. That is one of our fundamental social policies.[2] The law gives effect to this fundamental social policy by providing that a deceased person's property must be distributed according to the deceased person's will.

[14] However, the law, through the *Wills Act*, says that a will is not valid unless the will and its execution meet certain requirements of form which are described below. The Act provides one set of formalities for formal wills; a second set for holograph wills; and a third set for the wills of mariners at sea and personnel of the armed forces on active service. The prevailing legal rule is that the law will not recognize a will as valid–that is, a document cannot be admitted to probate–unless it is executed strictly in compliance with the set of required formalities which applies to it.[3] If the will is not admitted to probate, the law will not require the wishes of the person who made the will, the testator, to be carried out in accordance with the will.

[15] Academic writers have said that compliance with the prescribed formalities serves a number of purposes. Compliance is a safeguard against forgery and impersonation, though not a perfect one. Compliance with the requirements for a formal will is said to help to establish testamentary capacity, but witnesses are not required to be able to judge that capacity. Compliance with the requirements for a formal will (but not a holograph will) is a safeguard against coercion unless

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[2] Other social policies impose limits on an individual's power of disposition, but it is the existence of the power and not the limits placed on it which is relevant to this discussion.

[3] The later discussion will refer to some exceptional cases.

the witnesses are in collusion, but it is not a safeguard against fraud or undue influence which induces a testator to sign a will voluntarily. Going through the ritual for a formal will, or preparing a document entirely in the testator's handwriting, will bring home to the testator the seriousness and importance of the making of a will. Compliance makes for ease of court administration, as documents in proper form are more quickly and easily processed without the need for special applications.

[16] It is in our view clear that strict compliance with the formalities is not an end in itself. It is our view that the primary purposes of the formalities are, first, to ensure that documents admitted to probate are authentic and are intended to be wills, and, second, to exclude from probate documents which are not authentic or which are not intended to be wills. That is to say, in our view the formalities are primarily intended to recognize and promote freedom of testation, not to limit it or to place hurdles in its way. If it is not the purpose of the formalities to recognize and promote freedom of testation, it should be.

CONCLUSION No. 1

The policy of the law is to allow persons to give directions by will as to how their property is to be disposed of on death.

CONCLUSION No. 2

The primary purposes of the will formalities prescribed by the *Wills Act* are

(a) to ensure that documents that are authentic and intended to express the testamentary intention of

testators are admitted to probate, and

(b) to ensure that documents that are not authentic or are not intended to express the testamentary intentions of testators are not admitted to probate.

B. Formalities prescribed for formal wills

[17] The present formalities prescribed for formal wills originated in England in 1837. They superseded the requirements of the *Statute of Frauds* of 1677, which imposed the first requirement of attestation in England.

[18] The English *Wills Act 1837*[4] implemented most of the recommendations of a body of Real Property Commissioners. It was thought to provide one simple set of formal requirements (except for soldiers' and sailors' wills, holograph wills not then being recognized). The Commissioners were concerned to provide safeguards against fraud, forgery, imposition and the lack of capacity. It is clear from what the Commissioners said and from the statute itself that the intention was to ensure as far as possible that testators' wishes were respected.[5]

[19] The formalities prescribed by the 1837 *Wills Act* required a will

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[4] S.U.K. 1837, c. 26.

[5] Holdsworth, *History of English Law*, 1965, vol. 15 p. 172 makes the point about simplification. Charles I. Nelson and Jeanne M. Starck (*Formalities and Formalism: A Critical Look at the Execution of Wills* (1978-79) Pepp. L. Rev. 331 at 342) concluded that "...the Commission's primary concern was to create practical formalities to assure adequate evidence would be available at the testator's death, while at the same time not unduly burdening the courts with formalities which would only serve to defeat true wills".

to be

(a) in writing,

(b) signed by the testator or someone at his direction at the foot or end thereof, and

(c) signed, or the signature acknowledged, in the presence of two witnesses who

(i) are present at the same time, and

(ii) sign in the presence of the testator.

Section 40 of the 1875 *North-West Territories Act* introduced these same formalities into Alberta, and s. 5 of the *Wills Act*, S.A. 1927, c. 21 brought them into Alberta legislation. Sections 4 and 5 of the present Alberta *Wills Act* prescribe substantially the same requirements for formal wills today, though s. 8 has relaxed somewhat the requirement that the testator's signature be "at the foot or end" of the will. All of the common-law provinces and territories require compliance with substantially the same formalities for formal wills.

C. Formalities prescribed for holograph wills

[20] Alberta and some other provinces provide an alternative to a formal will. A testator may make a "holograph" will under s. 7 of the *Wills Act*. Holograph wills have been recognized in Alberta during the 70 years that have elapsed since the enactment of the *Holograph Wills Act*, S.A. 1927, c. 73. The requirements of the present s. 7 are that the will

(a) must be "wholly" in the testator's handwriting, and

(b) must bear the testator's signature.

The acceptance of holograph wills may be regarded as a relaxation of the requirement of the formalities prescribed for formal wills, or, alternatively, it may be regarded as the substitution of handwriting and signature as the required formalities.

D. Formalities prescribed for wills of armed forces personnel and mariners

[21] Section 6 of the *Wills Act*, which was first enacted in Alberta by an amendment to the *Transfer and Descent of Land Act* during the First World War,[6] relaxes the formalities for wills made by members of armed forces while on active service and for "a mariner or a seaman when at sea or in the course of a voyage". Such a person "may make a will in writing signed by him or by some other person in his presence and by his direction without any further formality or any requirement of the presence of an attestation or signature by a witness". That is, it is enough that there is a "writing", whether or not the "writing" is by the testator, and a signature which is that of the testator or a person acting under the testator's direction.

[22] Section 6 exercises a legislative dispensing power. Its existence shows that there may be circumstances under which some relaxation of the prescribed formalities is useful and will not be likely to lead to the admission to probate of documents that are not intended to be testamentary. However, wills made under s. 6 are not common and we have not seen any cases in which the relaxed formalities have not been complied with in cases to which s. 6 applies, so that further reference to them is not necessary.

E. International wills

[23] Part 3 of the *Wills Act* adopts the *Convention Providing a Uniform Law on the Form of an International Will*. The Convention is attached as a schedule to the *Wills Act*. Article 1.1 of the Convention provides that a will is valid as regards form irrespective of the place it is made, the location of the assets and the nationality, domicile or residence of the testator "if it is made in the form of an international will complying with Articles 2 to 5 hereunder".

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[6] S.A. 1917, c. 3, s. 39.

[24] With one exception, the formalities required by Articles 2 to 5 of the Convention[7] are similar to, though somewhat more rigorous than, the formalities required by ss. 4 and 5 of the *Wills Act*. The exception is that, in addition to the two witnesses required by s. 4, an international will must be acknowledged and signed in the presence of "a person authorized to act in connection with international wills". Under s. 48 of the *Wills Act*, all active members of the Law Society of Alberta are designated as persons authorized to act in connection with international wills. The authorized person is entitled to attach a certificate proving the essential facts about the identity of the testator and witnesses and the procedure followed in the execution of the will, which certificate, in the absence of evidence to the contrary, is conclusive of the formal validity of the will as a will.

[25] The Convention provides a permissive scheme which, if followed, will achieve international recognition of a will. This report and our recommendations deal only with the formal validity of wills to which Alberta law initially applies. Nothing in the discussion or in our recommendations affects the Convention scheme in any way, and no further reference will be made to it.

F. Formalities required for some other dispositions that take effect on death

[26] There are some documents other than wills which are really testamentary in nature, as they remain revocable until death and provide for the distribution of property only on death. Examples are beneficiary designations for insurance policies and for future income

[7] Articles 6 and 7 of the Convention provide for additional formalities: for example, the signature must be at the end of the will and all sheets must be signed by the testator or authorized person, and the date is to be noted at the end of the will by the authorized person. These are mandatory in form, though, as noted, the wording of Article 1.1 refers only to Articles 2 to 5.

plans such as RRSPs and RRIFs. For these designations the only formalities required are that they be made in a specified form and that they be signed. No witness is required. As we noted in ALRI Report 68, *Beneficiary Designations: RRSPs, RRIFs and Section 47 of the Trustee Act*, page 52, while there has been occasional litigation over whether a person who signed a designation was mentally competent or free from undue influence, there is no reported case, or judicial comment in a reported case, that suggests that the lack of any additional attestation requirement affected the validity of a designation in any way.

G. What is "writing"?

[27] Under s. 4 of the *Wills Act*, "[a] will is valid only when it is in writing." This requirement applies to all wills. A holograph will must be in a particular form of writing, that is, the testator's handwriting.

[28] Under s. 25(z) of the *Interpretation Act*, "'writing', 'written' or any similar term includes words represented or reproduced by any mode of representing or reproducing words in visible form". This is very broad. We are advised by Legislative Counsel that under Alberta drafting convention it does not include an electronic record.

3. EXCLUSION OF WILLS FROM PROBATE BY THE "STRICT COMPLIANCE" RULE

A. "Strict compliance" rule

[29] The general, and almost invariable, rule is that if the execution of a will does not strictly comply with the prescribed formalities the will cannot be admitted to probate and is not a valid will; that is, the wishes of the testator are rendered ineffective. The questions for consideration here are whether or not the application of the "strict compliance" rule results in the exclusion from probate of documents which represent testators' testamentary intentions, and, if so, whether the number of such documents so excluded justifies, or even requires, a remedy (assuming that a remedy can be devised which will not be worse than the evil to be corrected). In order to come to a conclusion on these questions, we turn first to information gathered in the course of our consultation, statements made by law reform agencies and academic commentators, and, finally, to reported cases.

B. Factual information

[30] As noted in Appendix A, we held two consultation meetings, one at Edmonton and one at Calgary, at which groups of practitioners with extensive experience in the area of wills and estates were invited to give information and advice. At our Edmonton consultation meeting, 7 out of 10 lawyers who practise in the area had seen wills which were not executed in strict compliance with formalities, and in Calgary 8 out of 10 had also seen such cases.

[31] Of 1413 probate files in Calgary in 1999, 10 involved failures to comply with execution requirements which could not be resolved on the face of the wills.[8] This number would not include documents which

[8] Statement by Justice Ernest Hutchinson to a meeting held at Calgary on June 21, 2000 to discuss Wills: Non-Compliance with Formalities.

were not propounded because it was apparent that they did not comply.

[32] It is worth referring here to an Australian account. In a 1993 article,[9] Justice Powell, the Probate Judge of the Supreme Court of New South Wales, gave some numbers relating to applications made under s. 18A of the New South Wales *Wills and Probate Administration Act* which came into force on November 1, 1989. Section 18A gave the court power to admit to probate documents which did not strictly comply with the prescribed formalities, that is, a dispensing power. In the 13 months from November 1989 to November 1990, 48 applications were made under s. 18A. In the 11 months ending December 31, 1991, 118 applications were made. The judge pointed out that total applications for grants were 19,000 in 1989, 20,500 in 1990 and 19,300 in 1991. If the applications are assumed to have been made at the same rate for the additional month in 1991, it would seem that the s. 18A applications were some 0.6 2/3% of all applications (though the judge's estimate was 0.25% to 0.5%).

[33] In correspondence, one Alberta Queen's Bench judge, speaking for himself and another judge, said that they had seen "numbers" of non-compliant wills. We have also received a few letters from lawyers referring to such cases.

[34] This information does not suggest that the numbers of wills that are not executed in strict compliance with formalities is great, particularly in relation to total wills. It is, however, significant. We were impressed by the fact that so many practitioners and judges have had personal experience with non-compliant wills.

C. Law reform agencies, texts and commentators

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[9] *Recent Developments in New South Wales in the Law Relating to Wills*, (1993) 67 Austl. L.J. 25.

[35] A number of law reform agencies have reviewed the question and found that problems of rejection existed which justified remedial legislative intervention.[10] In Australia, these include the South Australian Law Reform Committee, and the New South Wales, Queensland and Western Australia Law Reform Commissions. In Canada they include the British Columbia, Manitoba and Saskatchewan Law Reform Commissions and the Uniform Law Conference of Canada. The reports of these agencies are described in Appendix C.

[36] In the United States, the National Conference of Commissioners on Uniform State Laws has included model remedial legislation in the *Uniform Probate Code*. The American Law Institute's *Restatement of the Law Third* includes a remedial provision. An extract from *Restatement Third* appears in Appendix C. The *UPC* and *Restatement Third* provisions are based on the notion of "harmless error" which can be excused. Their effect is similar to the effect of a "dispensing power".

[37] Legislation based on such recommendations and proposals has been enacted in 5 Canadian provinces (Manitoba, New Brunswick, Prince Edward Island, Quebec and Saskatchewan) and all of the Australian states and territories. The Canadian legislation and examples of the Australian legislation appear in Appendix D. Six American states (Colorado, Hawaii, Michigan, Montana, South Dakota and Utah) have enacted legislation based on the *Uniform Probate Code's* "harmless error" provision which also appears in Appendix D.

[38] This level of law reform and legislative activity suggests that, in the absence of remedial legislation, the problem created by the rejection of wills simply because they do not strictly comply with

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[10] In England, the Lord Chancellor's Law Reform Committee declined to recommend a dispensing power on the grounds that to attempt to cure "the tiny minority of cases where things go wrong in this way might create more problems than it would solve...".

formalities is widespread. The formalities that are prescribed in the jurisdictions mentioned are much the same as those prescribed in Alberta.

D. Reported cases

(1) Formal Wills

[39] Examples of the exclusion from probate of documents that reflect testators' testamentary intentions over the last 20 years, and longer in Alberta, will be found in Appendix E.[11]

[11] See also *McNeil* v. *Cullen* (1905), 35 S.C.R. 510, 514. In the *McNeil* case the witnesses entered the room after the testator had signed the will. Although the lawyer, who was present, said that he had asked the testator whether the document was her last will and whether she wished the witnesses to sign, the witnesses said that this had not happened and all three levels of court found that there had been no acknowledgment and held that the will could not be probated. They did specifically find that the testator had signed the will (though there was a second question, which the courts did not have to consider, as to whether the document was the true will of the testator).

[40] The example best known in Alberta is *In re Wozciechowiecz Estate*.[12] In that case, the Alberta Appellate Division found that the testator's will gave effect to his intentions, but held that the will was invalid because, although the witnesses signed in the testator's hospital room, the testator, who was desperately ill, was incapable of turning towards the witnesses and therefore could not see them sign. Everything that was necessary to establish the testator's intention had been done. Even more extreme is the English case of *Re Colling*.[13] In that case, the testator signed before Witness 1, who signed, and the testator and Witness 1 then acknowledged their signatures before Witness 2, who then signed (all 3 being present at the time of the acknowledgment and Witness 2's signature). The court interpreted the *Wills Act* (UK) as requiring that the testator sign or acknowledge in the presence of both witnesses before either witness signed. The court recognized that the exclusion of the will from probate "glaringly" defeated the testator's intention.

[41] The British Columbia case of *Valentine* v. *Whitehead*[14] is another example. The testator signed the will twice, once before Witness 1 alone and the second time before Witness 2 alone. The will was denied probate. Yet another example is the Newfoundland case of *Re Murphy Estate*[15] in which a will written out by the testator's daughter-in-law was read over to the testator and signed by mark, both the reading and the signature having taken place in the presence of the priest, who signed as a witness, there being no other witness's signature. In each of the two cases, the will was denied probate.

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[12] (1931), 3 W.W.R. 283 (App. Div.).

[13] [1972] 3 All E.R. 729 (Ch.).

[14] (1990), 37 E.T.R. 253 (B.C.S.C.).

[15] [1999] N.J. No. 136 (Nfld. S.C.), online: QL (NJ).

[42] In a recent Alberta case, *Brandrick* v. *Cockle*,[16] the testator sat in a truck and said nothing while his wife got the witnesses to sign, using the hood of the truck; the wife kept the signature covered so that the witnesses could not see it; and the testator did not acknowledge to the witnesses that he had signed the will. After canvassing numerous English and Canadian cases on what amounts to the acknowledgment of a testator's signature, the Court stated the legal situation succinctly at p. 12: "In view of the clear and precise wording of s. 5 of the *Wills Act*, it matters not whether the Will appears to reflect the wishes of the Testators."

[16] (1997), 17 E.T.R. (2d) 1 (Alta. Surr. Ct.).

[43] In a series of three trial-level decisions in British Columbia and Ontario,[17] the courts found themselves able to admit to probate wills although a witness's signature was omitted or the witnesses were not together when the signing took place, and we have heard of some similar, though unreported, cases in Alberta. However, if those cases established a trend, the trend has been interrupted, if not terminated, by another trial-level decision in British Columbia , where the result was a particularly flagrant denial of a testator's wishes.[18] In that case, the notary who prepared the will went over it with the testator, who, in the presence of the notary and the notary's secretary, signed the will and acknowledged that it was her will. The secretary, who was to be the second witness, affixed her name stamp at the appropriate place but inadvertently failed to sign. The court declined to follow the three cases referred to above, and instead invoked the strict compliance rule and applied *Ellis* v. *Turner*,[19] a decision of the British Columbia Court of Appeal which applied the strict compliance rule. The strict compliance rule still seems to be firmly embedded, and waiting for the courts to reform the rule is not likely to be a fruitful course of action, or inaction.

[44] One apparent exception to the application of the strict compliance rule is a number of reported cases from different jurisdictions in which a husband and wife have signed each others' wills; courts have been able, by different devices, to probate the true wills. One device is to treat the document which the testator actually signed as the

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[17] *Kraus* v. *Tuni*, [1999] B.C.J. No. 2075 (B.C.S.C.), online: QL (BCJ); *Simkins Estate* v. *Simkins* (1992), 42 E.T.R. 287 (B.C.S.C.); *Sisson* v. *Park Street Baptist Church* (1999), 24 E.T.R. (2d) (Ont. Gen. Div.).

[18] *Bolton* v. *Tartaglia*, [2000] B.C.J. No. 758 (B.C.S.C.), online: QL (BCJ). See also *Re Murphy Estate*, [1999] N.J. No. 136 (Nfld. S.C.), online: QL (NJ), where the court refused to follow *Sisson*.

[19] (1997), 43 B.C.L.R. (3d) 283 (B.C.C.A.).

testator's will and then, in the course of interpretation, to substitute in that document the names of beneficiaries from the intended will. This device gives effect to the intentions of testators, but it is an artificial way of doing it, and a straightforward dispensation would be more satisfactory.

[45] Often, problems will be resolved by settlements involving those who would take under a non-compliant will and those who would take if it is not probated.

However, it is not always possible to effect settlements, and settlements, if effected, may not give effect to testators' intentions.

1. Holograph Wills

[46] In the case of holograph wills, the use of will forms has led to a particular difficulty: a testator will often fill out a will form in his or her own handwriting and sign it. In such a case, the testator's intention to adopt the printed words on the will form is just as clear as the testator's intention to adopt the words which the testator has written. The courts tend to admit such documents to probate if, and only if, (a) the printed words are superfluous or inessential and (b) the handwritten words are capable of standing by themselves : see, for example, *Sunrise Gospel Hour et al.* v. *Twiss*.[20] The latter requirement may lead to the rejection of the completed form even though it can be proven that the testator intended the form as completed to constitute a will.

CONCLUSION No. 3

Our conclusions are:

(1) that there are cases in which wills that are authentic and reflect the testamentary intentions of testators are excluded from probate because they do not strictly comply with formalities; and

(2) that the number of such documents so excluded is great enough to suggest that remedial action should be taken,

but only if appropriate remedial action can be devised and if the remedial action will not give rise to

[20] (1967), 61 D.L.R. (2d) 582 (Alta. App. Div.).

unacceptable new problems.

4. SHOULD SOME REMEDIAL PROVISION BE ADOPTED?

[47] We have concluded above:

1. That it is a fundamental policy of the law to allow persons to say how their property is to be disposed of on their deaths, subject to limits imposed by other social policies.
2. That the purpose of the formalities prescribed by the *Wills Act* is to ensure that documents which are authentic and are intended to be testamentary documents, and no others, are admitted to probate.
3. That the "strict compliance" rule excludes from probate significant numbers of documents which are authentic and which are intended to be wills.

[48] In our opinion, it follows from these conclusions that some provision should be made for the admission to probate of a will despite a failure to comply strictly with the formalities. That opinion is supported by the great majority of those whom we have consulted in connection with our project or who have commented on it. We will note the exceptions in our discussion of a dispensing power provision.

[49] We are reinforced in our conclusion by the fact that every law reform agency that has looked into the subject has decided that some remedy should be provided for cases in which documents which are obviously intended to be wills are rejected because of failure to comply with the formalities, and that so many legislatures have enacted remedial legislation.

5. THE FIELD OF CHOICE

A. Range of practical and effective remedial provisions

[50] Three broad kinds of remedial measures have been adopted in England, Canada, Australia and the United States to minimize the number of occasions on which testators' wishes are defeated by the exclusion from probate of non-complying wills:

(1) relaxation of the formalities;

(2) admitting to probate documents which "substantially comply" with the formalities;

(3) admitting to probate documents which no not comply with formalities but which do represent the testamentary intentions of the testators.

[51] We think that this list represents the range of measures

(a) which might be practical and effective in admitting to probate documents which testators intend to be wills, and

(b) which would not result in admitting to probate documents which deceased persons do not intend to be wills.

B. Description of possible remedial provisions

(1) Relaxation of formalities

[52] Essentially, the *Wills Act* now requires one of two procedures:[21]

(1) Gather together three persons and, while they remain together, have one of them sign (or acknowledge his or her signature) as testator and the other two sign as witnesses.

(2) Alternatively, the testator can write out a will wholly in his or her handwriting.

[53] It would be possible to make these requirements somewhat less

[21] We will not concern ourselves here with the armed forces and mariners provision.

rigid.

[54] For one example, in 1969 the *Uniform Probate Code* was amended to relax the formalities somewhat further. The amended provision, s. 2-502, requires writing; it requires that the writing be signed by the testator or by someone in the testator's presence and by the testator's direction; and it requires the signature of two witnesses, each of whom witnessed either (a) the signing of the will. or (b) the testator's acknowledgment of the signature or of the will. Section 2-502 does not require that the signature be at the foot or end of the will, and it does not require that the witnesses be present together. According to the explanatory note, it keeps formalities to a minimum with a view to keeping execution simple so that the will may be restored as the major instrument for disposition of wealth at death. The formalities required are, however, still substantial and go beyond those required for the validity of documents other than wills.

[55] In 1980, the English Lord Chancellor's Law Reform Committee declined to recommend a power to admit a document to probate despite lack of strict compliance with formalities on the grounds that "...to attempt to cure the tiny minority of cases where things go wrong in this way might create more problems than it would solve...". The Committee recommended instead that (a) any signature that was intended to validate a will, wherever it appeared, should be accepted, and (b) that the witnesses be allowed to either acknowledge or sign in each other's presence. These would be minimal relaxations.

[56] Relaxation of the formalities would allow into probate some documents that would comply with the relaxed formalities but do not strictly comply with the present formalities. However, after the relaxation the law would still focus on whether or not the testator has complied with the formalities rather than on whether the testator

intended to adopt a document as his or her will. It would still, in our opinion, allow the intentions of too many testators to be defeated because of failures of form and formality, at least unless the formalities were relaxed to the point of being meaningless. We therefore do not recommend that the formalities be relaxed.

1. A "substantial compliance" provision

[57] One kind of remedial provision that is sometimes recommended is a "substantial compliance" provision.

[58] The only existing example of a substantial compliance provision of which we

are aware is that of the Australian state of Queensland. The Queensland provision reads as follows:

> The Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator.

[59] The cases summarized in Appendix F show that the Queensland courts have adopted a high standard against which compliance must be measured. It has been said that they have read "substantial" to mean "near perfect".[22] The Saskatchewan Commissioners to the Uniform Law Conference of Canada eventually recommended against the adoption of a substantial compliance provision, saying that "the Queensland [substantial compliance] approach was proving to be ineffective".[23]

[60] A substantial compliance provision focuses on the formalities. It compares what was done with what ought to have been done. If what was done conforms to a sufficiently high standard of compliance, the document will be admitted to probate, but not otherwise. A substantial compliance provision would not give relief in many of the cases summarized in Appendix E and Appendix G.

[61] A substantial compliance provision would be better than no remedial provision at all. It would minimize any perceived risk of admitting to probate documents which testators do not intend to be wills. But we think that is all that can be said for it.

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[22] Langbein, John H., *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law* (1987) 87 Colum. L. Rev. 1.

[23] *Report of the Saskatchewan Commissioners on Substantial Compliance*, Proceedings of the 69th Annual Meeting, Uniform Law Conference of Canada, 1987.

[62] Under a substantial compliance provision, a testator's intention to adopt a document as a will is still irrelevant unless formalities were "substantially" complied with. No standard is prescribed other than that compliance must be "substantial". It is left to the courts to devise standards by which to decide whether or not compliance is "substantial".

[63] We do not recommend the adoption of a substantial compliance provision.

2. A dispensing power

[64] Another kind of remedial provision that is sometimes recommended is a dispensing power. In its broadest form a dispensing power allows a court to admit to probate any document that the testator intends to be a will. That is, (a) there must be a document, and (b) the testator must intend the document to be a will, but (c) a failure to comply with any other formalities will not necessarily exclude the document from probate. A will may be admitted to probate if it can be shown that the testator intended it to be a will. The standard of proof may be either the usual civil standard of a balance of probabilities or some higher degree of proof.

[65] "Dispensing power" is the term used in Canada and Australia for such a remedial provision. In the United States, a similar remedial provision has been developed under the name of "harmless error rule". The United States reasoning starts with the proposition that "the statutory formalities are not ends in themselves but rather the means of determining whether their underlying purpose has been met". An error, that is, a failure to comply with formalities, is harmless in relation to the purpose of the formalities, so long as the testator intends the document to be a will. A harmless error should be excused

"if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will".[24]

[66] Both terminologies are useful and satisfactory. The "harmless error" terminology brings the scope and reason for the rule to mind every time it is used. The "dispensing power" terminology brings to mind the effect of the power and does not require explanation. We propose to use the "dispensing power" terminology largely because that is the terminology that has been commonly used to describe the Canadian and Australian remedial legislation.

[67] We will later propose that a dispensing power provision be adopted. First, however, we will discuss it at greater length.

6. SHOULD A DISPENSING POWER BE ADOPTED IN ALBERTA?

A. History of dispensing powers in Canada and Australia and harmless error rules in the United States

(1) Dispensing powers in Canada

[24] *Restatement of the Law Third, Property, Wills and other Donative Transfers, §3.3.* An article by Professor John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law* (1987) 87 Colum. L. Rev. was influential in the development of the American response to the problem of non-compliant wills.

[68] The first broad dispensing power in Canada was enacted by Manitoba in 1983.[25] The section said, in effect, that if the court was satisfied that a document or writing on a document embodied testamentary intention, the court might order that the document be fully effective as a will "notwithstanding that the document or writing was not executed in compliance with all the formalities". The early Manitoba cases said that the only threshold requirement under this provision was testamentary intention in a documentary form and that neither substantial or any compliance with other formalities was required.[26] While matters were at this stage, the Uniform Law Conference of Canada adopted a slightly re-arranged version of the Manitoba provision, a recommendation in favour of a substantial compliance provision having been withdrawn because the Saskatchewan Commissioners had concluded that "the Queensland [substantial compliance] approach was proving to be ineffective" and that the Manitoba provision should be adopted.[27]

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[25] *The Wills Act*, S.M. 1982-83-84 c. 31, s. 23. The marginal note to the Manitoba amendment was "Substantial compliance in execution of a will", but the amendment conferred a dispensing power. It did not use the term "substantial compliance".

[26] *Re Pouliot; National Trust Co.* v. *Sutton et al.* (1984), 17 E.T.R. 225 (Man. Q.B.); *Re Briggs* (1986), 21 E.T.R. 127 (Man. Q.B.).

[27] *Report of the Saskatchewan Commissioners on Substantial Compliance*, Proceedings of the 69th Annual Meeting, Uniform Law Conference of Canada, 1987.

[69] Later, in 1990, the Manitoba Court of Appeal, in a majority judgment held that the Manitoba section required some attempt at compliance with the formalities.[28] However, following a recommendation from the Manitoba Law Reform Commission, the Manitoba section was amended to provide that the court can order that a testamentary document is effective "notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements..." (emphasis added). This amendment makes it clear that the only threshold requirements are that there is a document and that the document embodies the testator's testamentary intentions. In Saskatchewan, the Court of Appeal, specifically disagreeing with the *Langseth* decision, held that the Saskatchewan dispensing power section, which is the Uniform Act section, did not require any attempt at compliance with formalities.[29]

[70] Thus, Manitoba has had a broad dispensing power section since 1983, save for a period between the *Langseth* decision and the statutory reversal of that decision. Saskatchewan has had a broad dispensing power section since 1990, Prince Edward Island since 1988, and Quebec since 1993. New Brunswick enacted a dispensing power section in 1997 but the amendment has not been proclaimed pending appropriate changes to probate rules. These dispensing power provisions are collected in Appendix D, along with the dispensing power amendment to the *Uniform Wills Act* adopted by the Uniform Law Conference of Canada. The Manitoba, New Brunswick, Saskatchewan and Prince Edward Island provisions are all on the Manitoba/Uniform Act model (though the Prince Edward Island provision requires a signature). The Quebec provision, which does not apply to notarial wills, is somewhat different in that it applies to

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[28] *Re Langseth Estate; McKie et al.* v. *Gardiner et al.* (1990), 39 E.T.R. 217 (Man. C.A.).

[29] *Re Bunn Estate* (1992), 45 E.T.R. 254 (Sask. C.A.).

a "will" rather than to a "document", a circumstance which may have facilitated the acceptance of an electronic record as a will in the case of *Rioux* v. *Colombe*[30] which we will refer to below.

1. Dispensing powers in Australia

[71] All of the Australian states except Queensland (which has the substantial compliance provision which has been referred to) have enacted dispensing power provisions, and the two Australian Territories have done so as well. Examples of the Australian legislation are collected in Appendix D. The earliest of these was enacted in South Australia in 1975. The Western Australia and New South Wales provisions were adopted in 1987 and 1989 respectively.

2. Harmless error provisions in the United States

[72] Section 2-503 of the American *Uniform Probate Code*, which is set out in Appendix D, is entitled "Harmless Error". As we have noted, the harmless error rule which it sets out has much the same effect as the Canadian and Australian provisions that we have referred to as dispensing power provisions: it provides that a document that does not comply with the formalities is to be treated as a will if clear and convincing evidence establishes that the testator intended the document or writing on it to constitute the testator's will, a complete or partial revocation, or an alteration. Notes in *Restatement of the Law Third* show that this rule has been adopted in Colorado, Hawaii, Michigan, Montana, South Dakota and Utah.

[73] Rule 3.3 of *Reinstatement Third* states the harmless error rule as follows:

> 3.3 Excusing Harmless Errors
>
> A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the

[30] (1996), 19 E.T.R. (2d) 201 (Que. S.C.).

decedent adopted the document as his or her will.

The Comment on this provision points out that the question should be whether a defect in execution in any particular case "was harmless in relation to the purpose of the statutory formalities, not in relation to each individual statutory formality scrutinized in isolation": the purposive question "is whether the evidence regarding the overall conduct of the testator establishes, in a clear and convincing manner, that the testator adopted the document as his or her will". An extract from *Restatement Third's* discussion of the harmless error rule is included in Appendix C with the kind permission of the American Law Institute.

B. Reasons for enacting a dispensing power provision

[74] The reasons for adopting a dispensing power may be stated very simply:

1. The strict compliance rule sometimes works injustice by excluding from probate documents that testators have adopted as wills, so that some remedial provision should be made.
2. Of the range of remedial provisions which might be adopted, the dispensing power would be the most effective because it has the greatest potential for admitting into probate documents which testators have adopted as wills, which is the purpose of probate law and practice.

C. Objections raised to dispensing powers

(1) Will non-testamentary documents be admitted to probate under a dispensing power?

(a) Statement of objection

[75] A legitimate concern, and the one most often raised, is that under

a dispensing power courts will admit to probate documents which were not adopted as wills by the deceased persons whose wills they purport to be, that is, courts will admit documents which are not authentic or which were not intended to be wills. If that would be the result, there should be no relaxation of the strict-compliance rule.

[76] The point is succinctly put in one of the objections to any relaxation which we have received:

> "The strongest memory is weaker than the palest ink. The formalities are for protection of the deceased against fraud by the living greedy. Just how do you intend to learn of the deceased's intentions...by meta-physics, fortune tellers or mystics?"

Or, as the views of the consultant who raised the other of the two objections have been summarized:

> "The main reason [for maintaining the strict compliance rule] is what will be allowed in if the courts open the door a little bit. Her concern is that allowing things in will create problems. The formalities keep people from being taken advantage of."

a. Evidence provided by strict compliance with the formalities

[77] So what evidence of authenticity of a will does compliance with the formalities provide?

[78] It is worth repeating here some words used by Lord Mansfield in 1757, referring to the more onerous formal requirements of the *Statute of Frauds* which was then in force in England. He said:

> The Legislature meant only to guard against fraud, by a solemn attestation; which they thought would soon be universally known, and might very easily be complied with. In theory, this attestation might seem a strong guard: it may be some guard in practice. But I

> am persuaded, many more fair wills have been overturned for want of the form, than fraudulent have been prevented by introducing it. I...hardly recollect a case of a forged or fraudulent will, where it has not been solemnly attested.[31]

That is, compliance with the formalities is not a guarantee of authenticity, and failure to comply results in "fair wills" being overturned.

[79] A formal will bears three signatures in the appropriate places, purporting to be the signatures of the testator and the two witnesses. Usually but not invariably, when a formal will is presented for probate one of the witnesses or a third party will provide an affidavit that the formalities were complied with. If no such affidavit can be provided, an affidavit proving the testator's signature will suffice, so that a will can be probated with no more than an affidavit identifying the testator's signature plus two unverified signatures purporting to be those of witnesses. A holograph will is in the handwriting of the testator and signed by the testator. The handwriting will have to be identified by affidavit. Usually a document in the form of either a formal will or a holograph will, plus a supporting affidavit, will raise a high degree of probability that the document is authentic, and the wording of the will plus compliance with the formalities will raise a high degree of probability that the testator intended the document to be a will. Sometimes, however an apparently compliant document can be non-authentic.

b. Evidence provided by attempted compliance

[80] There are situations in which less than strict compliance will raise an equally high degree of probability and testamentary intention. Suppose that a testator has tried to comply strictly with the

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[31] *Wyndham* v. *Cheewink* (1757), 97 E.R. 377, 381 (K.B.).

formalities for a formal will but in the paper shuffle a witness fails to sign. Or suppose that a witness leaves the room momentarily while the other witness is signing. Or suppose that the testator is unable to raise his head or, though present, does not give a formal acknowledgment of what has been described as his or her will. Or suppose that the testator took the will in to Witness 1, acknowledged it as his or her will and asked the witness to sign, and then took the will in to Witness 2 and followed the same procedure. Any of those circumstances would constitute a failure to comply strictly with the formalities and would be grounds for holding that the will is not valid. But, in our opinion, none of those circumstances would render it less likely that the testator signed the will and intended to make it his or her will.

[81] Or suppose that a testator has bought a will form and has filled in all the blanks in his or her own handwriting and signed it. In our opinion, so long as the quantity of handwriting is sufficient to make the handwriting as readily identifiable as if the whole will were in handwriting, the fact that a testator has used a will form instead of copying it out in handwriting does not render it less likely that the testator signed the will and intended to make everything in it his or her will. In our opinion, there is no rational basis for accepting as a will what the written words say but rejecting as a will what the written words and the printed words together say: it is clear that a testator intends the written words and the printed words to be an integrated whole. The distinction between written words and printed words is drawn now, but that is because courts want to do justice by admitting to probate documents which are obviously authentic wills but consider that they are prevented from doing so by the strict compliance rule unless they can construct a will from the handwritten material.

[82] So, in our opinion, there are cases in which a testator's attempts to comply strictly with formalities are just as probative of authenticity and testamentary intention as the successful completion of the formalities would have been. In such cases, it would be just as safe to allow the non-compliant documents to be probated as it would have been if there had been strict compliance. The probative value of the document plus the signatures plus anything the witnesses have to say would be no less than the probative value of strict compliance. The ink used in such documents is just as dark as that used in strictly compliant documents.

c. Other evidence

[83] But there is a whole spectrum of documents, from strictly compliant documents that are clearly intended as wills, at the one extreme, to documents that make no pretension at compliance or of being intended as wills, at the other extreme. Can safeguards be erected that will avoid any unacceptable risk of admitting non-testamentary documents to probate? We think that the answer is yes.

[84] We start with the proposition that a remedial provision must be designed so that it will not let into probate documents which are not authentic or which are not intended to be wills. The first inquiry must be whether it is possible to design such a remedial provision.

[85] We pause to note that the intention which matters for this report is a testator's intention to adopt a document as the testator's will, that is, an intention to give by that document directions for the disposition of some or all of the testator's property on death, while retaining the power to revoke the directions at any time before the testator's death. If that is the testator's intention, then the underlying policy of

freedom of testation dictates that the document should be admitted to probate as a will.

[86] Once a non-compliant will is admitted to probate, questions may arise about whether it reflects the testator's actual testamentary intentions, just as similar questions may arise about intentions under a will that strictly complies with formalities. In both cases, doubts must be resolved by the usual methods of interpretation. The only questions for the court on an application to admit a document to probate should be whether the document which is propounded is authentic and whether the testator intended it to be his or her will.

[87] In our opinion, evidence other than actual or attempted compliance with the formalities may give as satisfactory proof of authenticity and testamentary intention as strict compliance with the formalities will do. But there are dangers inherent in allowing authenticity and testamentary intention to be established by outside evidence. The deceased person is not able to give evidence as to whether or not he or she signed a document or intended it to be a will. Evidence may be concocted by survivors or accomplices. Possibilities of fraud and forgery exist. In order to ensure authenticity and testamentary intention, we think that the *Wills Act* should provide that

(a) a document that does not strictly comply with formalities is presumed not to have been adopted as the will of the deceased person (This effect can be achieved by leaving untouched s. 5 of the *Wills Act*, which provides that a non-compliant will is not valid), and

(b) the presumption of invalidity can be rebutted only by evidence which proves by a higher standard than the ordinary balance of probabilities that the deceased person adopted the document as his or her will.

[88] What should the higher standard be? We have considered two alternatives. Either of them would do the job. One is preferred by a minority of members of our Board. The other is preferred by the majority.

[89] The minority preference is to provide that the presumption of invalidity of a non-compliant document can be rebutted only by proof beyond a reasonable doubt that the testator intended to adopt the non-compliant document as the testator's will. The criminal law standard of proof is, in the minority's view, well understood, and its adoption would serve as the highest possible assurance that only writings that are authentic and have been adopted as wills will be admitted to probate. In the minority view, the "clear and convincing evidence" formula preferred by the majority would introduce a standard that is less well understood and that may be less effective at screening out non-authentic documents.

[90] The majority of our board would prefer to avoid importing the criminal burden of proof into civil proceedings, where the underlying values and considerations are different from those which underlie the criminal law. The majority would prefer a provision which would enable a court to exercise the dispensing power only "if the Court is satisfied, on clear and convincing evidence, that the deceased person intended the writing to constitute the will" of the deceased person. This formula would require a court to be subjectively "satisfied" that the deceased person intended the writing to constitute a will, but it would go on to require the court to subject the evidence to an objective test, that is, whether the evidence would appear to an objective observer to be "clear and convincing".

[91] While the civil burden of proof is proof on a balance of

probabilities, courts have frequently used phraseology to suggest that different evidentiary standards may apply in different cases. As long ago as 1815, Sir John Nicholl, an English judge, said that where an attorney drew and supervised the execution of a will under which he took a substantial benefit, proof must be clear and decisive, both in relation to the execution of the will and as to the testator's knowledge of the contents.[32] In 1965, in a case in which the executor of a will, who was the husband of the principal beneficiary, took part in the preparation of the will, Ritchie J. brought this statement into the twentieth century, saying that "nothing which has been said should be taken to have established the requirements of a higher degree of proof than that referred to by Sir John Nicholl...".[33]

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[32] *Paske* v. *Ollat* (1815), 161 E.R. 1158.

[33] *Re Martin: MacGregor* v. *Ryan*, [1965] S.C.R. 757, 767. The preceding remarks indicate that the extent of proof required is proportionate to the gravity of the circumstances.

[92] The term "clear and convincing evidence" has been adopted for the American counterpart of dispensing powers by *Restatement of the Law Third* and by the *Uniform Probate Code*.[34] In Canada, Sopinka J., speaking for the majority of the Supreme Court, held that, where a lawyer moves from one firm to another, "there is...a strong inference that lawyers who work together share confidences..." and that courts should draw that inference "unless satisfied on the basis of clear and convincing evidence (emphasis added), that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client."[35] In *C(J)* v. *College of Physicians & Surgeons of B.C.*,[36] a discipline case in which it was alleged that a physician had engaged in sexual acts with a patient, Taylor J. of the British Columbia Supreme Court referred to the discipline committee's statement that "a higher standard of proof is called for going beyond the balance of probabilities and based on clear and convincing evidence" and said that this is essentially the view adopted by McLachlin J. in an unreported decision in the same court, *Jory* v. *College of Physicians & Surgeons of B.C.*, 1985. Taylor J. went on to say that "the most helpful term used in various judicial pronouncements on this subject seems to me to be the word 'convincing'". On appeal, one of the three judges of the Court of Appeal, Locke J.A., quoted a passage from Taylor J.'s judgment containing the words "clear and convincing" and said that

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[34] See Appendix D.

[35] *MacDonald Estate* v. *Martin*, [1990] 3 S.C.R. 1235, 1262.

[36] (1988), 31 B.C.L.R. (2d) 383. In *Rak* v. *B.C. (Superintendent of Brokers)* (1991), 51 B.C.L.R. (2d) 27, Hollinrake JA, speaking for the BC Court of Appeal referred extensively to the trial judgment in *C(J)* case, but chose from it Taylor J.'s statement that "the courts have not been prepared to define the requisite standard of degree beyond stating that it is neither the 'mere balance of probabilities' nor the criminal standard 'beyond a reasonable doubt', and did not specifically comment on what the words 'clear and convincing' might mean.

he was content to adopt that extract as setting out the law.[37]

[93] These judicial pronouncements seem to the majority of our Board to establish that the courts have no particular difficulty with the evidentiary standard of clear and convincing evidence, and, indeed, have used it of their own volition. We are satisfied that, if there is a requirement that a court exercise a dispensing power only "if it is satisfied by clear and convincing evidence" that a testator intended to adopt a document as a will of the testator, the risk of non-authentic non-compliant documents being admitted to probate will be very small, particularly in relation to the numbers of cases in which a dispensing power would prevent testators' intentions from being defeated by the strict compliance rule.

[94] What will constitute clear and convincing evidence that a document is authentic and was adopted by a deceased person as a will will necessarily be different in different cases.

[95] The fact that a testator assembled two witnesses in a lawyer's office to sign his or her will is likely to constitute clear and convincing evidence of intention to adopt the document as a will even though, in the paper shuffle, one signature was overlooked – even if the signature that is inadvertently omitted is the signature of the testator. The fact that a testator whose signature can be identified

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[37] *C.(J.)* v. *College of Physicians & Surgeons of B.C.* (1990), 42 B.C.L.R. (2d) 257, 268-269. The majority did not refer to the evidentiary standard. Locke J.A. did not base his concurring judgment on a failure to meet the evidentiary standard of "clear and convincing evidence", but rather on errors in assessing the evidence.

beyond doubt has properly filled in in his or her handwriting, and signed, a printed will form is likely to be clear and convincing evidence that the testator adopted the document as a will. The fact that a testator places in their safety-deposit box a document which looks like a will and bears evidence of an intention to sign it, if the possibility of tampering can be excluded, is likely to be clear and convincing of authenticity and intention to adopt the document as a will.

[96] Consider, on the other hand, the document which was admitted to probate in the Manitoba case of *Martineau* v. *Manitoba (Public Trustee)*.[38] In that case, the court admitted to probate a document which was entirely in the handwriting of Harold Myers, deceased. The document was headed "Harold Myers' Will". It listed a number of names with sums of money opposite them, and said "Balance to..." followed by the names of two institutions. The document was not signed in the usual sense of the word, though the court was prepared to hold that the words "Harold Myers" (omitting the apostrophe) at the head of the will constituted a signature. In our view, it is doubtful that the mere existence of this document in Mr. Myers' papers created even a mere balance of probabilities in favour of holding the document to be a will, but we think it obvious that the existence of the document did not constitute clear and convincing evidence that Mr. Myers had

[38] (1993), 50 E.T.R. 87 (Man. Q.B.).

adopted it as his will, as differentiated from having jotted down things that might go into a will.

[97] Testimony of interested persons is not likely to be accepted as clear and convincing evidence that a deceased person intended to adopt as his or her will a document which was not clearly and unequivocally adopted as a will. Testimony from disinterested persons about a course of action might in a proper case be enough to show that a testator had adopted such a document as a will. But the totality of the evidence must be enough to carry conviction that the testator adopted as his or her will the document that is propounded for probate; otherwise the dispensing power cannot be used to admit the document.

d. Experience with dispensing powers

[98] Appendix G collects reported Manitoba, Saskatchewan and Australian cases under dispensing power legislation. The reader should examine carefully the cases under the headings "Document Admitted to Probate". It should be noted that the Manitoba and Saskatchewan dispensing-power provisions have been in force for about 17 years and 10 years respectively and that the Australian provisions which are the subject of decisions summarized in Appendix G have been in force for periods varying from nearly 25 years (in South Australia) to 10 years (in New South Wales), so that there has been time for potential problems to make their appearance.

[99] Readers should also note that the Manitoba, Saskatchewan and New South Wales decisions summarized in Appendix G are based on provisions which merely require the court to be "satisfied" that a document embodies the testamentary intentions of a deceased person, so that in those jurisdictions there is no legislated requirement of clear and convincing evidence such as the one that we propose to recommend. On the other hand, South Australia and Western Australia decisions

are based on provisions that required proof beyond a reasonable doubt (though South Australia has since deleted that requirement).

[100] In general, it appears to us that the reported cases do not suggest that courts use dispensing powers to admit wills to probate in any but the clearest cases. The *Martineau* case seems to us to have been exceptional, and it was based on an ordinary balance of probabilities standard.

[101] In an effort to see whether or not the Manitoba dispensing power provision has proved beneficial, we made inquiries from an eminent Manitoba academic lawyer, who gives the university course in wills, and a former chair of the CBA Manitoba Wills and Trusts Section who has practised extensively in the area and has been an instructor in the area in the Bar Admission Course for several years and a sessional instructor in the Law Faculty. Both of them are satisfied that the dispensing power enables testators' intentions to be complied with in cases in which formalities are not strictly complied with and that it has not been used to admit to probate documents which do not reflect testators' intentions.

[102] We made similar inquiries from the Chair of the CBA Saskatchewan Taxation, Wills and Trusts Section. She has provided ALRI with a 1999 paper delivered by a Saskatoon practitioner to the CBA Saskatchewan Taxation Wills and Trusts Section, which, after going through the Saskatchewan cases on the dispensing power provision, expressed the conclusion "...that Section 37, formerly Section 35.1 of The *Wills Act*, is in the betterment of justice". The Chair advised that "[t]he members of the bar at the luncheon certainly seemed in agreement with [the Saskatoon practitioner's] position on this issue".

[103] We also inquired from another eminent academic on the faculty of the University of Western Australia as to whether or not the

Australian provisions are thought to have allowed non-testamentary documents into probate. While generally favourable to a dispensing power, he expressed the view that under a balance of probabilities standard of proof some courts have allowed into probate some dubious documents. He expressed the view that the standard should be proof beyond a reasonable doubt, which is the standard prescribed by two Australian states.[39]

e. Conclusion

CONCLUSION No. 4

We conclude that, if

(a) a document which does not strictly comply with formalities is rebuttably presumed to be invalid (which presumption will be provided by s. 5 of the *Wills Act* if it is left unamended), and

(b) the presumption can be rebutted only by clear and convincing evidence that the document is authentic and that the deceased person intended to adopt it as his or her will,

the risk that documents that are not authentic or have not been adopted by deceased persons as wills will be admitted to probate will be no greater than if the formalities had been strictly complied with.

2. Will the adoption of a dispensing power lead to sloppy practice and the use of

[39] Tasmania and Western Australia. South Australia originally required proof beyond a reasonable doubt, but later deleted this requirement.

wills?

[104] The concern here is that if it becomes known that wills can be admitted to probate despite the lack of strict compliance with the formalities, testators will be encouraged to make informal wills or use will kits, and less care will be taken in execution and attestation processes. Empirical evidence is not available to prove or disprove the validity of this concern. All that can be done is to estimate its probability.

[105] The enactment of a dispensing power would cause a testator to engage in sloppy practice or the use of a will kit only in a case in which:

(a) the testator knows about the formalities and would be deterred by them from making a will without professional help, and

(b) the testator knows that there is a dispensing power under which a court might rescue the testator from the consequences of sloppy practice.

But it seems that a testator who knows enough about the law relating to wills to know that formalities have to be complied with and also that the dispensing power exists is likely to know two more things. One is that proving a non-compliant will will impose substantial additional legal costs on the testator's estate. The second is that failure to comply with the formalities will increase the chance that the will will be rejected completely, thus defeating the testator's intentions. That is to say, a testator who knows about the effect of the formalities and about the existence of the dispensing power will also know that failing to take steps to ensure that a will complies with formalities is a mug's game. Lawyers who prepare wills will have the same knowledge and, apart entirely from a desire to adhere to professional standards of practice, will not want to expose testators to risks and themselves to negligence actions by inattention to the formalities.

CONCLUSION No. 5

The adoption of a dispensing power is not likely to lead to significantly greater use of wills kits or to a significantly greater incidence of sloppy practice in the preparation and execution of wills.

3. Will the adoption of a dispensing power impose an undue burden on personal representatives?

[106] One of our two consultants who did not favour any departure from the strict compliance rule was concerned that the adoption of a remedial provision would make it necessary for personal representatives to search for possibly testamentary documents and to make difficult decisions as to what should be put before the court, with a consequent risk of liability for making the wrong decision.

[107] A dispensing power is intended to allow non-compliant testamentary documents into probate. By its very nature it will raise a possibility that an apparently testamentary but non-compliant document found in a deceased person's papers may be capable of being admitted to probate. So there will be cases in which a personal representative will have to cope with the existence of such a document.

[108] This does not mean that every possibly testamentary document must be propounded for probate. It will mean that a personal representative will be well-advised to give notice of the existence of a possibly testamentary document to everyone who might take a benefit under it. If evidence that a court might consider clear and convincing that the deceased person intended the document to be a will is uncovered, then the document should be propounded by the beneficiaries or the personal

representative. If a personal representative is in doubt, they can attach a doubtful document to an application for probate of a will or for administration, and the question of its admissibility to probate may then be dealt with by the court.

[109] It is no doubt easier and more administratively efficient to administer an estate without regard to the wishes of the deceased person as disclosed by a document that does not strictly comply with formalities. We do not think, however, that the additional burden imposed on personal representatives by the existence of a dispensing power will be very great, and we think that it should be imposed in order to avoid defeating testators' intentions.

CONCLUSION No. 6

The adoption of a dispensing power will not impose undue burdens on personal representatives.

4. Will the adoption of a dispensing power lead to increased litigation?

[110] One concern that has been put forward is that the existence of a dispensing power may result in increased litigation. The propounding of a non-compliant will will require at least an application to the court supported by clear and convincing evidence of the testator's testamentary intention. If those who would take under a previous will or on an intestacy contest the validity of the non-compliant will it may be necessary to have a trial. Such cases may result in more litigation than would otherwise take place.

[111] We have not seen evidence of such an increase. *Restatement of the Law Third* says emphatically that "the harmless error rule does not increase litigation", and referred to a 1979 letter to the British

Columbia Law Reform Commission from a judge in Israel, which has had a dispensing power provision since 1965. The dispensing power in his view, actually reduced the amount of litigation because advocates are less likely to oppose probate on the mere grounds of defects in form, so that the battleground is restricted to issues of intent, which should be the foremost, if not the only issues. It will also be remembered that in New South Wales the number of applications brought under the dispensing power was somewhere between 0.25% and 0.67% of all applications for probate in the first two years after the adoption of the dispensing power. The number of reported cases in Manitoba and Saskatchewan is by no means daunting, and our inquiries there did not turn up any suggest that litigation had increased by reason of the dispensing power.

CONCLUSION No. 7

The adoption of a dispensing power will not lead to significantly increased litigation.

[112] We would also say that if some increased litigation is necessary in order to ensure that testators' wishes are carried out, it is worth incurring the increased litigation.

D. Formal recommendations

[113] We will now make formal recommendations for a dispensing power, subject to the safeguards we have discussed earlier.

RECOMMENDATION No. 1

We recommend that the *Wills Act* be amended to give the court power to admit to probate a document that does not comply with the formalities prescribed by the

Act but which a deceased person intended to adopt as his or her will.

RECOMMENDATION No. 2

In order to ensure that the proposed power does not result in the admission to probate of documents which deceased persons did not intended to adopt as their wills, we recommend:

(a) that there be a presumption that a document that does not strictly comply with the formalities prescribed by the *Wills Act* is invalid (which presumption will be provided by s. 5 of the *Wills Act* if that section is not amended), and

(b) that the presumption of invalidity can be rebutted only if the court is satisfied by clear and convincing evidence that the testator intended to adopt the document as a will, in which event the court may order the will to be valid as a will of the deceased person.

7. HOW WOULD A DISPENSING POWER OPERATE?

[114] A number of issues need to be addressed if a dispensing power is adopted. The following discussion describes some of the major questions.

A. Should it be possible to dispense with a signature?

[115] Up to this point we have discussed a dispensing power in general terms. There is, however, one specific question that has caused some difficulty: should it be possible to admit to probate under the dispensing power a document which is not signed by the testator or someone under the testator's authority?

[116] Assuming for the moment that a broad remedial power is desirable, there is a serious question as to whether a signature of some kind should nevertheless be required. The arguments are as follows:

1. Arguments for a requirement of a signature

It is probably safe to say that the great majority of people – and possibly all people – regard signing a document as the way to signify the adoption of its contents, and consider that it is only with the act of signing that authentication of the document as the act of the person signing occurs. That being so, there are likely to be few, if any, cases in which a testator who deliberately intends to adopt a document as their will will not make any effort to sign it. On the other hand, people sometimes jot things down which may sound like testamentary dispositions but are intended only for consideration, and there is a significant risk that such jottings will be admitted to probate although they do not represent settled intentions, which risk, it may be argued, outweighs the risk of an occasional exclusion from probate of a truly testamentary but unsigned document.

2. Arguments against a signature requirement

Whatever the generally held view about the effectiveness and requirement of signatures may be, there are likely to be a few cases in which an unsigned document does in fact represent the testamentary intentions of the person who signed it. The courts can be counted on to determine whether a document is

testamentary and to weed out those documents which are not testamentary, particularly if a "clear and convincing evidence" standard is mandated.

[117] It is worth noting here that the Manitoba, Quebec and Saskatchewan dispensing powers extend to dispensing with a signature and that the New Brunswick provision probably does so as well. So do all of the Australian dispensing powers. The harmless error rule in the *Uniform Probate Code* and in *Restatement of the Law Third* would extend to excusing a failure to sign. The exceptions are Prince Edward Island, which requires that the document be signed by the deceased, and Queensland, whose substantial compliance provision is unlikely to extend to cover the omission of a signature.

[118] The following examples of cases in which unsigned documents have been admitted to probate are taken from Appendix G:

1. *Re Bunn Estate* (Saskatchewan C.A.):[40] A document which purported to dispose of testatrix's assets, which was in testatrix's handwriting but unsigned, was enclosed with a properly executed will document which only named an executor, and was found in an envelope labelled "Last Will and Testament of Andree Eileen Bunn." The unsigned document was admitted to probate.

2. *In the Estate of Williams, Deceased* (South Australia S.C.):[41] Testator wrote up her will. She had neighbours come together witness both her will and her husband's will, but testator failed to sign her will. Testator wrote "Wills" on the enveloped containing the two documents. Testator's unsigned will was admitted to probate.

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[40] (1992), 45 E.T.R. 254.

[41] (1984), 36 S.A.S.R. 423.

3. *In the Estate of Masters (Deceased)*; *Hill* v. *Plummer* (New South Wales C.A.):[42] An unsigned statement in the deceased's handwriting on a notepad, which statement was headed as the testator's will and which was found among a number of books on the deceased's bookshelf, was not admitted to probate under the New South Wales dispensing power on the grounds that it did not appear to be intended as a will. Another handwritten document which the testator had delivered to a friend (who did not take anything under the document) and indicated to be his disposition of his property was admitted to probate by a majority of the Court of Appeal, reversing the trial judge. The wording of the document appeared to state the deceased's intentions. It does not appear from the judgment that this document was signed.

4. *In the Estate of Sutton, Deceased* (South Australia S.C.):[43] Signed and unsigned alterations on will followed the fluctuations of testator's relationship with son. The will was probated with all the alterations.

5. *Re Letcher* (ACT):[44] Deceased wrote out a will but did not sign it because she was afraid that if she made a formal will she would die. The will was admitted to probate.

[119] It will be seen that in each of these cases there was strong evidence from the unsigned document and from the testator's actions that the document represented the testator's testamentary intentions. The standard of proof of intention was the balance of probabilities

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[42] (1994), 33 N.S.W.L.R. 446.

[43] (1989), 51 S.A.S.R. 150.

[44] [1993] A.C.L. Rep. 395.

except in the South Australia cases, where at the times of those decisions the standard was proof beyond a reasonable doubt.

[120] There are cases in several jurisdictions in which, in the course of the paper shuffle, a husband and wife have signed the wills prepared for each other. An Alberta example is *Re Knott Estate*.[45] Since it is so obvious that each testator intended to sign the will prepared for that testator, the courts have found ways to achieve the correct result, e.g., by probating the will erroneously signed by the testator and rectifying it by substituting names from the will prepared for the testator. A dispensing power would do away with the need for such devices as it would be possible to probate the will which was prepared for the testator and

[45] (1959), 27 W.W.R. 382 (Alta. D.C.).

which the testator intended to sign and adopt as his or her will despite the failure to sign it.

[121] The case of *Martineau* v. *Manitoba (Public Trustee)* (Manitoba Q.B.) which we have referred to above is worrying, as, on the face of it, it appears at least as likely that the document was jottings made in contemplation of making a will as that the document was intended to be the will itself, and, while the court expressed an opinion that the document was a valid holograph will, the order made was that the document be as fully effective as if executed in compliance with the formalities, which is an application of the dispensing power. We think, however, that a requirement that the deceased's intention to adopt a non-complying document as a will be proved by clear and convincing evidence would effectively dispose of problems of this kind.

[122] We regard the question whether or not it should be possible to admit to probate a document which is not signed by the testator as the most difficult question in this area. Our conclusion is that the answer should be yes, and that the dispensing power should extend to admitting an unsigned document to probate if there is clear and convincing evidence that the testator intended to adopt the document as a will.

[123] It seems to us to be clear that there are cases in which testators have failed to sign documents which they intended to adopt as wills, and which they thought they had adopted as wills. The failure to sign will almost always be due to error but it may on occasion be due to ignorance of the formal requirements of the *Wills Act*. So there is a positive reason for allowing the court to dispense with a signature. The other side of the coin is the risk that making it possible to admit an unsigned document to probate will result in the admission of documents that testators did not intend to adopt as their wills. We

think that the reported cases show that this risk is very low, and we think that it can be avoided for all practical purposes by the requirement that a court cannot admit a non-compliant document to probate unless the court is satisfied by clear and convincing evidence that the testator intended to adopt the document as his or her will. Such evidence will usually be difficult to come by in the case of unsigned documents, but if it is available we see no reason why the intentions of the testator should be defeated by a refusal to admit the document to probate.

RECOMMENDATION No. 3

We recommend that the dispensing power extend to admitting a document to probate despite the lack of a signature.

B. Should it be possible to dispense with writing?

(1) Oral wills

[124] The question whether or not it should be possible to dispense with writing by making an oral will should be asked, though we think that there is no doubt about the answer, which can be given briefly.

[125] As noted above, the definition of "writing" in the *Interpretation Act*, which applies to the *Wills Act*, is broad, including "words represented or reproduced by any mode of representing or reproducing words in visible form". In other jurisdictions, words written on a tractor rim, a door and a wall have been held to be wills. So long as it is clear that the testator has adopted a writing as a will we do not think that this breadth of definition is objectionable.

[126] There may be cases in which a deceased person has made an oral statement with the intention of adopting it as a will. We do not think

that many persons do so. That is, while a refusal to admit an oral will to probate may occasionally defeat a testator's intentions, we think that the incidence of such cases is small. On the other hand, to allow evidence of what testators have said to create a will which should be admitted to probate would be to create uncertainty and confusion in which many testators' testamentary wishes would be defeated through the admission to probate of statements which were not intended as wills. The underlying purpose of probate–to admit to probate expressions of testators' testamentary intentions–would, in our opinion, be defeated rather than promoted by the admission of oral wills.

RECOMMENDATION No. 4

We recommend that it should not be possible to dispense with the requirement of writing.

1. Electronic records

[127] One question that may arise in the future is whether an electronic record, either a computer record or a videotape, should be capable of being treated as a will.

[128] An electronically-recorded will has been admitted to probate in Quebec,[46] where "a holograph will or a will made in the presence of witnesses that does not meet all the requirements of that form is valid nevertheless if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the

[46] *Rioux* v. *Coulombe* (1996), 19 E.T.R. (2d) 201 (Que. S.C.). The description of the case is based on the English version of the headnote.

deceased".[47] In the *Rioux* case testator committed suicide. A note beside her body gave directions to find an envelope which contained a computer diskette marked "this is my will/Jacqueline de Rioux/february 1, 1996". The diskette contained one electronic file which made testamentary dispositions. The file had been saved to computer memory on the same day, and the deceased had noted in her diary that she had made a will on computer. The court noted that great care must be exercised by a court before validating a will recorded on computer memory, but, as there was no doubt that the testator intended the electronic record to be a will, the will was admitted to probate.

[47] Quebec *Civil Code*, art. 714. The Quebec provision does not specifically require "writing".

[129] Conventional thinking is that an electronic record cannot satisfy the requirements for a will. Even current model equivalency rules that accept electronic records in relation to most legal relationships exclude from their scope wills and codicils, as well as powers of attorney, land transfers that have to be registered, and negotiable documents.[48] We think that, if the question of admissibility of an electronic document to probate is to be considered, it should be considered in the context of the formalities as a whole and not in the context of a dispensing power. The dispensing provision which we recommend in this report is not intended to extend to electronic records. The draft amendment which is Part IV of this report refers to "writing" rather than to a "document", and we are advised by Legislative Counsel that the Alberta drafting convention is that, while the word "document" may be on its way to including an electronic record, the word "writing" does not do so; and this interpretation is consistent with the definition of "writing" in the *Interpretation Act*.

RECOMMENDATION No. 5

The dispensing power should not extend to allowing electronic records to be admitted to probate.

C. Should the dispensing power apply to alterations, revocations and revivals?

[130] Up to this point, this report has dealt with wills and has made a recommendation that the courts be given power to admit wills to probate despite a lack of compliance with formalities. We now turn to the questions: should the dispensing power apply to the making of alterations to existing wills, to documentary revocations of existing

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[48] See, for example, *Uniform Electronic Commerce Act* (Uniform Law Conference of Canada) and *United Nations Model Law on Electronic Commerce* (UNCITRAL).

wills, and to documentary revivals of previous wills?

[131] In principle, we think that the discussion of the dispensing power in relation to wills applies equally to the alteration, revocation and revival of wills. The fundamental principle is that probate law should try to give effect to the testamentary intentions of testators, and that principle applies to alterations, revocations and revivals in the same way as it applies to wills. We do not think that it matters for this purpose whether the original will is a formal will or a holograph will or whether the alteration, revocation or revival is formal or holograph.

[132] Some special circumstances may apply. If, for example, a testator who has an executed will in their possession makes changes on the face of the will and signs or initials the changes, there is, subject to proof of authenticity, a strong inference that the testator intended to change that will. But we think that the proposed dispensing power will take such differences in circumstances into account by requiring clear and convincing evidence that a testator adopted an alteration, revocation or revival as an expression of testamentary intention.

[133] Those of our consultants who favoured a dispensing power also favoured its extension to alterations and revocations. We would not expect to find a different view with respect to revivals.

RECOMMENDATION No. 6

We recommend that the dispensing power extend to the making of alterations to wills, to documentary revocations of wills, and to documentary revivals of wills.

D. Should the dispensing power apply to wills that are made in contemplation of

marriage?

[134] Under s. 17 of the *Wills Act*, the marriage of a testator revokes the testator's will unless "there is a declaration in the will that it is made in contemplation of the marriage". The declaration cannot be made in any other way than by inclusion in the will.

[135] Essentially, s. 17 prescribes a formality for the necessary declaration: the declaration must be "in the will". We had not intended to make any recommendation with respect to this requirement as we had not in the early stages of our project turned up any instances of injustice flowing from it. However, a practitioner who commented on our Consultation Memorandum suggested that the requirement that the declaration be in the will constitutes a trap for the unwary testator, and, upon reflection, we have concluded that she is right. There is no more reason to make it an absolute requirement that a declaration that a will is made in contemplation of marriage be made in the will than there is to make it an absolute requirement that a testator sign or acknowledge his or her signature in the presence of two witnesses present at the same time. We think that the arguments for a dispensing power apply with equal force to the case of the declaration, and we think that the dispensing power should be exercised on similar grounds, that is, that the court be satisfied by clear and convincing evidence that the testator made the will in contemplation of the marriage.

RECOMMENDATION No. 7

We recommend that, if the Court is satisfied by clear and convincing evidence that a will was made in contemplation of a marriage, the will is not revoked by the marriage.

E. Transition

[136] The dispensing power should not apply to the wills of persons who die before the provision comes into force, because that would upset rights which have vested on the deaths of testators. It should, however, apply to the wills of persons who die after the provision comes into force. That is because it will give better effect to the wishes of testators, so that there is no need to give testators opportunities to avoid its application.

RECOMMENDATION No. 8

We recommend that the amendments to the *Wills Act* implementing the recommendations previously made in this report apply to the wills of all persons who die after the amendments come into force.

8. CONCLUSION AND SUMMARY

[137] Our recommendations for the adoption of a dispensing power have focussed on a very narrow aspect of the law of wills and probate, that is, the effect of a failure to comply with the formalities prescribed by the *Wills Act* other than writing. As the resulting reform will be piecemeal only, we should before leaving the subject consider what effect our proposals will have on the standing of the formalities and on the law of succession generally.

[138] At the present time, the effect of the formal requirements goes to the legal validity of a will: if the will does not comply with any applicable formal requirements of writing, execution and attestation it will be legally invalid and therefore ineffective. That is, a failure of form will result in a failure of substance.

[139] If a dispensing power is adopted, the formal requirements will still be there. However, their effect will be downgraded: instead of going to substance a failure to comply with the formal requirements other than the requirement of writing will only impose a presumption of invalidity. The presumption of invalidity will be a strong one, as it can be rebutted only by clear and convincing evidence, but it will only be a presumption.

[140] It seems to us that this state of the law would be appropriate, and that it would be a significant improvement on the present state of the law. The reasons for the formalities are the same as they always have been, but the adoption of a dispensing power will provide an alternative foundation for admitting a will to probate. This will result in testators' wishes being followed in many of the cases in which the strict compliance rule now defeats them. It is true that

the formalities will still override testators' wishes in cases in which testators have adopted documents as their wills but that adoption cannot be demonstrated by clear and convincing evidence. However, in the nature of things that unfortunate result cannot be avoided without undue risk of defeating testators' intentions by validating documents which were not adopted as wills.

[141] Taking a larger view, our proposals will leave in force a regime under which wills must conform to one set of formalities, albeit with an escape clause, while the extensive will substitutes that have come into being must conform to different sets of formalities. Usually the formalities for wills are more extensive than the formalities for will substitutes, but under our proposals, if a signature can be dispensed with, an occasional will may be admitted to probate though it conforms only to a lesser standard of formality than is required of will substitutes. It might be desirable to review the whole area of the form of testamentary and quasi-testamentary dispositions with a view to rationalizing it, but that will have to be left for another day.

[142] In the meantime, it is our hope that the proposals made in this report will avoid the injustices imposed by the strict compliance rule without allowing non-testamentary documents to be admitted to probate.

IV DRAFT LEGISLATION

The following is a draft of amendments to the *Wills Act* which we think would give effect to the proposals we have made.

Proposed amendments to the *WILLS ACT*

Revocation by marriage

17(1) A will is revoked by the marriage of the testator except if

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

(b) the Court is satisfied, on clear and convincing evidence, that the testator made the will in contemplation of the marriage, or

(c) the will is made in exercise of a power of appointment of real or personal property that would not in default of the appointment pass to the heir, executor or administrator of the testator or the persons entitled to the estate of the testator if the testator died intestate.

(2) Subsection (1)(b) applies only in respect of a testator who dies after this section comes into force.

Dispensing with formal requirements

20.1(1) In this section, "formal requirements" means the requirements contained in sections 5 to 8, 16(c), 19 and 20 for the making, revocation, alteration or revival of a will.

(2) The Court may, notwithstanding that a writing was not made in accordance with any or all of the formal requirements, order the writing to be valid as a will of a deceased person or as the revocation, alteration or revival of a will of a deceased person if the Court is satisfied, on clear and convincing evidence, that the deceased person intended the writing to constitute the will of the deceased person or the revocation, alteration

or revival of a will of the deceased person, as the case may be.

(3) This section applies only in respect of a person who dies after this section comes into force.

This report was approved for publication by the Board of the Institute at its meeting on June 22nd, 2000.

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CHAIRMAN

DIRECTOR

June 2000

APPENDIX A

CONDUCT OF ALRI'S PROJECT ON WILLS THAT DO NOT COMPLY WITH FORMALITIES

It has long been known that the "strict compliance" rule—the rule that a will cannot be admitted to probate unless its execution and attestation strictly comply with the formalities prescribed by the *Wills Act*—has excluded from probate documents which express the testamentary intentions of testators. For some years a project to determine whether something should be done about the rule has been on ALRI's list of potential projects.

In February 1999, we received a letter from Joseph P. Brumlik, Q.C. which referred to jurisprudence on the subject and expressed the view that it is strange that the courts have the authority to do justice by relieving against ambiguities, insufficiencies and omissions but not against non-compliance with the formalities. He suggested that consideration might be given to urging the Alberta Government to consider a relieving provision such as those in force in Manitoba and Saskatchewan. At its meeting of May 10, 1999, ALRI's Board agreed that the time had come for a project to be activated to determine whether the strict compliance rule should be relaxed in some way.

Upon reflection, it appeared to us that there was no effective way of consulting the testators and beneficiaries who are affected by the strict compliance rule and who will be affected by any relaxation of that rule. We accordingly decided that we should consult lawyers and judges who have experience with wills and estates and could advise as to whether something should be done, and, if so, what the appropriate remedy would be. The lawyers consulted would include in-house counsel to trust companies. In order to achieve effective consultation, we prepared our Consultation Memorandum No. 8, *Wills: Non-Compliance with Formalities,* which was issued in December 1999 and which set out as fully as we could manage the circumstances and factors that should be considered in deciding what action, if any should be taken, the options that are open, and the experience in other jurisdictions which have enacted remedial legislation.

We took the following steps:

5. We wrote all members of the Calgary Wills and Trusts Section and the Edmonton Wills and Estates Section of the Canadian Bar Association, Alberta Branch, advising them of our project and suggesting that interested persons obtain a copy of Consultation Memorandum No. 8.
6. We wrote the contact persons of the Bar Associations outside Edmonton and Calgary to the same effect.
7. The Benchers' Advisory kindly ran a notice of the project and invited interested persons to obtain Consultation Memorandum No. 8.
8. We arranged two invitational meetings of lawyers (and one judge) chosen for their professional standing and involvement in wills and estates practices to meet at Edmonton and Calgary respectively to discuss the issues involved in general and Consultation Memorandum No. 8 in particular.
9. We made inquiries from Professor Cameron Harvey, University of Manitoba Faculty of Law and Eric G. Lister of Winnipeg, a former chair of the CBA Manitoba Wills and Trusts Section as to the operation of the Manitoba dispensing provision and from Shelley Pillipow of Saskatoon, the chair of the CBA Saskatchewan Taxation, Wills and Trusts Section, who expressed her own views and gave us a paper by a member of the section, Allan Haubrich of Saskatoon, as to the operation of the Saskatchewan dispensing provision.
10. We also made inquiry from Professor Neville Crago, University of Western Australia, as to the operation of the Australian dispensing provisions.
11. We posted Consultation Memorandum No. 8 on our Website.

We also raised the subject with the Chief Justice of Alberta and the Chief Justice and Associate Chief Justice of the Court of Queen's Bench, with the result that Justices Johnstone, Clark, Lewis and Hutchinson were designated by the Chief Justice to provide comment, for which we are grateful. At Chief Justice Moore's suggestion, we wrote Justices Hembroff and Holmes at Lethbridge and Red Deer respectively and received views from them. Justice Hembroff spoke for himself and Justice Yanosik.

In the result, we have received the help and advice of the following in addition to those specifically mentioned above:

(a) **Participants in the Edmonton invitational meeting**

Tom Carter
Kate Hurlburt
Suzanne McAfee
Don Mallon
Karen Rackel
Gary Romanchuk
Anne de Villars, Q.C.
Ken Lypkie
Karen Platten
Phil Renaud

(b) Participants in the Calgary invitational meeting

John C. Armstrong, Q.C.
Dave Aust
Jean Blacklock
Jane Carstairs
Don Hatch, Q.C.
Mr. Justice Hutchinson
Lana Lien
Dennis Pelkie
Brian Smith
Chris Thomas

(c) **Lawyers who have written or telephoned views**

J. Martin Hattersley Q.C. (Edmonton)
Eugene Kush Q.C. (Hanna)
Allan McMillan (Slave Lake)
Neil McKay (Edmonton)
Alex K.H. Rose (Lacombe)
Steven L. Shavers, (Grande Prairie)
Carole A. Shaw (Calgary)
Remi G. St. Pierre (Edmonton)
M.J. Verstraten (Calgary)

In her letter to us, Carole A. Shaw suggested that s. 17 of the *Wills Act*, which provides that a will is revoked by marriage unless there is a declaration in the will that it is made in contemplation of marriage, should be amended to permit other evidence that a will is made in contemplation of marriage. We were persuaded by this letter to add that point to our project.

It will be seen from the text of this report that the comments and advice we have received in connection with this project have been at a high level of content and concern for the public interest and have given us valuable guidance which has affected the shape and content of our recommendations.

APPENDIX B

RELEVANT PROVISIONS OF THE *WILLS ACT*, R.S.A. 1980 C. W-11

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definition

1 In this Act, "will" includes a testament, a codicil, an appointment by will or by writing in the nature of a will in exercise of a power and any other testamentary disposition.

R.S.A. 1980, c. W-11, s. 1

Application of Act

2(1) Unless otherwise expressly provided, Parts 1 and 2 apply only to wills made on or after July 1, 1960.

(2) For the purposes of this section a will that is re-executed or is republished or revived by a codicil shall be deemed to be made at the time at which it is so re-executed, republished or revived.

(3) Chapter 369 of the Revised Statutes of Alberta, 1955 continues in force, as if unrepealed, in respect of wills made before July 1, 1960.

R.S.A. 1980, c. W-11, s. 2

PART 1

GENERAL

Devises

3 A person may by will devise, bequeath or dispose of all real and personal property, whether acquired before or after making his will, to which at the time of his death he is entitled either at law or in equity, including... (*certain specifics omitted*).

R.S.A. 1980, c. W-11, s. 3

Will to be in writing

4 A will is valid only when it is in writing.
R.S.A. 1980, c. W-11, s. 4

Validity of will

5 Subject to sections 6 and 7, a will is not valid unless

(a) it is signed at the end or foot thereof by the testator or by some other person in his presence and by his direction,

(b) the testator makes or acknowledges the signature in the presence of 2 or more attesting witnesses present at the same time, and

(c) 2 or more of the attesting witnesses subscribe the will in the presence of the testator.

R.S.A. 1980, c. W-11, s. 5

Wills of servicemen

6(1) A member of the Canadian Forces while placed on active service pursuant to the National Defence Act (Canada), or a member of any other naval, land or air force while on active service, or a mariner or a seaman when at sea or in the course of a voyage, may make a will by a writing signed by him or by some other person in his presence and by his direction without any further formality or any requirement of the presence of or attestation or signature by a witness.

(2) For the purpose of this section a certificate signed by or on behalf of an officer purporting to have custody of the records of the force in which a person was serving at the time the will was made setting out that the person was on active service at that time is sufficient proof of that fact.

(3) For the purposes of this section, if a certificate under subsection (2) is not available, a member of a naval, land or air force is deemed to be on active service after he has taken steps under the orders of a superior officer preparatory to serving with or being attached to or seconded to a component of such a force that has been placed on active service.

R.S.A. 1980, c. W-11, s. 6

Holograph will

7 A testator may make a valid will wholly by his own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

R.S.A. 1980, c. W-11, s. 7

Signature

8(1) In so far as the position of the signature is concerned, a will is

valid if the signature of the testator, made either by him or the person signing for him, is placed at or after or following or 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 will.

(2) A will is not rendered invalid by the circumstance that

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

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

(c) the signature is placed among the words of a testimonium clause or of a clause of attestation or follows or is after or under a clause of attestation either with or without a blank space intervening, or follows or is after or under or beside the name of a subscribing witness,

(d) the signature is on a side or page or other portion of the paper or papers containing the will on which no clause or 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 or 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 5, 6 or 7 or this section does not give effect to a disposition or direction that is underneath the signature or that follows the signature or to a disposition or direction inserted after the signature was made.

R.S.A. 1980, c. W-11, s. 8

Incompetent attesting will

12 If a person who attested a will was at the time of its execution or afterward has become incompetent as a witness to prove its execution, the will is not on that account invalid.

R.S.A. 1980, c. W-11, s. 12

Devise to witness

13(1) If a will is attested by a person to whom or to whose then wife or husband a beneficial devise, bequest or other disposition or appointment of or affecting real or personal property, except charges and directions for payment of debt, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns the person so attesting, or the wife or the husband or a person claiming under any of them, but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.

(2) If a will is attested by at least 2 persons who are not within subsection (1) or if no attestation is necessary, the devise, bequest or other disposition or appointment is not void under that subsection.

R.S.A. 1980, c. W-11, s. 13

Attestation by creditor

14 If real or personal property is charged by a will with a debt and a creditor or the wife or husband of a creditor whose debt is so charged attests a will, the person so attesting, notwithstanding that charge, is a competent witness to prove the execution of the will or its validity or invalidity.

R.S.A. 1980, c. W-11, s. 14

Executor as witness

15 A person is not incompetent as a witness to prove the execution of a will or its validity or invalidity solely because he is an executor.

R.S.A. 1980, c. W-11, s. 15

Revocation

16 A will or part of a will is revoked only by

(a) the marriage of the testator, subject to section 17,

(b) another will made in accordance with this Act,

(c) a writing declaring an intention to revoke and made in accordance with the provisions of this Act governing the making of a will, or

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

R.S.A. 1980, c. W-11, s.16

Revocation by marriage

17 A will is revoked by the marriage of the testator except when

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

(b) the will is made in exercise of a power of appointment of real or personal property that would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he died intestate.

R.S.A. 1980, c. W-11, s. 17

No revocation by presumption

18 A will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

R.S.A. 1980, c. W-11, s. 18

Alteration of will

19(1) Subject to subsection (2), unless an alteration that is made in a will after the will has been made is made in accordance with the provisions of this Act governing the making of a will, the alteration has no effect except to invalidate words or meanings that it renders no longer apparent.

(2) An alteration that is made in a will after the will has been made is validly made when the signature of the testator and the subscription of witnesses to the signature of the testator to the alteration, or, in the case of a will that was made under section 6 or 7, the signature of the testator, are or is made

(a) in the margin or in some other part of the will opposite or near to the alteration, or

(b) at the foot or end of or opposite to a memorandum referring to the alteration and written in some part of the will.

R.S.A. 1980, c. W-11, s. 19

Revival of will

20(1) A will or part of a will that has been in any manner revoked is revived only

(a) by re-execution thereof with the required formalities, if any, or

(b) by a codicil that has been made in accordance with this Act that shows an intention to give effect to the will or part that was revoked.

(2) Except when a contrary intention is shown, if a will which has been partly revoked and afterward wholly revoked, is revived, the revival does not extend to the part that was revoked before the revocation of the whole.

R.S.A. 1980, c. W-11, s. 20

APPENDIX C

REPORTS AND RECOMMENDATIONS FOR REFORM

(In chronological order)

South Australia Law Reform Committee
Report 28, 1974
The Law Reform Committee made the following recommendations:

4. "[I]n all cases where there is a technical failure to comply with the Wills Act, there should be a power given to the Court or a Judge to declare that the will in question is a good and valid testamentary document if he is satisfied that the document does in fact represent the last will and testament of the testator and that he then had the requisite testamentary capacity. Such a validating provision would stop a number of technical arguments as to the formal validity of wills."

5. "There should be...a general provision that if the document produced without doubt represents the last will of the deceased and the Court is satisfied that for some good and sufficient reason [e.g., dying in the desert] it was impossible or impracticable to obtain witnesses to that will then the Court should have power to declare that the will is valid in those circumstances."

The Law Reform Committee's recommendations were limited to allowing wills to be probated where there are "technical failures" to comply with formalities. The amendment to the South Australia Wills Act was more broadly framed and conferred a general dispensing power. See Appendix D.

Queensland Law Reform Commission
Report 22, 1978
The Commission made the following recommendation:
"12. The provision relating to the formalities attending the execution of a will should be retained intact from the former law...However, if substantial compliance with the formal requirements is shown, and the court is satisfied that the instrument presented for probate represents the testamentary intention of the maker of it, the court should be able to admit it to probate" (and extrinsic evidence should be admissible).

The provision implementing the Law Reform Commission's recommendation appears in App. D.

Lord Chancellor's Law Reform Committee
Report 22, 1980

A dispensing power was not recommended as it could lead to increased litigation, expense and delay. "We think that to attempt to cure the tiny minority of cases where things go wrong in this way might create more problems than it would solve and we have therefore concluded that a general dispensing power should not be introduced into our law of succession".

The Committee recommended minor relaxations in the formal requirements relating to the placement and acknowledgement of signatures.

Manitoba Law Reform Commission
Report 43, 1980
Report 22B, 1992 (Included in 22nd Annual Report, 1992/93, p. 37)
The Commission made the following recommendations in Report 43:

(f) There should be a wide dispensing power along the South Australia lines. A substantial compliance provision "unnecessarily limits the potential scope of the remedial doctrine, weakening its usefulness".
(g) There should not be a threshold requirement of a signature, which would not conform to the functional analysis on which the remedial provision is based.
(h) The standard of proof should be the balance of probabilities. This standard of proof is employed in other areas of probate law and the introduction of a different standard would only create inconsistency in the probate process. The civil standard serves its functions well, for reasons given.
(i) The provision should not say that the power applies "if the Court is satisfied", as this connotes a subjective analysis by the judiciary and does not emphasize an objective examination of the sufficiency of the evidence. It would be unclear and create uncertainty. The provision should say "if it is proved".

The Commission's recommendations in Report 43 were implemented by the addition of sec. 23 to the *Wills Act*. The marginal note to the section was "Substantial compliance", and the section applied if a "document or writing was not executed in compliance with all the formal requirements imposed by this Act". The Manitoba Court of Appeal held s. 23 did not apply unless the court is satisfied "that there has been some compliance, some attempt to comply, with the formal requirements" (*Langseth Estate* v. *Gardiner* (1990), 75 D.L.R. (4th) 25). The Commission thereupon made a further Report 22B, which is reproduced in its 1992-93 Report, and which recommended that

(a) "Dispensation Power" be substituted for "Substantial compliance" in the marginal note, and
(b) The words "any or all of" be inserted before the words "formal requirements", so that the section would apply despite the fact that there had been no attempt to comply with any of the formal requirements.

The Commission's recommendations in Report 22B were implemented. The resulting s. 23, as amended, appears in Appendix D.

The Commission was of the view that the requirement of strict compliance with formalities creates injustice which would be removed by a dispensing power. It did not think that any great increase in litigation should be expected, and it thought that any

increase which did occur would be offset by a decrease in challenges on technical grounds.

Law Reform Commission of British Columbia
Report 52, 1981
The Commission made recommendations as follows:

(d) The court should have power to declare a will valid despite non-compliance with formalities if the court is satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect.
(e) The standard of proof should be the balance of probabilities.
(f) The threshold requirement should be a document in writing signed by the testator.

The Commission expected that the vast majority of wills will continued to be executed formally because formally-executed wills will be instantly recognizable as wills and will be admitted to probate without the need for proof in solemn form. The Commission did not expect that the provision would result in increased litigation.

The Commission thought that a "signature performs a valuable channelling and evidentiary function... [and] it restricts the application of the dispensing power to documents which are most likely to represent attempts to communicate a settled testamentary intent" (p. 52-53).

The Commission's recommendations have not been implemented.

Tasmanian Law Reform Commission,
Report 35, 1983
The Commission recommended that the court be given power "...to declare an otherwise defectively executed will to be valid, if it can be shown that the defects are inconsequential and do not detract from the overall purposes of the *Wills Act* and that the testator had at least attempted to comply with those formalities".

This appears to contemplate a power that is somewhat broader than a "substantial compliance" power, but substantially narrower than a dispensing power provision. It will be seen from App. D that the Tasmanian legislation adopted a dispensing power provision.

Western Australia Law Reform Commission
Report 76, 1985
The Law Reform Commission made recommendations as follows:

1. The broad South Australia dispensing power should be adopted;
2. The requirement of proof of intention beyond a reasonable doubt as it then stood in South Australia should be adopted;
3. The dispensing power should extend to alterations and revocations.

The Commission thought that the dispensing power gives the court power to save wills in

cases in which justice requires that effect be given to testators' intentions, which the "strict compliance" rule prevented the courts from doing. The Commission thought that the power should apply even where a testator has made no attempt to comply with the formalities. The Commission took comfort from the development of the law which had taken place under the South Australia dispensing power, as lawyers and others would be able with confidence to rely on the South Australia precedents.

The Commission thought that the requirement of proof beyond a reasonable doubt would avoid a flood of fraudulent or unmeritorious applications, that it would prevent a reduction of the standard of care for execution of wills, that it would operate as a psychological barrier to courts being unduly easily persuaded, and that the adoption of a different standard of proof would create uncertainty as to the relevance of the South Australia decisions.

The Western Australia provision implementing the Law Reform Commission's recommendations appears in App. D.

New South Wales Law Reform Commission
Report 47, 1986
The Law Reform Commission made recommendations as follows:

12. Oral or nuncupative wills should not be introduced (difficulties of proof and interpretation);
13. Videotaped wills should not be introduced (less attention to accuracy of expression and detail);
14. Holograph wills should not be introduced (lack of Australian tradition; and testators could be misled into thinking any will prepared by themselves, in whatever form, would be valid without the need to involve witnesses);
15. Some modest relaxation of the formalities with regard to place of signature should be enacted, and the requirement that witnesses must sign in each other's presence be deleted;
16. A "substantial compliance" provision should not be adopted because it is excessively narrow; it is an ambiguous concept which, in Queensland, provides no guidance; and the South Australian alternative appears to be working well.
17. The Wills Act should confer power on the Supreme Court to admit to probate a will, alteration or revocation not executed with the statutory formalities if the court is satisfied that the deceased intended the will, alteration or revocatory document to take effect as such. The only threshold requirement should be a written document: even a signature should not be a threshold requirement. Extrinsic evidence as to manner of execution and testator's intention should be admissible.

The New South Wales provision implementing the Law Reform Commission's recommendations appears in App. D.

Uniform Law Conference of Canada
1987
In 1982, the Uniform Law Conference of Canada received a report with respect to

proposed amendments to the *Wills Act* which considered the question of a dispensing power. In 1987, the Saskatchewan Commissioners made a report to the Conference in which, after describing but not analysing dispensing power and substantial compliance provisions, they recommended the adoption of a substantial compliance provision.[49] However, a footnote says that when the report was presented, "the Saskatchewan Commissioners withdrew this recommendation because it appeared the Queensland approach was proving to be ineffective and instead the Saskatchewan Commissioners made recommendation that the Manitoba approach be adopted". The section which appears in the Uniform Acts (see App. D) is based on the Manitoba section as it then stood.

Extract from *Restatement of the Law Third, The American Law Institute, Volume 1, Property: Wills and Other Donative Transfers.*

§ 3.3 Excusing Harmless Errors

A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.

Comment:

a. Purpose of the statutory formalities. The purpose of the statutory formalities described in § 3.1 (Attested Wills) and § 3.2 (Holographic Wills) is to determine whether the decedent adopted the document as his or her will. The

[49] Uniform Law Conference of Canada, *Proceedings of the Sixty-Ninth Annual Meeting*, 1987, 353.

formalities are meant to facilitate this intent-serving purpose, not to be ends in themselves.

Four discrete functions have been attributed to the formalities— the evidentiary, cautionary, protective, and channelling functions. The evidentiary function requires solid evidence of the existence and content of the decedent's directions. The cautionary function requires some indication that the decedent arrived at these directions with adequate awareness. The protective function attempts to assure that the contents and the execution of the will were the product of the decedent's free choice. The channelling function is meant to facilitate a substantial degree of standardization in the organization, language, and content of most wills, so that they can be prepared and administered in a fairly routine manner.

b. Excusing harmless error. As noted in Comment *a*, the purpose of the statutory formalities is to determine whether the decedent adopted the document as his or her will. Modern authority is moving away from insistence on strict compliance with statutory formalities, recognizing that the statutory formalities are not ends in themselves but rather the means of determining whether their underlying purpose has been met. A will that fails to comply with one or another of the statutory formalities, and hence would be invalid if held to a standard of strict compliance with the formalities, may constitute just as reliable an expression of intention as a will executed in strict compliance.

This *Restatement*, supported by the *Restatement Second, Property (Donative Transfers)* § 33.1, Comment *g*, and by the Revised UPC (see Statutory Note), is aligned with this modern trend. This Restatement adopts the position that a harmless error in executing a will be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.

The trend toward excusing harmless errors is based on a growing acceptance of the broader principle that mistake, whether in execution or in expression, should not be allowed to defeat intention nor to work unjust enrichment. The movement to cure well-proved mistakes in expression is reflected in Tentative Draft No. 1 (1995) of this *Restatement*,[50] *on Construction, Reformation, and Modification of Donative Documents*.

The question in each case is whether a defect in execution was harmless in relation to the purpose of the statutory formalities, not in relation to each individual statutory formality scrutinized in isolation. Examining each formality in isolation could simply result in an inquiry as technical and non-purposive as the strict-compliance approach. The purposive question is whether the evidence regarding the overall conduct of the testator establishes, in a clear and convincing manner that the testator adopted the document as his or her will.

In applying this standard to particular cases, a hierarchy of sorts has been found to

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[50] When available, the permanent citation to this material will be given in the pocket part to this volume.

emerge among the formalities. The requirement of writing is so fundamental to the purpose of the execution formalities that it cannot be excused as harmless under the principle of this *Restatement*. Only a harmless error in executing a *document* can be excused under this *Restatement*.

Among the defects in execution that can be excused, the lack of a signature is the hardest to excuse. An unsigned will raises a serious but not insuperable doubt about whether the testator adopted the document as his or her will. A particularly attractive case for excusing the lack of the testator's signature is a crossed will case, in which, by mistake, a wife signs her husband's will and the husband signs his wife's will. Because attestation makes a more modest contribution to the purpose of the formalities, defects in compliance with attestation procedures are more easily excused.

Illustrations:

1. *Letter of instructions; draft prepared in accordance with instructions.* G sent a signed letter to his attorney giving directions for the preparation of his will. G died while the will was being prepared. Neither the letter nor the draft prepared by his attorney can be given effect because G never adopted either document as his will.

2. *Incomplete signature.* G neglected to make a will until she was near death. After giving instructions for the preparation of her will, she had the draft brought to her bedside. Witnesses were present as the will execution began. G had written several letters of her name but had not completed writing her signature when she suddenly fell back and died. Shortly after G's death, the witnesses signed the document. G's failure to complete her signature is a harmless error that may be excused because her act of partially signing the document in these circumstances constitutes clear and convincing evidence that G adopted the document as her will.

3. *Attestation defect— witness failed to sign.* H and W, husband and wife, arrived at their attorney's office to execute their wills, which had been prepared in accordance with their instructions. Two legal secretaries, who were to act as attesting witnesses, were present when H signed his will and when W signed her will. Both witnesses then signed H's will in H's presence. One of the witnesses signed W's will in W's presence, but for some unexplained reason, the other witness neglected to sign. The failure to obtain the signature of one of the witnesses is a harmless error that may be excused because the evidence establishes by clear and convincing evidence that W adopted the document as her will.

4. *Attestation defect— witness signed outside testator's presence.* G was ill in bed and unable to come to his attorney's office. G's attorney, who had drafted G's will in accordance with G's directions, arranged to go to G's house to conduct the execution ceremony. As G's attorney looked on, G signed the will. G's attorney had expected two neighbours to attend and act as attesting witnesses, but the neighbours never showed up. G's attorney then signed the will as one of the attesting witnesses, took the will back to her office and showed the document to

one of her law partners, informing the partner that the document was G's will and that G had requested that the law partner witness the will as an attesting witness. The law partner then telephoned G and inquired as to whether the instrument presented was his will. After G verified that it was, the law partner, in the presence of the drafting attorney, signed the document as an attesting witness. The drafting attorney's law partner testified that he knew G's voice. The failure of the drafting attorney's law partner to sign in the presence of the testator (or in a UPC jurisdiction, the failure to sign after witnessing the testator's act of signing or of acknowledging his signature or his will), is a harmless error that may be excused because the evidence establishes by clear and convincing evidence that G adopted the document as his will.

c. *Scope of harmless-error rule*. The harmless-error rule established in this section applies not only to defective execution but also to the validity of attempts to revoke a will or to revive a revoked will, topics covered in Chapter 4.

APPENDIX D

RECOMMENDED AND ACTUAL LEGISLATION PROVIDING FOR PROBATE OF NON-COMPLIANT WILLS

CANADIAN LEGISLATION AND PROPOSED LEGISLATION

MANITOBA
WILLS ACT, s. 23:

Dispensation Power
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 (1997 amendment unproclaimed)

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

PRINCE EDWARD ISLAND
PROBATE ACT, s. 69.2:
69.2 If on application to the Estates Section of the Trial Division of the Supreme Court 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 int hat other document, as the case may be.

QUEBEC
CIVIL CODE, s. 714:

714. A holograph will or a will made in the presence of witnesses that does not meet all the requirements of that form is valid nevertheless if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased.

SASKATCHEWAN

WILLS ACT, s. 37:

Substantial compliance

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

UNIFORM LAW CONFERENCE OF CANADA
UNIFORM WILLS ACT

19. Notwithstanding a lack of compliance with all the formal requirements as to execution that are imposed by this Act, a [court] that is satisfied that

(a) a document intended by a deceased to constitute a will embodies the testamentary intentions of the deceased, or

(b) a document or writing on a document embodies the intention of a deceased to revoke, alter or revive a will of the deceased or a document described in clause (a),

may order that the document or writing is 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 a will of the deceased or of a document described in clause (a).

AUSTRALIAN LEGISLATION

NEW SOUTH WALES

WILLS AND PROBATE ADMINISTRATION ACT

Certain documents to constitute wills etc.

18A. (1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements of this Act, constitutes a will of the deceased person, an amendment of such a will or the revocation of such a will if the Court is satisfied that the deceased person intended the document to constitute his or her will, an amendment of his or her will or the revocation of his or her will.

(2) In forming its view, the Court may have regard (in addition to the document) to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the deceased person.

QUEENSLAND
WILLS ACT

The Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator.

SOUTH AUSTRALIA
WILLS ACT

12(2) Subject to this Act, if the Court is satisfied that a document that has not been executed with the formalities required by this Act expresses testamentary intentions of a deceased person, the document will be admitted to probate as a will of the deceased person.

(3) If the Court is satisfied that a document that has not been executed with the formalities required by this Act expresses an intention by a deceased person to revoke a document that might otherwise have been admitted to probate as a will of the deceased person, that document is not to be admitted to probate as a will of the deceased person.

(4) This section applies to a document whether it came into existence within or outside the State.

(5) Rules of Court may authorise the Registrar to exercise the powers of the Court under this section.

These provisions were substituted in 1994 for s. 12(2) as it was enacted in 1975, which read as follows:

> A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document in probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.

The 1994 amendment dropped the 1975 requirement that there can be no reasonable doubt of the deceased's intention. It has restated the specific intention required.

TASMANIA
WILLS ACT

Power of Supreme Court to dispense with formal requirements

26(1) A document purporting to embody the testamentary intentions of a deceased person is taken, notwithstanding that it has not been executed in accordance with Division 3, to be a will of the deceased person, an amendment of such a will or the revocation of such a will if the Court, on application for a grant of probate of the last will of the deceased person, is satisfied that there can be no reasonable doubt that that person intended the document to constitute the will of that person, an amendment of such a will or the revocation of such a will.

(2) In considering a document for the purposes of subsection (1), the Court may have regard, in addition to the document, to any other evidence relating to the manner of execution or the testamentary intentions of the deceased person, including evidence, whether admissible before the commencement of this Act or otherwise, of statements made by the deceased person.

STATE OF VICTORIA
WILLS ACT 1997

When may the Court dispense with requirements for execution or revocation?

(1) The Supreme Court may admit to probate as the will of a deceased person

(a) a document which has not been executed in the manner in which a will is required to be executed by this Act; or

(b) a document, an alteration to which has not been executed in the manner in which an alteration to a will is required to be executed by this Act –

if the Court is satisfied that that person intended the document to be his or her will.

(2) The Supreme Court may refuse to admit a will to probate which the testator has purported to revoke by some writing, where the writing has not been executed in the manner in which a will is required to be executed by this Act, if the Court is satisfied that the testator intended to revoke the will by that writing.

(3) In making a decision under sub-section (1) or (2) the Court may have regard to –

(a) any evidence relating to the manner in which the document was executed; and

(b) any evidence of the testamentary intentions of the testator, including evidence of statements made by the testator.

WESTERN AUSTRALIA
WILLS ACT

Informal wills

34. A document purporting to embody the testamentary intentions of a deceased person is a will of that person, notwithstanding that it has not been executed in accordance with section 8, if the Supreme Court in a probate action is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.

Informal alteration of will

35. Any alteration made to a will of a deceased person after the will was executed or made has effect, notwithstanding that the alteration has not been made in accordance with section 10, if the Supreme Court in a probate action is satisfied that there can be no reasonable doubt tat the deceased intended the will as so altered to constitute his will.

Information revocation of will

36. A writing declaring an intention of a deceased person to revoke a will or part of a will has effect, notwithstanding that it has not been executed in accordance with section 15(1)(c), if the Supreme Court in a probate action is satisfied that there can be no reasonable doubt that the deceased intended by the writing to revoke the will or part of the will, as the case may be.

Informal revival of will

37. A writing declaring an intention of a deceased person to revive a will or part of a will that has been revoked has effect, notwithstanding that it has not been revived in accordance with section 16(1), if the Supreme Court in a probate action is satisfied that there can be no reasonable doubt that the deceased intended by the writing to revive the will or part of the will.

UNITED STATES PROVISIONS

RESTATEMENT OF THE LAW THIRD, PROPERTY, WILLS AND OTHER DONATIVE TRANSFERS, §3.3:

> § 3.3 Excusing Harmless Errors
> A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.

UNIFORM PROBATE CODE , revised s. 2-503 (adopted by Colorado (in part), Hawaii, Michigan, South Dakota, and Utah):

Revised UPC § 2-503. Harmless Error. Although a document or writing added upon a document was not executed in compliance with [the statutory formalities for executing a will], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, or (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

APPENDIX E
SOME CANADIAN CASES ON NON-COMPLIANT WILLS IN THE ABSENCE OF A DISPENSING POWER

I. CASES ON FORMAL WILLS IN THE ABSENCE OF REMEDIAL LEGISLATION

ALBERTA CASES

DOCUMENTS AND ALTERATIONS ADMITTED TO PROBATE

Reversed wills

Re Knott Estate (1959), 27 W.W.R. 382 (Alta. D.C.). Husband and wife had solicitor draw wills for them. They inadvertently signed each other's wills. Document admitted to probate with variations, applying, without analysis *In re Brander Estate* (1952), 6 W.W.R. (N.S.) 702 (B.C.S.C.) (below).

DOCUMENTS AND ALTERATIONS EXCLUDED FROM PROBATE

Witnesses not in testator's presence

In Re Wozciechowiecz Estate, [1931] 3 W.W.R. 283 (Alta. A.D.). Will properly executed except that testator was too ill to turn to see witnesses sign. Witnesses signed in the same room. Probate refused.

No signature or acknowledgment in witnesses' presence

Brandrick v. *Cockle* (1997), 17 E.T.R. (2d) 1 (Alta. Surr. Ct.). One will prepared for testator and wife. Wife placed document on hood of truck in which testator was seated and asked witnesses to sign. Testator's signature was concealed when witnesses signed, and testator did not acknowledge the signature to the witnesses. Probate refused:

it matters not whether the will appears to reflect the wishes of the testators.

The judgment gives the essential facts of a number of English and Canadian cases and the results which followed. The most important one was *McNeil* v. *Cullen* (1905), 35 S.C.R. 510, where the Supreme Court said that, where proof of a will depends upon the testator's acknowledgment of their signature, there must be clear evidence of their acknowledgment and approbation, and it appears that no acknowledgment is sufficient unless the witnesses either saw or might have seen the testator's signature.

BRITISH COLUMBIA CASES

DOCUMENTS AND ALTERATIONS ADMITTED TO PROBATE

Reversed wills

In re Brander Estate (1952), 6 W.W.R. (N.S.) 702 (B.C.S.C.). Husband and wife inadvertently signed each other's wills. Wilson J., applying a New Zealand judgment, held that words wrongly introduced by the signature to the wrong document could be struck out and the words intended could be identified by evidence and substituted. Will signed by husband was probated as his will with substitutions.

Authorized signature

Re Fiszhaut (1966), 56 D.L.R. (2d) 38 (B.C.S.C.). A person signed on behalf of testator but in the person's name, not the testator's. The *Wills Act* did not preclude signature of other person when signing for testator.

Witnesses not together

Simkins Estate v. *Simkins* (1992), 42 E.T.R. 287 (B.C.S.C.). Will in testator's handwriting (BC has no holograph provision). Signed before Witness 1, alone. Then acknowledged before Witness 2, alone, so formalities not strictly complied with. Absurd to rule such a will invalid. Probate granted.

Reliable evidence needed to overcome presumption of regularity

Beniston Estate v. *Shepherd* (1996), 16 E.T.R. (2d) 71 (B.C.S.C.). Will signed before two witnesses, the sons of testator's "significant other" who was partially deprived of inheritance given by earlier will. Sons claimed they did not realize they were signing testator's will and that testator had not signed in their presence. Evidence of defect must be reliable when document appears properly executed. Will included words on back of will, as they were in existence when will signed and were intended to be included.

Witness's signature omitted

Kraus v. *Tuni* (1999), B.C.J. No. 2075. Lawyer drafted will and explained it to testator. Testator signed. Lawyer called secretary in. Testator

signed or acknowledged in presence of both, and secretary witnessed, all 3 being together. Lawyer neglected to sign. No doubt of these facts. Court quoted *Ellis v. Turner* (see below) but said that it was bound by two decisions precisely on point, *Simkins* (above) and *Sisson* (See under Ontario below) and admitted will to probate.

DOCUMENTS AND ALTERATIONS EXCLUDED FROM PROBATE

Witnesses not together

Valentine v. *Whitehead* (1990), 37 E.T.R. 253 (B.C.S.C.). Testator signed 1981 will in presence of Witness 1 alone, then signed again in the presence of Witness 2, alone. Probate refused. (1967 will, which had been destroyed, was revived because testator's presumed intention was to revoke it only if the 1981 will was valid.)

No signature or acknowledgment in witnesses' presence

Ellis v. *Turner* (1997), 43 B.C.L.R. (3d) 283 (C.A.). Will on stationer's form created by testator. Wrote her name at top, not at end. Testator asked two witnesses to sign her will, and said that she wanted to complete her will as she was going into hospital. The two witnesses signed but testator did not sign or acknowledge in their presence. Probate denied, as declaring it valid would by-pass the clear provisions of the *Wills Act* and create a discretion in court which is not there.

Second witness's stamp at appropriate place but witness forgot to sign

Bolton v. *Tartaglia* (2000) B.C.J. No. 758 (B.C.S.C.). Testator attended notary's office to sign will prepared from testator's instructions. Notary called secretary in to act as second witness. Testator signed in the presence of both witnesses. Notary signed as witness. Secretary placed her stamp, which included her name, at the appropriate place but forgot to sign. Application to probate the will unopposed. *Wills Act* not complied with and courts, while regretting having to find a will invalid, have done so until recently. Declined to follow *Simkins*, *Sisson* and *Krause*. Applied *Ellis* v. *Turner*.

ONTARIO CASES

DOCUMENTS AND ALTERATIONS ADMITTED TO PROBATE

Unauthorized destruction

Re Krushel Estate (1991), E.T.R. 129 (O.C.J.) Holograph will torn up by another person. Pieces retrieved. Probated as valid holograph will.

Reversed wills
Re Malichen Estate (1995), 6 E.T.R. (2d) 217 (O.G.D.). Husband and wife signed each other's wills. Admitted to probate.

Witness's signature omitted
Sisson v. Park Street Baptist Church (1999), 24 E.T.R. (2d) 18 (O.C.J.) Will signed before two witnesses. One witness forgot to sign. Will admitted to probate. Absence of legislation should not stop the court from developing the common law where there as been substantial compliance, given that dangers two witnesses are to guard against did not exist.

DOCUMENTS AND ALTERATIONS EXCLUDED FROM PROBATE

Instructions for will
Re Coate Estate (1987), 26 E.T.R. 161 (Ont. Surr. Ct.). Typewritten letter with handwritten changes giving detailed instructions for a new will not admitted to probate, nor copy of previous will on which testator wrote annotations. Previous will probated in original form.

NEWFOUNDLAND, NEW BRUNSWICK AND NOVA SCOTIA CASES

DOCUMENTS AND ALTERATIONS EXCLUDED FROM PROBATE

One witness
Re Murphy Estate, [1999] N.J. No. 136 (QL) (Nfld. S.C.). Will written out for illiterate testator by daughter-in-law. Taken by testator and son to priest. Will read over in priest's presence to testator, who expressed agreement and signed by mark. Son wrote testator's name beside the mark. Priest witnessed. Probate refused on grounds only one witness. Court could not circumvent clear statutory provision. Could

not follow *Sisson*. (Son was executor. Judgment doesn't say whether he was beneficiary.)

Re Murphy Estate (1998), 170 N.S.R. (2d) 1 (N.S. Probate). Deceased changed name of one legatee and initialled the change. Presumption that changes were not made until after will was executed. Will probated without the change.

Unwitnessed alterations

Re Kane (1978), 5 E.T.R. (N.S.P.C.). Two large Xs drawn on two pages of will and initialled by testator. X marks of no force or effect. (1) Leaves vacuum. (2) Danger of someone else getting hold of the will and cancelling it.

Unsigned and unwitnessed alterations

Re Gallant Estate (1984), 59 N.B.R. (2d) 72 (N.B. Probate). Will had ink marks drawn through various areas of the will, including the signature. Words were still apparent. Will probated in original form.

Re Jackson's Estate (1991), 288 A.P.R. 55 (N.S. Probate). Will admitted to probate with alterations on will initialled by testator and 2 witnesses. Other notes on will made by testator not signed by testator or witnesses and not valid.

Re Ley Estate (1988), 208 A.P.R. (N.B. Probate). Holograph will had lines drawn through it and names substituted. Text remained clearly legible so there was no effective revocation. Alterations not signed so not effective. Will probated without alterations.

II. CASES ON HOLOGRAPH WILLS

DOCUMENT ADMITTED TO PROBATE

Holograph will with irregular signature

Re Moir (1942), 1 D.L.R. 337 (Alta. A.D.). Wholly handwritten document, signed only at end of first of two pages, not entitled will, no reference to death, used words of present gift, buttressed by extrinsic expressions of intention. The document complied with formalities as

it was wholly handwritten and signed.

Printed form will

In Re Ford Estate (1954), 13 W.W.R. 604 (Alta. D.C.). Preprinted will form. Portions written by testator constituted a holograph will. Preprinted words deleted.

Pre-printed will form. Witnesses not together. Holograph parts probated.

Sunrise Gospel Hour et al v. *Twiss*, [1967] 59 D.L.R. 321 (Alta. A.D.). Pre-printed will form completed wholly in testator's handwriting and signed at end, but could not be probated as formal will because the witnesses were not present at the same time. However, the words filled in by the testator constituted by themselves a valid holograph will. The clause appointing an executor could not be included as the words filled in could not stand by themselves.

Holograph will with signature before end

Re Romaniuk Estate, (1986) 23 E.T.R. 294 (Alta. Surr. Ct.). Facts like Sunrise Gospel Hour. Document admitted to probate, including a fourth page which followed the testator's signature, which was on third page, holding that Wills Act does not say where the signature to a holograph will must be.

Instructions for will

Re Neilson Estate (1989), 243 A.P.R. 1 (N.B. Probate). Handwritten instructions to lawyer admitted to probate, though signed only with testator's first name.

Pre-printed form. Holograph portion admitted

Re Carr Estate: Re Brown (1990), 40 E.T.R. 163 (N.B. Probate). Testator completed a printed will form in his own handwriting. Handwritten portion constituted a clear, intelligible intention and admitted to probate. Printed portion disregarded.

Pre-printed form. Holograph portion admitted. Unsigned and unwitnessed alterations excluded

Re Chevarie Estate, [1996] N.B.J. No. 433 (Q.B.). Testator filled in relevant sections of pre-printed will form in her own handwriting. This constituted a valid holograph will with printed portion and

non-essential parts excluded. Many alterations and additions made later and not admitted. Will admitted to probate in its original form.

DOCUMENT NOT ADMITTED TO PROBATE

Signatures on first page

In re Brown Estate (1953), 10 W.W.R. 163 (Alta. S.C.).
Pre-printed will form filled in handwriting and signed and witnessed on first of four pages. Not a holograph will because of printing. Only the first page could be probated.

No signature

Re Coughlan Estate (1955), 16 W.W.R. 14 (Alta. D.C.). Two sheets wholly in testator's handwriting but not signed were found in a third sheet which was a will form folded in half and which testator had signed. However, the third sheet was dated before the other two. No signature to authenticate the two sheets. Documents not admitted to probate.

APPENDIX F

SOME CASES ON A SUBSTANTIAL COMPLIANCE PROVISION

QUEENSLAND BEING THE ONLY JURISDICTION SURVEYED

DOCUMENT ADMITTED TO PROBATE

Witnesses not together in testator's presence

Re Matthews (1989), 1 Qd. R. 300 (S.C.). Testator was very ill. Signed will before Witness 1, who attested and subscribed. Asked Witness 1 to take the will to Witness 2 and have him sign. Witness 2 signed in the presence of Witness 1. Formalities substantially complied with. Unduly harsh to deny efficacy because only one witness available.

DOCUMENT EXCLUDED FROM PROBATE

Witnesses not together and signature not in presence of witnesses

Re Grosert (1985), 1 Qd. R. 513 (S.C.).Testator acknowledged signature to Witness 1, who attested, but not in the presence of Witness 2. Probate refused. Testator did not sign in the presence of two witnesses, and unclear that the signature was placed in the presence of either. No substantial compliance.

Witnesses not together and lack of acknowledgment

Re Johnston (1985), 1 Qd. R. 516 (S.C.). Testator did not sign in the presence of either witness, and the witnesses signed at different times. Neither saw any relevant part of the document and only one was told it was a will. No substantial compliance.

Only one witness signed in testator's presence

Re the Will of Eagles (1990), 2 Qd. R. 501 (S.C.). Witness 1 signed in testator's presence. Witness 2 signed but no one saw her do it, nor did she read the document. Length of time lapse not clear. Held that not every case of only one witness will amount to substantial

compliance. There seems to have been some doubt as to whether alterations to the document were in place at the time of the witnesses' signatures.

APPENDIX G
CASES UNDER DISPENSING POWERS

SASKATCHEWAN CASES

DOCUMENT ADMITTED TO PROBATE

Re Bunn Estate (1992), 45 E.T.R. 254 (Sask. C.A.). Sealed envelope labelled as last will. The first document in the envelope complied with formalities but only named executor. The second was in testatrix's handwriting but unsigned and disposed of assets. Testamentary intention clear. Both documents admitted to probate. Sask. s. 35.1 (dispensing power) did not require any attempt to comply with formalities. Disagreed with majority in *Langseth* (see under Manitoba cases.) Not necessary to consider the rule of attachment.

Re Lang Estate (1992), 45 E.T.R. 136 (Sask. Surr. Ct.). Formal will. Alterations in testator's own handwriting and initialed. No witnesses to alterations. Alterations accepted.. Remedial amendments to be interpreted liberally to give effect to intention. Wide discretion to accept noncomplying alterations if they represent testator's intentions.

Re Jensen Estate (1993), 49 E.T.R. 114 (Sask. Q.B.). Alterations dated and signed. Testator had made statements that she wanted to make changes to her will, and that she wanted to leave all her money to Chris, which was effect of the alterations. Alterations admitted.

Re McDermid Estate (1994), 5 E.T.R. (2d) 238 (Sask. Q.B.). Husband and wife filled out commercial wills forms and signed them in accordance with formalities. However, through inadvertence each signed the will prepared for the other. Will prepared for deceased's signature, together with the other, admitted to probate. Intention clear and unequivocal.

Re Warren Estate (1994), 112 Sask. R. 62 (Sask. Q.B.). Will was witnessed by two sisters who were the only beneficiaries. Will admitted to probate. Any irregularity may be cured once necessary testamentary intention found.

DOCUMENT EXCLUDED FROM PROBATE

Re Balfour Estate (1990), 38 E.T.R. 108 (Sask. Q.B.). "Whatever my daughter decides is O.K. if anyone else doesn't like it too bad.". Not shown to be testamentary.

MANITOBA CASES

DOCUMENT ADMITTED TO PROBATE

Re Pouliot; National Trust Co. v. *Sutton et al* (1984), 17 E.T.R. 224 (Man. Q.B.). Formal will. Testator later struck out executor's name and replaced it, signing his name beside the amendments. Will admitted to probate with changes. Threshold requirement is expression of testamentary intention in some form.

Re Briggs (1986), 21 E.T.R. 127 (Man. Q.B). Document wholly in deceased's handwriting purported to be will but was signed at the beginning instead of the end. Admitted to probate. Document represented testamentary intention.

Martineau v. *Manitoba (Public Trustee)* (1993), 50 E.T.R. 87 (Man. Q.B.). Unsigned document in testator's handwriting , saying at beginning "Harold Myers' Will" and using testamentary language. Admitted to probate. Represented testamentary intention.

Kuszak v. *Smoley* (1986), 23 E.T.R. 237 (Man. Q.B.). Testator filled out will form with no witnesses. The handwritten parts were not enough to constitute a holograph will: the printed words were required. Document admitted to probate. Document embodied testamentary intentions.

Re Shorrock Estate (1996), 109 Man. R. (2d) 104 (Man. Q.B.). Formal will with only one witness. Admitted to probate. No longer a requirement that some of the formal requirements must have been complied with. Document represented testamentary intention.

DOCUMENT EXCLUDED FROM PROBATE

Re Langseth Estate; McKie et al. v. *Gardiner et al.* (1990), 39 E.T.R. 217 (Man. C.A.). Alterations in formal will in testator's handwriting. Some unsigned. None witnessed. Dispensing power was to admit will notwithstanding noncompliance with "all of the formal requirements". As no compliance at all, majority held that alterations could not be admitted. Sullivan J. dissented, holding no compliance

necessary. (Note: The Manitoba Act was subsequently changed to allow will to be admitted notwithstanding noncompliance with "any or all" of the formalities.)

Montreal Trust Co. of Canada v. *Andrezejewski (Committee of)* (1994), 6 E.T.R. (2d) 42. Unsigned undated memorandum clipped to pre-printed will form and both inside a booklet concerning wills and estates. Not admitted. Not satisfied that the document represented testamentary intentions.

Re Chersak Estate (1995), 99 Man. R. (2d) 169 (Q.B.). Document purporting to be will entirely in the handwriting of a friend of deceased. No signature by deceased, but two witnesses signed above an attestation clause. Not admitted to probate. No compliance with formalities. Testamentary intention not established on balance of probabilities.

George v. *Daily* (1997), 15 E.T.R. (2d) 1 (Man. C.A.). Testator advised accountant he wished to change will and accountant made alterations on will at testator's directions. Accountant wrote lawyer detailing instructions given to him. Lawyer met testator, who confirmed desire to revoke and confirmed proposed dispositions. However, lawyer advised testator to obtain a medical certificate of competence. Nothing further happened, and testator died 2 months later. Motions court held that accountant's letter's constitute a will. Court of appeal reversed. Letter was at best instructions and never touched by animus testandi. 2-month delay militated against finding of testamentary intention (per 2 judges), though it was not necessary to determine the issue (per 2 judges, including one of the first two). Possibility of admissibility of a document prepared by a third party left open.

AUSTRALIAN CASES

SOUTH AUSTRALIAN CASES[51]

[51] Section 12(2) of the *Wills Act* of South Australia was adopted in 1975. Throughout the time when these South Australian cases were decided, it provided that a document

DOCUMENT ADMITTED TO PROBATE

In the Estate of Graham, deceased (1978), 20 S.A.S.R. 198 (S.C.). Testator signed will and asked nephew to get it witnessed. Nephew brought the will to two neighbours who knew testator and signed as witnesses. Court satisfied beyond a reasonable doubt. Observed that the greater departure from formalities the harder it would be for court to reach required satisfaction.

In the Estate of Kolodnicky, Deceased (1981), 27 S.A.S.R. 374 (S.C.). Testator signed in presence of Witness 1 (though Witness 1 did not recall whether testator was present when Witness 1 signed). Testator was present when Witness 2 signed but did not sign in Witness 2' s presence. Witnesses did not sign in each other's presence. Testator did make efforts to have will witnessed and no reasonable doubt that deceased intended the document to be his will. Document admitted to probate.

In the Estate of Clayton, deceased (1982), 31 S.A.S.R. 153 (S.C.). Testator made will on printed form in own handwriting. No witnesses. Evidence that testator believed he had made valid will. Mere production of handwritten and signed document will not usually be enough. Document admitted to probate.

In the Estate of Standley, deceased (1982), 29 S.A.S.R. 490 (S.C.). Testator and Witness 1 signed document in each other's presence. Witness 2 signed without knowledge of content and not in testator's presence. Court satisfied that document was intended as will, and admitted it to probate. Court also accepted alterations made to the will and initialled by testator.

In the Estate of Dale, deceased; Dale v. Wills (1983), 32 S.A.S.R.

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purporting to embody testamentary intention but not executed in accordance with formalities could be probated if the court was satisfied beyond a reasonable doubt that the deceased person intended the document to be his will. The requirement of proof beyond a reasonable doubt was deleted in 1994. The subsection was revised in 1998 but is to much the same effect as is stood after 1994.

215 (S.C.). Deceased wrote on pre-printed form. Deceased and Witness 1 signed in each other's presence. Deceased took will to Witness 2 and signed it a second time before Witness 2 who then signed. No reasonable doubt that it was the testator's will and should not fail for want of formality. Document admitted to probate.

In the Estate of Blakely, deceased (1983), 32 S.A.S.R. 473 (S.C.). Testator and wife had wills prepared by solicitor. Each inadvertently signed the other's will. Sec. 12(2) broad enough to cover complete lack of execution in these circumstances. Signature was placed where testator's intention was beyond doubt. Canadian courts have performed mental gymnastics to recognize such will. General rule has been to contrary. Law should have a sensible remedy. Wills and signatures should be notionally transposed and read together. Admitted to probate.

In the Estate of Williams, Deceased (1984), 36 S.A.S.R. 423 (S.C.). Testator wrote up her will and arranged for neighbours to witness both hers and her husband's. Husband signed his will and neighbours witnessed. Neighbours signed testator's will as witnesses but testator failed to sign her will. Testator wrote "Wills" on envelope. Complete in every respect except for testator's signature. Will admitted to probate.

In the Estate of Possingham, Deceased (1983), 33 S.A.S.R. 227 (S.C.). Testator made and initialled alterations on duly executed will, and wrote in the margin "deletions authorised by me", followed by his signature. Court satisfied that the alterations represented testamentary intention. Will admitted to probate with alterations.

In the Estate of Smith, Deceased (1985), 38 S.A.S.R. 30 (S.C.). Deceased's will found in her personal effects at hospital, signed but not witnessed. Told grand-niece that she had a will. No later will existed. Will provided for those to whom one would expect her to leave her estate. No reasonable doubt that testator intended document to be her will. Admitted to probate.

In the Estate of Ryan, Deceased (1986), S.A.S.R. 305 (S.C.). Will left everything to husband, then daughter. Daughter ill, not expected to recover. Testator made and signed unwitnessed addition to will leaving everything to grandson instead of daughter. No reasonable doubt of

her intention. Will and document admitted to probate.

In the Estate of Pantelij Slavinskyi, Deceased (1988), 53 S.A.S.R. 221 (S.C.). Testator in presence of two witnesses wrote in pencil on a wall what the Court interpreted as a will leaving everything to testator's 3 nieces in the USSR (though all the substantive part said was "To all my nieces"), telling the witnesses that he was writing his will, that he was going to hospital, and that he was leaving everything to his 3 nieces. He signed on the wall and one witness signed below his signature. The other witness, though she understood Ukrainian, which was the testator's language, was illiterate and declined to sign. The writing on the wall gave one niece's address, and the testator stuck in a crack on the wall an envelope with the address of a second niece, which was considered part of the will (though it does not seem to have been necessary, as the 3rd niece also took though her name and address were not included). Held that there was no reasonable doubt that the testator intended the writing to be his will and that he intended his property to go to the three nieces. Will admitted to probate. (The only non-compliance with formalities appears to have been that the second witness did not sign: otherwise the question was one of interpretation.)

In the Estate of Sutton, Deceased (1989), 51 S.A.S.R. 150 (S.C.). Alterations first deprived son and then reinstated the interest, following the fluctuations of their relationship. Will probated with both signed and unsigned alterations, there being no reasonable doubt that deceased intended the document to constitute his will. Absence of signature was a formality which could be excused under sec. 12(2).

DOCUMENT EXCLUDED FROM PROBATE

Baumanis v. *Praulin* (1980), 25 S.A.S.R. 423 (S.C.). Typed will prepared under testator's instructions. Testator requested small alterations but died the same day before the revised will could be executed. Testator did not intend that document to

be the will. Document not executed at all cannot be admitted: sec. 12(2) says "...not executed with formalities".

In the Estate of Kurmis, Deceased (1981), 26 S.A.S.R. 449 (S.C.). Additional legacy inserted into body of executed will, without signature or formality. Legacy excluded from probated will. Not executed at all.

WEST AUSTRALIAN CASES[52]

DOCUMENT ADMITTED TO PROBATE

In the Estate of Crossley (deceased): Crossley v. *Crossley*, [1989] W.A.R. 227 (S.C.). Testator made will in own handwriting, signed and dated but not witnessed. Divorced wife (with whom deceased was living at time of death) named sole executrix and residual beneficiary after bequests to children. Testator showed the will to daughter. Previous similar documents were marked "cancelled" on each page before date of current will. Will admitted to probate. Document must purport to embody testamentary intentions and no reasonable doubt that intended as will, which is enough. Referred to South Australian provision as similar.

In the Matter of the Will of Lobato: Shields v. Caratozzolo, [1991] 6 W.A.R. 1 (S.C.). Testator told lawyer she wanted to cancel her will. Wrote on hospital paper that she wanted to cancel her will and stating her new dispositions, and sent paper to lawyer who mailed the revised will to the hospital, but it did not reach her and was never executed. Remedial section is to allow effect to be given to intentions. Fundamental test is whether court is satisfied beyond a reasonable doubt that the testator intended the document to be a will. The paper was admitted to probate.

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[52] The Western Australia remedial provision was adopted in 1987. Though somewhat differently arranged, it is to the same effect as the South Australian section as it stood while it required that the Court be satisfied beyond a reasonable doubt that the testator intended the document to be their will.

Public Trustee (WA) v. *Reid*, [1993] A.C.L. Rep. 395 W.A. 24. Deceased asked Public Trustee to remove two beneficiaries from will. Public Trustee sent new will. Testator signed the new will but it was not witnessed. Court satisfied that there could be no reasonable doubt testator intended the document to be his will. Document admitted to probate.

DOCUMENT EXCLUDED FROM PROBATE

Henwood v. *Publiic Trustee*, [1993] 9 W.A.R. 22 (S.C.). Testator instructed lawyer to draft a new will. Document prepared after death not admitted to probate. Document not prepared before death and not seen by "testator" cannot be a will.

Re Barfield, [1993] A.C.L. Rep. 395 W.A. 25. Unexecuted document was in the form of a will leaving property to sons, contrary to some statements to family members. Held that there was a reasonable doubt whether the deceased intended the document to be his will. Document not admitted to probate.

NEW SOUTH WALES CASES[53]

DOCUMENT ADMITTED TO PROBATE

In the Estate of Masters; *Hill* v. *Plummer* (1994), 33 N.S.W.L.R. 446 (C.A.). (See below for disposition of Documents 1 and 3.) Document 2 was a handwritten document (referred to by the dissenting judge as "a scrap of paper") handed by deceased to a friend (who did not take under the document) in hospital along with words indicating that it was his will. Held by the majority that under all the circumstances the deceased intended Document 2 to be his will and it was admitted to probate.

DOCUMENT EXCLUDED FROM PROBATE

Re application of Brown; *Estate of Springfield* (1991), 6 N.S.W.L.R. 535 (S.C.).The deceased dictated testamentary intentions to an

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[53] Section 18A of the NSW *Wills, Probate and Administration Act* was adopted in 1989. A document is deceased person's will if it purports to embody testamentary intentions and if the court is satisfied that deceased intended it to be their will. Extrinsic evidence is admissible.

associate, who wrote them down and transcribed them into will form. As the document was not seen, read or written by deceased, it was no more than notes of associate of his understanding of what deceased wanted in his will. The Court must be satisfied that the deceased intended to make the document his will. Document not admitted to probate.

In the Estate of Masters; *Hill* v. *Plummer* (1994), 33 N.S.W.L.R. 446 (C.A.). Deceased wrote letter to P (Document 1) "...Just in case I should die before I make my will, everything I own...goes to you." Held that deceased did not intend Document 1 as a will, but rather contemplated the making of a later will. Document 1 not admitted to probate. Document 3 was notes on a pad which was found after deceased's death among a number of books on a bookshelf. It outlined dispositions of property. It does not appear to have been signed. The court thought that it was just a draft and was not intended as a will. Document 3 not admitted to probate. (See above re Document 2.)

AUSTRALIAN CAPITAL TERRITORY CASE[54]

DOCUMENT ADMITTED TO PROBATE

Re Letcher, [1993] A.C.L. Rep. 395 A.C.T. 1. Deceased wrote a will on two pieces of paper but did not sign because she was afraid that if she made a formal will she would die. Held that the documents expressed her testamentary intention and were her will. Documents admitted to probate.

[54] Section 11A of the ACT *Wills Act* was adopted in 1991. It is the same as NSW sec. 18A.