ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

WILLS: Non-Compliance With Formalities

Consultation Memorandum No. 8

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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ACKNOWLEDGMENTS

Some law reform projects are not front page news, nor are they vociferously demanded by the public. They do, however, matter to people who are faced by problems created by bad laws, and, to the extent that the law operates unfairly, they impact on the overall view of the ability of the legal system to respond appropriately. This is one such project. It focuses on whether a good rule (the requirement of formalities of wills) needs to be tempered with some discretion, and, if so, how it should be tempered.

One reason why the issue is somewhat obscure is that problems arising from a requirement of strict compliance with formalities are known only to those who experience them. And the people affected by a specific problem of that kind may have been able to craft an acceptable but indirect and makeshift solution.

ALRI's task is to determine the incidence of the perceived problem, define it, and, if it needs solution, to prepare a reasonable and specific means of solving it. This task has fallen to W.H. Hurlburt, Q.C., who is a Board member and Director Emeritus of the Institute. He has prepared this Consultation Memorandum as the first step in formulating recommendations for any needed improvements in the law. ALRI's Board has approved the Consultation Memorandum for circulation for discussion purposes but has not reached any conclusions about the problems or their solution.

Others have examined this issue and we acknowledge the assistance of organisations such as the British Columbia Law Reform Commission, now the BCLI, the Manitoba Law Reform Commission, and the American Law Institute from whose materials we draw specifically.

PREFACE AND INVITATION TO COMMENT

Wills are occasionally excluded from probate because their execution does not comply strictly with the formalities required by the *Wills Act*. The Alberta Law Reform Institute has undertaken a project to determine whether or not provision should be made for admitting to probate some or all wills that do not strictly comply with the formalities but which testators intend to constitute their wills. Such recommendations have been adopted by four Canadian provinces, the *Uniform Wills Act* adopted by the Uniform Law Conference of Canada, all of the Australian states, a number of American states, and the American Uniform Probate Code and Restatement Third of the Law of Property.

ALRI is issuing this Consultation Memorandum to interested persons in order to obtain informed comment and advice as to what, if anything, should be done. The reader's comments and advice are solicited.

Comments on this paper and the questions and issues raised by it should be in ALRI's hands by January 31, 2000. Comments may be made by any form of communication, but some form of written or electronic communication is preferred. Comments supported by reasons will be the most helpful. It will make ALRI's work easier if page references could be given where applicable.

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Comments should reach the Institute on or before **January 31, 2000**.

Table of Contents

LIST OF ISSUES ii
A. INTRODUCTION 1
B. PURPOSE OF WILLS LEGISLATION 3
C. FORMALITIES 3
1. Formalities Required for Formal Wills, Alterations and Revocations 3
2. Formalities Required for Holograph Wills 4
3. Armed Forces Personnel and Mariners 4
4. Formalities Required for Some Other Dispositions That Take Effect on Death . . 5
5. What Is "Writing"? 5
6. Purposes of the Formalities 5
7. Effect of Failure to Comply with Formalities 7
D. ISSUES TO CONSIDER 7
ISSUE No. 1 8
a. Formal Wills 8
b. Holograph Wills 9
ISSUE No. 2 10
a. Cases in Which an Attempt Has Been Made to Comply with Formalities 10
b. Cases in Which No Attempt Has Been Made to Comply with Formalities 10
c. Whether Apparent Compliance with Formalities Provides Superior Evidence 11
d. Preventing Duress, Fraud and Undue Influence 12
ISSUE No. 3 13
ISSUE No. 4 15
a. Summary of Possible Remedial Provisions 15
i. Relaxation of formalities 16
ii. A "Substantial compliance" provision 17
iii. A dispensing power? 19
(a) Nature of dispensing power 19
(b) Dispensing powers in Canada 19
(c) Dispensing powers in Australia 21
(d) "Harmless Error" provisions in the United States 21
(e) Summary of issues and arguments relating to a dispensing power 22
(f) Specific formalities 24
(g) Requirement of "writing" or a "document" 24
(h) Will in electronic form 25
(i) Requirement of signature 26
(j) Requirement of witnesses 30
(k) Other proposals 32
ISSUE No. 5 32
E. ALTERATIONS AND REVOCATIONS 33
ISSUE No. 6 33
F. PRESUMPTION OF REGULARITY 34
G. SUMMARY AND CONCLUSION 35

1. Ultimate Questions 35
2. Invitation to Comment 36
APPENDIX A 37
Extract from Restatement of the Law Third, The America Law Institute, Volume 1 Property: Wills and Other Donative Transfers.
APPENDIX B 47
Some Canadian Cases on Non-Complying Wills
APPENDIX C 54
Some Cases on a Substantial Compliance Provision
APPENDIX D 55
Some Cases Under Dispensing Powers
APPENDIX E 69
Recommended and Actual Legislation Providing for Probate of Non-Compliant Wills

LIST OF ISSUES

ISSUE No. 1 8
ISSUE No. 2 10
ISSUE No. 3 13
ISSUE No. 4 15
ISSUE No. 5 32
ISSUE No. 6 33

A. INTRODUCTION

[1] Everyone is entitled to dispose of his or her property on death. That is one of our fundamental social policies.[1] The law gives effect to this fundamental social policy by requiring that a deceased person's property be distributed according to the deceased person's will.

[2] However, the law says that a will is not effective unless the will and its execution meet certain requirements of form which are described below. It 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. Unless one of these sets of formalities is strictly complied with, a testator's testamentary dispositions will not be carried out. A will which does not comply with formalities cannot be admitted to probate.[2]

[3] Excluding from probate documents which do **not** reflect "testators'" intentions is obviously a good thing. However, excluding from probate documents which **do** reflect testators' intentions negates testators' right to dispose of their property on death is a bad thing. The existence of the possibility that the strict compliance rule excludes documents which reflect testators' intentions raises the question: should the law admit at least some documents to probate even though they do not strictly comply with the formalities?

[4] The Alberta Law Reform Institute has undertaken a project to determine whether or not some provision should be made for admitting to probate wills which do not comply strictly with the formalities but which represent the testamentary intentions of testators, and, if yes, what the provision should be.

[5] ALRI has moved this project to the top of its agenda now at the suggestion of a senior practitioner who cited a case of his own in which a

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

2 The later discussion will disclose some exceptions to this statement.

failure to comply with formalities had raised difficulties (which, happily, were resolved). ALRI board members have also encountered situations in which difficulties have arisen, and members of the CBA Alberta Wills & Estates Section (Edmonton) mentioned an additional number, so that it seems appropriate to look into the subject with a view to deciding whether anything should be done.

[6] ALRI is publishing this Consultation Memorandum in order to solicit information relevant to the ultimate questions and to solicit views based on a consideration of all relevant factors. It discusses a number of issues and solicits information and views with respect to them. It then raises the ultimate questions as follows:

1. Should it be possible to admit to probate a document which does not strictly comply with the formalities prescribed by the *Wills Act* for formal wills or holograph wills?

2. If the answer to Question 1 is yes, should the *Wills Act* be amended by

   allowing wills to be probated if they are in "substantial compliance" with the prescribed formalities?
   giving the court power to probate a document which does not comply with some or all of the prescribed formalities but which expresses the testator's intention?
   providing some other form of relief for non-compliant wills?

[7] It should be noted that this project is not about the formalities themselves, which will remain as they are. The present formalities are actually quite easy to comply with, and, if complied with, they do give some foundation for an inference that the compliant will does reflect the testamentary intentions of the testator. The only question is whether or not some other forms of evidence of testators' intentions should be accepted in specific cases.

[8] Some opinions are expressed in this Consultation Memorandum. These are only the opinions of the drafter and are put forward for the purpose of discussion. They have not been considered or adopted by ALRI's Board, which

will consider the topic in the light of the discussion in this Consultation Memorandum and in light of comment on the topic which ALRI receives.

[9] ALRI accordingly invites comment on the ultimate questions set forth above, on the specific issues identified in this Consultation Memorandum and on any other specific issues which arise during the discussion. Commentators need not, however, address all of the issues unless they wish to do so. Comment accompanied by reasons will be most helpful, and references to this Consultation Memorandum by page numbers will make ALRI's task easier.

B. PURPOSE OF WILLS LEGISLATION

[10] The basic premise of this Consultation Memorandum is that the concrete objective of legislation dealing with the form and probate of wills is to give effect to the testamentary intentions of deceased persons, and that, to achieve that objective the law

- provides procedures by which owners of property can say how their property is to be disposed of on death, and
- takes steps to ensure as far as practicable that
    - wills which reflect the intentions of testators are admitted to probate, and
    - documents which do not reflect the intentions of testators are excluded from probate.

C. FORMALITIES

[11] ALRI assumes for the purpose of this project that the present formalities will be continued. The question for the project is whether or not some escape provision should be provided for wills which do not strictly comply with the formalities. However, it is necessary to bear in mind what the required formalities are and what their purposes are, and they will be described here.

1. Formalities Required for Formal Wills, Alterations and Revocations

[12] Under secs. 4 and 5 of the *Wills Act*, a formal will must be

in writing,

signed by the testator or someone at his direction at the foot or end thereof,[3] and

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

are present at the same time, and

sign in the presence of the testator.

[13] These requirements are substantially those which appeared in the *Wills Act 1837* (1837 S.U.K. c. 26). Sec. 40 of the *North-West Territories Act*, SC 1875 introduced them into Alberta. Sec. 5 of *The Wills Act*, SA 1927 c. 21 brought them into Alberta legislation. All of the common-law provinces and territories require compliance with substantially the same formalities.

2. Formalities Required for Holograph Wills

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

- must be "wholly" in the testator's handwriting, and
- must bear the testator's signature.

[15] The acceptance of holograph wills may be regarded as a relaxation of the requirements of the formalities, or, alternatively, it may be regarded as the substitution of handwriting and signature as the required formalities.

3. Armed Forces Personnel and Mariners

[16] Sec. 6 of the *Wills Act*, which was first enacted in Alberta by an amendment to the *Transfer and Descent of Land Act* (1917 SA c. 3 sec. 39), 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

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[3] Sec. 8 of the *Wills Act* relaxes somewhat the requirement that the testator's signature be "at the foot or end" of the will, but this relaxation is not relevant to the present discussion.

"writing" is by the testator, and a signature which is that of the testator or a person acting under the testator's direction. Wills made under sec. 6 are not common and we have not seen any cases in which the relaxed formalities have not been complied with in such cases.

4. Formalities Required for Some Other Dispositions That Take Effect on Death

[17] There are some documents other than wills which are really testamentary in nature, as they remain revocable until death and take effect only on death. Examples are beneficiary designations for insurance policies and future income plans such as RRSPs and RRIFs. For these designations the only formalities required are that they be made in specified forms 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 an attestation requirement affected the designation in any way.

5. What Is "Writing"?

[18] Under sec. 4 of the *Wills Act*, "[a] will is valid only when it is in writing." A holograph will must be in a particular form of writing, that is, the testator's handwriting.

[19] Under sec. 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 definition is very broad. While it seems unlikely that it includes electronic records, the point does not appear to have been judicially considered.

6. Purposes of the Formalities

[20] The formalities required for formal wills are customarily said to perform a number of functions:

- To ensure that a document propounded for probate was executed by the testator. (It appears that the formalities are effective here. A rogue might impersonate the alleged testator to witnesses who do not know

the testator, or might forge the testator's signature and those of the witnesses, but that is not the usual case.)

- To ensure that the testator was of sound mind.
  (Presumably witnesses would not sign if they thought that a testator was incapable of dealing with his or her affairs, but the witnesses are not required to have either medical knowledge or knowledge of the testator, so the assurance of mental capacity is not very strong.)

- To ensure that the document reflects the testator's intention.
  (If a person goes through the elaborate process of assembling two witnesses and signing a document in their presence, it is highly likely that a person's intention was to make the document their will, and similarly if the person goes through the process of writing out a will and signing it. The assurance is quite strong.)

- To avoid fraud, undue influence and coercion.
  (Absent collusion, and absent coercion of the witnesses as well as coercion of the testator, the presence of witnesses gives a strong assurance that the testator was free from physical coercion. However, it will not give much assurance against undue influence, as a testator who is subject to undue influence does in fact intend to make a document their will.)

- Through ritual, to caution the testator about the importance of the document.
  (Again, a testator who goes through the formalities for either a formal will or a holograph will must in most cases realize the importance of the document.)

- To make for ease of administration.
  (The presumption of regularity created by compliance with formalities will in most cases make the granting of probate comparatively easy.)

7. Effect of Failure to Comply with Formalities

[21] Some courts have interpreted the *Wills Act* provisions robustly to hold that a will complies with formalities when that conclusion is not inevitable. Generally speaking, however, a failure to comply strictly with the prescribed formalities means that a will cannot be admitted to probate. In 1905, Davies J., giving the judgment of the Supreme Court of Canada, quoted with apparent approval a reference by the English Court of Appeal to the *Wills Act* as "a statute in which there was no elasticity".[4]

D. ISSUES TO CONSIDER

[22] This Consultation Memorandum will now discuss the issues as they appear to ALRI. Readers are invited to comment on whether they are the right issues, and, if not, to advise what the right issues are.

[23] Initially, the discussion will apply only to the initial execution of wills, leaving until later the making of alterations in wills and revocations effected by writing (rather than by destruction).

[24] Appendix B gives summaries of some Alberta cases back to 1931 and other Canadian cases decided over the last 20 years[5] in which the probate of wills has been contested on the grounds of non-compliance with formalities. The reader may wish to look at these to get a feeling for what Canadian courts have been doing in the area.

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[4] *McNeil* v. *Cullen* (1905) 35 SCR 510, 514, quoting *Blake v. Blake* 7 PD 102, per Brett LJ. In the *McNeil* case the witnesses entered the room after the testatator 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).

[5] This time period has been chosen with an eye to relevance to present-day discussions, though some earlier Alberta cases have been included. In 1980, the Manitoba Law Reform Commission listed the following as cases in which wills had been excluded for failure because of technical defects in the order of acknowledgments and signing: *Moore v. King* (1842) 163 ER 716; *Hindmarsh v. Charlton* (1861) 11 ER 388 (HL); *Rose v. Bouck* (1908) 2 Alta LR 263; *Re Davies* [1951] 1 All ER 920; *Re Grossman* [1969] 2 All ER 108; and *Re Brown* [1954] OWN 301 (Surr. Ct..) The Commission also referred to other cases of exclusion due to technical failures. (See *Report on The Wills Act" and the Doctrine of Substantial Compliance*, Manitoba Law Reform Commission Report #43, 1980.)

ISSUE No. 1
Are there cases in which the requirement of strict compliance with the formalities excludes testamentary documents which reflect the testator's testamentary intentions

a. Formal Wills

[25] Although the formalities are easy to comply with, failures of compliance occur, and probate of non-complying wills has been refused though the testator's testamentary intention was clear. Readers should, however, test this proposition and point out any arguments to the contrary.

[26] The example best known in Alberta is *In re Wozciechowiecz Estate* (1931) 3 WWR 283. 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* [1972] 3 All ER 729 (Ch.), where the testator signed before Witness 1, who signed, and where 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 Act as interpreted by the Court required 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.

[27] The British Columbia case of *Valentine v. Whitehead* (1990) 37 ETR 253 (BCSC) (see Appendix B) 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* [1999] NJ No. 136 (QL) (Nfld SC) (see Appendix B) in which a will written out by 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. Some other examples in Appendix B, are not as clear-cut because the testators' intentions were less certain, for example, in *Brandrick v. Cockle* (1997) 17 ETR (2d) 1 (Alta Surr Ct), the testator sat in a truck and said nothing while his wife got the witnesses to sign; 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.

[28] Upon occasion, the courts have gone to some lengths to admit non-complying wills to probate. Two examples are the British Columbia case of *In re Brander Estate* (1952) 6 WWR (NS) 702 (BCSC) and the Alberta case of *Re Knott Estate* (1959) 27 WWR 382 (Alta DC), in each of which a husband and wife inadvertently signed each other's wills. Then there are one recent Ontario case and two recent British Columbia cases in which non-complying wills have been admitted to probate. The Ontario case is *Sisson v. Park Street Baptist Church I* (1999) 24 ETR (2d) 18 (OCJ), where one of the two witnesses forgot to sign. The first British Columbia case is *Simkins Estate v. Simkins* (1992 42 ETR 287 (BCSC), where the testator signed the will before Witness 1 and later acknowledged the signature before Witness 2. The second British Columbia case is *Krause v. Toni* [1999 BCJ No. 2075, Penticton Registry No. 17406 where the lawyer who prepared the will forgot to sign as witness. These last three cases may possibly represent an incipient judicial revolt against the strict compliance rule. They are all at the trial level, however, and it is not likely that the strict-compliance approach will be abandoned.

b. Holograph Wills

[29] In the case of holograph wills, the use of will forms has led to difficulty: a testator may fill out a will form in their 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 (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* [1967] 59 DLR 321 (Alta App.Div.) (see Appendix B). 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 their will.

Drafter's view on Issue 1

[30] In the drafter's view, the answer to the question stated as Issue 1 is clearly yes. What do readers think?

ISSUE No. 2
Are there cases in which other evidence of a testator's testamentary intention would be as satisfactory as the evidence of intention provided by the formalities?

a. Cases in Which an Attempt Has Been Made to Comply with Formalities

[31] First, consider cases in which attempts have been made to comply with the formalities but there has been a technical failure to comply. In such a case, the additional probative value of technical compliance will not be great. The *Wozciechowitz* and the *Colling* cases are again examples, this time of cases in which the other evidence proved that the respective wills represented the intentions of the testators as conclusively as the evidence provided by technical compliance would have done. Proof that the testator could have seen the witnesses sign, in *Wozciechowitz*, or proof that the testator had acknowledged her signature before either witness signed, in *Colling*, would not have added anything material to the probative effect of what in fact happened. Once a testator has gone so far as to sign a document and have it witnessed, it will usually be clear that they intended to adopt the document as their own. It is difficult to see how the joint presence of witnesses is a significantly greater guarantee of intention than sequential appearances before two witnesses. Similarly, it is difficult to see how a completely handwritten will is a significantly greater guarantee of intention than a signed printed form with the substantive provisions filled in the testator's handwriting.

b. Cases in Which No Attempt Has Been Made to Comply with Formalities

[32] Consider next cases in which there has been no significant effort to comply with the formalities with respect to an apparently testamentary document. There is an initial suspicion that the document was not intended to be testamentary, or even in some cases that the document was not that of the deceased person.

[33] In such a case there may still be convincing evidence that a purported testator did in fact sign a written document and did intend it to be his or her will. Suppose, for example, a testator hands to a friend an unsigned document which disposes of the testator's property and there is ample evidence to show that the testator told the friend that the document was the testator's will. Or suppose, for another example, that the signature is clearly that of the testator; the document, though not handwritten, clearly says that it is a will and does what wills usually do; and the document is found in the testator's safety deposit box.

c. Whether Apparent Compliance with Formalities Provides Superior Evidence

[34] Will compliance with the formalities provide evidence that is superior to the kinds of evidence referred to above?

[35] Compliance with the formalities, in the case of a formal will, will result in the production of a document bearing three signatures. This, without more, will give rise to a presumption of regularity: see for example *Re Mitchell Estate* (1960) 32 WWR 337, where Riley J. applied the presumption of validity in a case in which neither witness had any recollection of seeing the will signed, a state of affairs which is not unlikely if a will was signed 20 or 30 years before the testator's death. But the presence of three signatures without more is not significantly more highly probative of a testator's intention than is the testator's signature alone. Even the usual attestation clause, though it gives some contemporaneous evidence, is not highly probative of compliance with the formalities, as witnesses may not pay any attention to it.

[36] Court practice seems ambivalent about the formalities. Surrogate Rule 16 requires a subscribing witness to take an affidavit as to the witness's impression of the testator's competence and intention to adopt the will and as to the joint presence of the testator and witnesses at time of signature. The rule thus exerts significant pressure to add an additional formality to those prescribed by the *Wills Act*, namely, the swearing of a contemporaneous witness's affidavit, as that affidavit can be accepted upon the application for probate, thus avoiding evidentiary difficulties. However, if no affidavit from a witness can be produced, an affidavit identifying the testator's signature will suffice, or alternatively, an affidavit from someone who was present at the signing verifying that the formalities were observed. So, ultimately, the

presence of three signatures plus proof of the testator's signature, will be accepted as probative of the testator's intention. Or three signatures plus another witness's account of the execution procedures (which would not be sufficient in the absence of the three signatures).

[37] Rule 17 imposes additional requirements where the testator was blind or illiterate or authorized another person to sign: the applicant for probate must provide evidence not only that formalities were complied with but that the will was read over or explained to the testator. That is, compliance with the statutory formalities is not regarded as sufficiently probative in such cases.

[38] Then, it should be noted that the acceptance of holograph wills indicates that, in the lawgiver's mind at least, some evidence other than that of apparent compliance with the sec. 5 formalities is sufficient: presumably, the testator's handwriting and signature, coupled with the fact that the testator took the trouble to write out the will, is a form of evidence that has at least as much probative value as the presence of three signatures.

[39] It will be remembered that armed forces personnel on active service and mariners on voyages can, without witnesses, make wills that are not wholly in their handwriting. This is no doubt a practical response to the fact that their circumstances may make compliance with formalities difficult or impossible. But the lack of evidence that documents not reflecting the intentions of such testators have been probated may suggest that the dangers flowing from a lack of strict compliance with formalities are not too great.

d. Preventing Duress, Fraud and Undue Influence

[40] As noted above, compliance with formalities is a significant assurance that a will was not signed under duress, as duress will normally be apparent to witnesses. However, other evidence may also effectively negative duress: even finding a will in the testator's safety deposit box may demonstrate that it was there by the testator's choice.

[41] There is another question: does compliance with the formalities provide a safeguard against fraud and undue influence? This is one of the functions they are said to perform. Assuming that the witnesses are not accomplices, it seems likely that signing before two witnesses would be a safeguard against

duress, but it is not clear that it would be much of a safeguard against fraud or undue influence, both of which may induce a testator to give the actual consent which is necessary for the voluntary execution of the will. Do readers see the formalities as a safeguard against fraud and undue influence? If so, would other evidence of free and untainted consent suffice instead?

Drafter's View about Issue 2

[42] Again, in the drafter's view, the answer is clearly yes, though readers should test this proposition and point out any arguments to the contrary. Note that an affirmative answer to this issue does not dispose of the question whether or not a provision for the admission of non-compliant documents to probate may tend to cause the admission of documents for which the evidence is not so clear.

ISSUE No. 3
Is the incidence of cases in which wills are rejected for failure to comply with irregularities and other satisfactory evidence of intention is available enough to suggest some form of relaxation of the formalities?

[43] It is one thing to say that requiring strict adherence to the formalities will sometimes exclude wills which reflect the intention of the testator and that there are at least some cases in which other evidence of intention would be as satisfactory as the evidence of the formalities. It is another to say that the incidence of such cases is enough to suggest that some provision should be made for them.

[44] ALRI would be very much interested in information as to the incidence of cases in which lack of compliance with formalities has caused the rejection of wills or has made settlement negotiations necessary. Have readers run into such cases? In formal will cases? In holograph will cases? Here we would also ask: in alterations cases? In revocation cases?

[45] Law reform agencies[6] which have examined the question have concluded that there is enough of a problem to justify, and even require, some provision for admitting at least some non-complying wills to probate, and legislatures have acted on that basis.[7]

[46] As noted in the introduction, ALRI was advised by one senior practitioner that he had been able to conclude by settlement a case in which formalities were not strictly complied with. His suggestion that ALRI should undertake the present project had the effect of bringing the project to ALRI's front burner, though it had been on ALRI's list for some time. One of ALRI's board members had run into two cases. Another had also encountered the problem, and had seen more than one case of problems with alterations. Members of the CBA Wills & Trusts Section (Edmonton) referred to a number of cases. This is anecdotal evidence. ALRI would like to know as much as possible about the incidence of problems arising from non-compliance with formalities and would very much appreciate the advice of readers on the point.

[47] What is the experience of readers? ALRI would be particularly interested to know whether, in readers' views, the documents rejected because of failures to comply strictly with formalities did or did not constitute accurate reflections of the "testators'" testamentary intentions.

Drafter's View about Issue 3

[48] It is the drafter's opinion that the cases summarized in the Appendices in which probate was denied for lack of strict compliance with formalities, or would have been denied but for a remedial provision, plus the anecdotal evidence mentioned above,

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6 The South Australian Law Reform Committee, the Law Reform Commission of New South Wales, the Law Reform Commission of British Columbia and the Manitoba Law Reform Commission all recommended remedial legislation. The Uniform Law Conference of Canada amended its *Uniform Wills Act* to provide for a broad dispensing power. The Uniform Probate Code (U.S.) and Restatement Third recommend a "harmless error" rule which is similar to a dispensing power.

7 As noted elsewhere in this report, Manitoba, Prince Edward Island, Quebec and Saskatchewan have enacted dispensing-power provisions, as have 5 Australian states, the sixth (Queensland) having enacted a substantial compliance provision.

are sufficient to justify some form of relaxation of the strict-compliance requirement.

ISSUE No. 4
If documents which do not strictly comply with formalities are to be accepted for probate, what form should the remedial provision take?

a. Summary of Possible Remedial Provisions

[49] The following discussion assumes that it is desirable to make some provision for probating wills, alterations and revocations, or any of them, that do not comply strictly with the formalities.

[50] There has been a good deal of discussion as to measures which might be taken to relieve against failures to comply with formalities. ALRI is aware of only three that have been seriously considered. These are: (a) relaxation of the formalities; (b) a “substantial compliance” provision; and (c) a “dispensing power”. This appears to the drafter to establish the range of reasonable remedial provisions. Nevertheless, ALRI would be pleased to receive from readers any additional suggestions as to preferable remedial provisions. (“None of the above”, that is, the *status quo*, is of course another possible choice, but the assumption of this part of the Consultation Memorandum is that some remedial provision should be adopted.)

[51] This Consultation Memorandum will now discuss these possible remedial provisions in turn. The following questions will be asked with respect to each, though not necessarily in this form:

(1) Would this provision admit to probate more wills that reflect the intentions of testators?
(2) Would this provision admit to probate more wills that <u>do not</u> reflect the intentions of testators?
(3) On balance, would the good which this provision is likely to do outweigh the harm it is likely to do?

[52] That is, admission of a will to probate should not be a reward for good conduct on the part of the testator, nor should probate be denied to express disapproval of the conduct of a testator who has not troubled to comply with

formalities. The law about the admission of wills to probate should be, and is, intended to give effect to testators' intentions and testators' intentions only.

i. Relaxation of formalities

[53] 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.

[54] Earlier, in 1969, the Uniform Probate Code had been amended to relax the formalities somewhat further. Sec. 2-502 of the 1982 UPC [8] 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. Sec. 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 other documents.

[55] As noted above, ALRI's project does not extend to a consideration of the appropriateness of present formalities. However, a reader who thinks that the problems created by the strict compliance rule could be solved by a reduction in the formalities should feel free to comment accordingly.

Drafter's view about relaxation of formalities

[56] It is the drafter's view that any relaxation of the formalities would not do much good unless the relaxation is so significant it

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8 See Appendix E for the text of the provision.

> might result in the loss of the advantages which flow from strict compliance with formalities. While the relaxations described above would not be likely to do any harm, they would not do much good.

ii. A "Substantial compliance" provision

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

[58] The only existing example of a substantial compliance provision of which ALRI is aware is that of the Australian state of Queensland. The 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.

It will be seen that this provision leaves it to the court to determine what is "substantial compliance". It is clear, however, that there must be some compliance which is more than rudimentary. (A good enough try will win a cigar.)

[59] A "substantial compliance" provision will provide relief in cases in which an attempt has been made to comply with formalities, if that attempt has been successful enough to be called "substantial compliance". It will not provide relief in other cases. An argument against preferring such a provision over a more extensive "dispensing power" is that it still focuses on the degree of compliance with prescribed procedures rather than on the question whether or not a document reflects a testator's testamentary intention. On the other hand, a "substantial compliance" provision would not open the floodgates, if that is a fear under a "dispensing power".

[60] However, it will be seen from the cases in Appendix C that the Queensland courts have required a high degree of compliance with formalities before allowing a non-compliant will to be probated under Queensland's substantial compliance provision. Because of this judicial approach, in an often-cited article which has been seminal in the United States, Professor John H. Langbein of Yale University said this:

> In the hands of the Queensland courts the measure has been a flop. They have read "substantial" to mean "near perfect" and have continued to invalidate wills in whose execution the testator committed some innocuous error.[9]

In the discussion of the subject in the Uniform Law Conference, the Saskatchewan Commissioners reported the same conclusion, saying that

> the Queensland ["substantial compliance"] approach was proving to be ineffective.[10]

Professor Langbein's conclusion, while strongly put, is based on a thorough and detailed analysis of the Queensland jurisprudence.

[61] If it is assumed that compliance with the formalities is an important safeguard against probating documents which do not represent testamentary intentions, a substantial compliance provision is relatively safe in comparison with a dispensing power. But, although such a provision would avoid defeating testators' intentions in a few cases, it would not help in many of the cases cited in Appendix B and Appendix D.

[62] At a recent meeting of the CBA Alberta Wills & Trusts Section (Edmonton) the off hand opinions expressed generally favoured a substantial compliance provision. The question in the drafter's mind is whether the law might, without admitting significant numbers of documents which do not reflect testators' testamentary intentions, go further than a substantial compliance provision.

Drafter's view about a substantial compliance provision

[63] In the drafter's view:

- A substantial compliance provision would admit to probate more wills that reflect the intentions of testators, but would still exclude a number of wills which reflect testamentary intentions.

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9 *Langbein, John H., Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, (1987) 87 Columbia Law Review 1. Professor Langbein's views have been influential in the development of the American response to the problem of non-compliant wills. The Australian cases up to 1987 are closely analyzed on a principled basis.

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

- It is unlikely that a substantial compliance provision would admit to probate a significant additional number of wills that do not reflect the intentions of testators.
- On balance, the good which this provision is likely to do would outweigh the harm it is likely to do.

iii. A dispensing power?

(a) Nature of dispensing power

[64] Another kind of relaxation 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 and which reflects the testator's testamentary intentions. That is,

- there must be a document;
- the testator must intend the document to be a will, and
- the document must express the testamentary intentions of the testator, but
- a failure to comply with any other formalities will not necessarily exclude the document from probate. The testator's intentions must be proved by evidence.

[65] It would be possible to have a narrower form of dispensing power. For example, the provision could say that some attempt to comply with formalities must be made or that a signature is required.

[66] If a dispensing power were to be adopted, there would be a question as to the appropriate burden of proof to be discharged by the proponents of a non-compliant will. The burden could be:

- the usual civil standard of a balance of probabilities;
- as some of the Australian statutes provide, proof beyond a reasonable doubt (though the introduction of the criminal burden into civil law may not be desirable); or
- as the Uniform Probate Code and Restatement Third provide, it could require "clear and convincing evidence" of a testator's intention.

(b) Dispensing powers in Canada

[67] The first broad dispensing power in Canada was enacted by Manitoba in 1983 (*The Wills Act* SM 1982-83-84 c. 31 sec. 23). Although the marginal note was "Substantial compliance in execution of will", the section did not use that term. 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 it be fully effective "notwithstanding that the document or writing was not executed in compliance with all the formalities". The early cases said that the only threshold required by this provision was testamentary intention in a documentary form and that "substantial" or any compliance with formalities was not required. (*Re Pouliot; National Trust Co.* v. *Sutton et al* (1984) 17 ETR 224 (Man. QB.); *Re Briggs* (1986) 21 ETR 127 (Man. QB).) 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, as noted above, the Saskatchewan Commissioners had concluded that "the Queensland ["substantial compliance"] approach was proving to be ineffective" so that the Manitoba provision should be adopted.[11]

[68] Later, in 1990, the Manitoba Court of Appeal, in a majority judgment held that the Manitoba section required <u>some</u> attempt at compliance with the formalities (*Re Langseth Estate; McKie et al.* v. *Gardiner et al.* (1990) 39 ETR 217 (Man. CA.)). However, following a recommendation from the Manitoba Law Reform Commission, the Manitoba section was changed so 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..." so that, apart from the requirement of a document, testamentary intention is the only thing that needs to be shown. In Saskatchewan, the Court of Appeal, specifically disagreeing with the *Langsteth* decision, held that the Saskatchewan dispensing-power section, which is the Uniform Act section, did not require any attempt at compliance with formalities.

[69] Thus, Manitoba has had a broad dispensing-power section since 1983, save for a period between the *Langseth* decision which, as noted, said that some compliance with formalities was necessary, and the statutory reversal of that decision. Saskatchewan has had a dispensing power provision since 1990, Prince Edward Island since 1988 and Quebec since 1993. These provisions are collected in Appendix E, along with the dispensing-power

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

amendment to the *Uniform Wills Act* adopted by the Uniform Law Conference of Canada.

(c) Dispensing powers in Australia

[70] 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 has done so as well. Examples of the Australian legislation are collected in Appendix E.

(d) "Harmless Error" provisions in the United States

[71] Both Restatement Third and the Uniform Probate Code include provisions referred to as "Harmless Error" provisions.

[72] Sec. 2-503 of the UPC, which is set out in Appendix E, is entitled "Harmless Error". It is, however, similar to the Canadian and Australian provisions that we have referred to as "dispensing-power provisions: it provides that a document or writing added upon a document that does not comply with the formalities is to be treated as a will, an alteration in a will, or a revocation of 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 revocation, or an alteration. Notes in Restatement Third show that this rule has been adopted in Colorado, Hawaii, Michigan, Montana, South Dakota and Utah.

[73] Rule 3.3 of Reinstatement Third is 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 decedent adopted the document as his or her will.

The Comment on this provision points out that the question is 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". The effect of the application of the Restatement

Third "harmless errors" rule is therefore much the same as the effect of the Canadian and Australian dispensing powers .

[74] The Restatement's Comment goes on to point out that the requirement of a writing is so fundamental that the lack of it cannot be excused as harmless. It goes on to say that, among the defects in execution that can be excused, the lack of a signature is the hardest to excuse and defects in attestation the easiest.

[75] The Restatement Third's description and discussion of the "harmless error" rule and the reasons for it, its exposition of its effects, and its illustrative examples are clear and concise. We have therefore, with the kind permission of the American Law Institute, attached the entire section 3.3 as Appendix A to this Consultation Memorandum.

(e) Summary of issues and arguments relating to a dispensing power

[76] A broad dispensing power obviously has the greatest potential for admitting into probate documents which express testators' testamentary intentions, which is a good thing. At least some of the documents which would be admitted into probate under a dispensing power would represent the testamentary intentions of the testators.

[77] Would a broad dispensing power:

- also have a potential for allowing into probate documents which do not express testators' testamentary intentions, e.g., documents which are not intended to be wills and documents executed under undue influence, fraud or duress?
- be likely to provoke litigation over the validity of non-complying documents?
- lead to sloppy practices in the preparation of will, including more self-prepared wills?

These would be bad things.

[78] It may be said in response to the latter suggestions:

- that lawyers will still want to draw wills and supervise their execution properly, both for professional reasons and because, even if there is a dispensing power, formality-compliant wills will be more readily probated without question and without the need for outside proof of intention.
- that testators go to lawyers primarily to ensure that wills are properly drawn to express their testamentary intentions, and will not stop going to lawyers so merely because there is a chance that a will that does not comply with formalities will be admitted to probate.
- that a testator who becomes aware that there is a dispensing power, and thus be encouraged to flout the formalities, will also be likely to be aware that additional legal proceedings will be necessary to prove intention in the case of a non-complying will and will want to avoid that additional cost and trouble.
- that being able to probate a non-complying testamentary document may actually reduce litigation by making technical objections less profitable, a point that the British Columbia Law Reform Commission said had been made to them by an Israeli correspondent, where there is a dispensing power.

[79] Appendix D collects reported Manitoba, Saskatchewan and Australian cases on a dispensing power. The reader should examine carefully the cases in the column entitled “Document Admitted to Probate”. It should be noted that the Manitoba and Saskatchewan 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 D have been in force for periods varying from nearly 25 years (in South Australia) to 10 years, so that there has been time for potential problems to make their appearance.

[80] In general, it appears to the drafter that the reported cases do not disclose general tendencies on the part of the courts which have dispensing powers to admit to probate documents which do not reflect testamentary intentions, though, as will appear below, the drafter is somewhat concerned by the admission to probate of unsigned documents. Readers should look at the case summaries in order to form a view on the question whether or not dispensing powers have led to the admission to probate of documents which do not express testators’ testamentary intentions, which point is fundamental to a discussion of the possible adoption of a dispensing power.

[81] In an effort to see whether or not the Manitoba dispensing-power provision has proved beneficial, ALRI has made inquiries from Professor Cameron Harvey of the Faculty of Law, University of Manitoba, who gives the course in wills, and Mr. Eric G. Lister of Winnipeg, a former chair of the CBA Manitoba Wills and Trusts Section who has practiced 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 the few cases in which formalities are not strictly complied with and that the power has not been used to admit to probate documents which do not reflect testators' intentions. Mr. Lister pointed out that the existence of the section makes it possible for a lawyer who has been instructed to draw a will and who takes notes under systematic headings to have the client sign the notes as an interim measure pending the preparation of the will, so that the client's death in the time required to prepare the will will neither defeat the client's intentions nor expose the lawyer to a negligence action.

[82] ALRI made similar inquiries from Shelley Pillipow of Saskatoon, the Chair of the CBA Saskatchewan Taxation, Wills and Trusts Section. Ms. Pillipow has provided ALRI with a 1999 paper delivered by Allan Haubrich of Saskatoon 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". Ms. Pillipow advised that "[t]he members of the bar at the luncheon certainly seemed in agreement with Mr. Haubrich's position on this issue".

(f) Specific formalities

[83] It will be useful here to consider whether specific formalities are needed in order to exclude documents which do not express testamentary intentions, with a view to seeing whether a broad dispensing power, a dispensing power limited by certain formal requirements, or a substantial compliance provision would be the best device.

(g) Requirement of "writing" or a "document"

[84] The logical starting point, though it may be hardly worth mentioning, is to consider whether or not to dispense entirely with the requirement of a

documentary record of a testator's intentions. It would be possible – and, indeed, it was possible at one time in England – to give effect to an oral will. However, Sec. 4 of the *Wills Act* provides that "a will is valid only when it is in writing," and the Canadian and Australian dispensing power provisions do not allow the courts to dispense with a written record of testamentary intention. The question here is whether some form of record should be regarded as essential.

[85] We doubt that any significant body of thought would suggest that an oral will, or a will which has not been reduced to some form of writing, should be admitted to probate. While admitting unwritten wills to probate might upon occasion give effect to the testamentary intentions of testators, we think that it would generally be considered that there would be an unacceptable degree of risk that undocumented expressions of testamentary intention would not reflect those intentions. Further, it seems likely that almost any testator who knows that they have the power of testation will also know that it must be exercised in writing.

(h) Will in electronic form

[86] The *Uniform Wills Act* and the Manitoba, Prince Edward Island and Saskatchewan dispensing-power provisions apply only where there is a "document". It seems unlikely, but it is possible, that the courts would interpret "document" to include an electronic record.

[87] An electronically-recorded will has been admitted to probate in Quebec,[12] 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 deceased". [13]The 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 file which made testamentary dispositions. The file had been saved to memory on the same day, and the deceased had noted in her diary that she had made a will on

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12 *Rioux v. Coulombe* (1996) 19 ETR (2d) 201 (Que. SC). The description of the case is based on the English version of the headnote.

13 Quebec *Civil Code*, art. 714.

computer. It was 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 a diskette and the text printed from it constituted the testator's will, it was admitted to probate.

[88] There are obvious risks that an electronic record may be created or tampered with by others, and there is no signature or other internal evidence to show that the record was adopted as a will by the purported testator. On the other hand, the extrinsic evidence of the testator's intention was compelling in the *Rioux* case, subject only to the kind of complex fraud which no requirement of formalities can prevent.

[89] If the dispensing-power approach is taken, should it be possible to admit to probate a will which is contained in a computer or on disk?

(i) Requirement of signature

[90] If any form of substantial compliance or dispensation-power provision is adopted, should a signature be required? If it is shown that a "testator" intended to sign a "will" but omitted to do so due to inadvertence, should the "will"be admitted to probate?

[91] Literally construed, it seems that the Manitoba provision and at least some of the Australian provisions do not require a signature, and the Saskatchewan provision has been interpreted in that way (see *Re Bunn Estate* (1992) 45 ETR 254 (Sask CA). (See Saskatchewan cases, App. C)

[92] 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:

- **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 their adoption of its contents, and consider that it is <u>only</u> 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 does 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 things 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 of a truly testamentary document by requiring a signature.

- **Arguments against a signature requirement**
  Whatever the generally held view about the effectiveness and requirement of signatures, 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.

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

- ***Re Bunn Estate*** (Saskatchewan CA): a document disposing of testatrix's assets, which was in testatrix's handwriting but unsigned, and which was enclosed with a properly executed will document which only named an executor, and which was found in an envelope labeled "Last Will and Testament of Audree Eileen Bunn," was admitted to probate.

- ***Martineau v. Manitoba (Public Trustee)*** (Manitoba QB): The document reproduced on the following page was admitted to probate. While the court expressed an opinion that the words "Harold Myers" forming part of the heading "Harold Myers' Will" were intended as a signature and that the document was therefore 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.3. ***In the Estate of Williams, Deceased*** (South Australia SC): Testator wrote up her will and had neighbours 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. Will admitted to probate.

"Harold Myers Will. Nov/1988

Salvation Army competition 10.000
Harry Croft: cello Music 1-500
Burrell George & Honda 5,000
Larry Martineau tools 5,000
Terry Penner gold in 1,500
~~Martin~~ Relechaty bow 1.500
10.000
? ~~United~~ Way 1700 Ellice 10,000
Handicapped 1,500
~~Grant Crafts~~
~~[illegible]~~
~~[illegible]~~ ~~2,000~~
~~El Montefiore~~ 2,000
~~L~~

Children's Hospital Research Found 5.000

Ronald McDonald House 5.000

Morris Fenner bowmaking
pernambuco tools & Henderson book
wood-pernambuco & ebony

balance to St.Bon.Hospital
Health Sciences Centre } equally

Sale of House-390 Simcoe"

- ***In the Estate of Masters (deceased); Hill v. Plummer*** (New South Wales CA): 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.

- ***In the Estate of Sutton, Deceased*** (South Australia SC): Signed and unsigned alterations on will followed the fluctuations of testator's relationship with son. Will probated with all the alterations.

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

[94] It will be seen that in each case except *Martineau v. Manitoba Public Trustee* there was quite strong evidence from the unsigned document and from the testator's actions that the document represented the testator's testamentary intentions. *Martineau* is worrying, to the drafter, to whom it appears likely that the document was merely notes of what the deceased was considering and not a dispositive document.

[95] So, if there is to be a dispensing power, there is a serious question as to whether a signature requirement would on the whole be detrimental because it would defeat too many testators' intentions or whether it would on the whole be beneficial because it would avoid admitting to probate a significant number of documents which are not intended to be dispositive.

[96] If a "signature" is to be required, what can constitute a signature? Sec. 5 of the *Wills Act* requires a will to be signed "at the end or foot thereof", with some minor relaxation in sec. 8. Testators sometimes do strange things with signatures. See, for example, *Re Briggs* (1986) 21 ETR 127 (Man. QB). in

Appendix D, where a document signed by the testator at the beginning instead of the end was admitted to probate under a dispensing power. See the case of *Re McDermid Estate* (1994) 5 ETR (2d) 238 (Sask. QB.) in Appendix D, where a husband and wife signed each other's wills, and the document prepared for deceased, along with the other will, was admitted to probate: the signature on the wrong document was sufficient under the dispensing power (though note that, even without a dispensing power the courts have been able to deal with that situation by striking out words wrongly introduced into the will signed by the testator and substituting the correct words: see *Re Knott Estate* (1959) 27 WWR 382 (Alta DC) in Appendix B. Should anything intended as a signature, whether on the will or not, or wherever it appears on the will (so long as it was intended as a signature) be sufficient?

[97] Should it be possible to dispense with a signature, so long as it can be proven on a balance of probabilities that a document not signed by a person represents the testamentary intention of that person? Should a signature be dispensed with if the omission to sign was due to inadvertence? If a signature is required, what should be acceptable as a signature?

(j) Requirement of witnesses

[98] Signing a document before a witness, or acknowledging one's signature before a witness, is an indication that the person signing is aware of the importance of the document and intends it to have effect. Signing a document before <u>two</u> witnesses adds to the solemnity of the transaction and to the likelihood that the person signing intends it to be a will, as it is probably fairly generally known that a will requires two witnesses and is the only document which does so. The witness may also be in a position to assess the testator's mental capacity, though again they may not, and they may be in a position to see that the testator signed voluntarily. So the requirement of witnesses does add substantially to the likelihood that the person signing intended the document to be their will and believed that it reflected their testamentary intentions.

[99] That still leaves a question as to whether the requirement of witnesses is so important that a will should not be admitted to probate unless it is complied with in substance.

[100] First, it has to be noted that the Legislature long ago provided for two different substitute procedures:

- the holograph will, which does not require one witness, much less two. Presumably it is considered that the facts that a document is in the testator's handwriting and that it is signed are at least an equivalent guarantee that the document represents the testator's testamentary intentions. If so, it may be that other forms of proof will be equally efficacious.

- The mariners' and service personnel will which need not be witnessed at all, writing and a signature being enough. This exception is no doubt intended to recognize the difficulty that such people may have in getting witnesses, but there is no reason to think that the Legislature intended to provide for probating documents that do not represent testamentary intentions.

[101] Second, it has to be noted that the mere presence of three signatures does not guarantee that a document was signed, or the testator's signature acknowledged, by the testator in the presence of the witnesses. See, for example, *Brandrick v. Cockle* (1997) 17 ETR (2d) 1 (Alta Surr Ct). in Appendix B. There is thus no magic in three signatures.

[102] Third, it has to be noted that, at a technical level, the requirement that all three persons be present at the same time at the signing or acknowledgment of a signature does not add very much to a situation in which the testator signs or acknowledges in the presence of two witnesses separately. That is, the precise formality required may not add much.

[103] However, the sec. 5 formalities, as has been noted above, do generally add to the likelihood that a document propounded for probate reflects the testamentary intentions of the apparent testator. The question is really whether some other form of evidence should be accepted as to all or part of what the sec. 5 formalities tend to prove.

[104] Should something less than the requirements that the testator and two witnesses must be together and that the testator's signature must be made or acknowledged in the presence of both witness, be accepted?

(k) Other proposals

[105] Some form of substantial compliance provision or dispensing power appears to the drafter to be the only practicable way of relaxing the requirement of strict compliance with the formalities, but readers are invited to put forth other devices which might be better. Readers are also invited to put forward variations of substantial compliance provisions and dispensing power provisions which they think would be useful.

Summary of Drafter's Views about Issues 1 to 5.

[106] In summary, the drafter's views to this point are:

- that relaxation of formalities or substantial compliance provisions would still defeat the intentions of too many testators;
- that some form of dispensing power is reasonably safe, particularly given the jurisprudence described in Appendices B to D;
- that even dispensing with a signature and allowing electronic wills, with proper safeguards, might be considered.

ISSUE No. 5

Would allowing non-complying wills to be probated allow documents to be probated which do not express the intention of testators, and would this result outweigh the advantages, if any, of allowing some non-complying wills to be probated?

[107] Discussion of Issue 4 (which form of relaxation, if any) is likely to have provided answers to the question raised by Issue 5.

[108] This issue requires the formation of a judgment based on information which is necessarily incomplete. It involves an assessment of the additional assurance of testamentary intention which compliance with the formalities gives, over and above the assurance provided by other kinds of evidence, that a document is intended to be a will and reflects the testamentary intentions of the testator.

[109] Taking everything into consideration, does the reader think that relaxing the requirement of strict compliance with formalities will result in

documents being probated that do not reflect testators' intentions? Note that this question is to be answered with respect to a substantial compliance provision and also with respect to a form of dispensing power if the reader thinks that one of them is otherwise desirable.

Drafter's View about Issue 5

[110] In the drafter's view, a properly-devised substantial compliance provision or dispensing power, coupled with the usual safeguards of judicial fact-finding, would not have a tendency to cause documents to be admitted to probate which do not reflect testators' intentions.

E. ALTERATIONS AND REVOCATIONS

ISSUE No. 6
Should a provision allowing non-complying wills to be admitted to probate apply to
(a) alterations in wills, or
(b) revocations of wills, or
should different provisions apply?

[111] This Consultation Memorandum has to this point dealt primarily with the original execution of wills. It is now time to consider whether either alterations or revocations (other than revocations by destruction) or both should be treated differently. A testator may make informal changes in their formal will, thinking that they have effectively amended the will. The intention may be clear, but the alterations or revocations will be ineffective unless the formalities are complied with.

[112] At present, the same formalities apply to alterations as to the original execution of wills, that is, a formal alteration must be signed, or the signature acknowledged, in the presence of two witnesses, who subscribe in the testator's presence, and a holograph alteration must be wholly in the handwriting of the testator and must be signed. It may be that an alteration to a formal will which complies with the formalities of a holograph will is effective in Alberta: see Feeney, Canadian Law of Wills, 77. Similarly, unless the testator or someone under his directions destroys a will with the

intention of revoking it, a revocation must comply with either the principal formalities or with the holograph formalities.

[113] A likely scenario is that a testator under a formal will makes a written alteration in the will by striking out one provision and substituting another with or without initialling or signature. Should such an alteration be effective? Should a signature be required? Will initials do?

[114] Another likely scenario is that a testator will strike out a provision without making a substitution, again either initialling or signing beside the striking out. The provision may or may not be obliterated so that its content can no longer be read. Should such a striking out be effective?

[115] The argument for a substantial compliance provision or dispensing power may be stronger in the case of an alteration or revocation on the face of an existing will than in the case of an informal will, as making changes in an existing will is likely to indicate a testamentary intention, if there is proof that it was the testator who made the changes.

Drafter's View about Alterations and Revocations

[116] In the drafter's view, if a substantial compliance provision or dispensing power is adopted with respect to the execution of wills, the same provision should apply to alterations and to revocations other than revocations by destruction.

F. PRESUMPTION OF REGULARITY

[117] A document which appears to comply with formalities and uses testamentary language will usually be given the benefit of a (rebuttable) presumption of regularity. If a "substantial compliance" provision or dispensing power is adopted, a non-complying document is not likely to be given the benefit of a similar presumption. However, the existing presumption is not likely to be disturbed, so that complying documents will have an advantage over non-complying documents in the ease of obtaining probate.

[118] If thought desirable, a presumption of regularity could be enacted for documents which comply with formalities. However, as stated, it seems unlikely that allowing non-complying documents into probate would result in

the disturbance of the existing presumption. However, if readers wish to comment on this point, they are welcome to do so.

G. SUMMARY AND CONCLUSION

[119] This Consultation Memorandum has raised the question whether or not some provision should be made which would allow a document to be probated despite a failure to comply strictly, or at all, with the formalities prescribed for formal wills or the formalities prescribed for holograph wills. If the decision is that some such provision should be made, there are two likely options. One of those options is a provision that a will can be probated if it is executed in "substantial compliance" with the formalities. The other is that the court will have power to admit to probate a document which does not comply with formalities. The power could extend to dispensing with all formalities, with all formalities except writing, or with all formalities except writing and signature.

[120] The Consultation Memorandum also raises the question whether any remedial provisions that apply to the original execution of wills should also apply to alterations in wills and revocation of wills.

1. Ultimate Questions

[121] We will formulate the ultimate questions as follows:

1. ***Should it be possible to admit to probate a document which does not strictly comply with the formalities prescribed by the Wills Act for formal wills or holograph wills?***

2. ***If the answer to Question 1 is yes, should the Wills Act be amended by***
   - ***(a) allowing wills to be probated if they are in "substantial compliance" with the prescribed formalities?***
   - ***(b) giving the court power to probate a document which does not comply with some or all of the prescribed formalities but which expresses the testator's intention?***
   - ***(c) providing some other form of relief for non-compliant wills?***

2. Invitation to Comment

[122] As stated at the beginning of this Consultation Memorandum, ALRI invites comment on the ultimate questions set forth above, on the specific issues identified above, and on any other specific issues which arise during the discussion. Commentators need not, however, address all of the issues unless they wish to do so. Comment accompanied by reasons will be of the most assistance in arriving at conclusions on the basis of the best information, and references to this Consultation Memorandum by page numbers will make ALRI's task easier.

[123] The views and comments of readers on all the questions raised by this Consultation Memorandum are solicited.

APPENDIX A

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

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§ 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 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 channeling 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 channeling 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,[14] 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 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

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

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 neighbors to attend and act as attesting witnesses, but the neighbors 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 wit 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.

STATUTORY NOTE

(All statutory citations, except for those to foreign jurisdictions, are to WESTLAW, as of October 1998)

1. *Revised Uniform Probate Code harmless-error rule*. Section 2-503 of the Revised Uniform Probate Code, which was retitled by technical amendment in 1997, provides:

> *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.

The Revised UPC harmless-error rule has been enacted in the following jurisdictions:

Colorado: Colo. Rev. Stat. § 15-11-503 (deviates from Revised UPC § 2-503 by omitting clauses (ii), (iii) and (iv))

Hawaii: Haw. Rev. Stat. Ann. § 560:2-503

Michigan: 1998 Mich. Pub. Act No. 386, § 2503 (to be codified at Mich. Comp. Laws Ann. § 700.2503) (eff. 4/1/00)

Montana: Mont. Code Ann. § 72-2-523

South Dakota: S.D. Codified Laws § 29A-2-503

Utah: Utah Code Ann. § 72-503

2. *Harmless-error rules in foreign jurisdictions.* A harmless-error rule similar to the one adopted in § 3.3 has been enacted in the following foreign jurisdictions:

Australia

[For examples of Australian legislation see Appendix E]

Canada

[For examples of Canadian Legislation, see Appendix E]

Israel

> *Israel Succession Law, 5725-1965,* in Ministry of Justice, 19 Laws of the State of Israel 62, ch. 1, § 25 (1965). Where the Court has no doubt as to the genuineness of a will, it may grant probate thereof notwithstanding any defect with regard to the signature of the testator or of the witnesses, the date of the will, the procedure set out [for attested wills] or capacity of the witnesses.

REPORTER'S NOTE

1. *Comment a. Purpose of the statutory formalities.* The statutory formalities for the execution of a will are to be intepreted in light of their underlying functions, and not as an end in themselves. The principal functions of the statutory formalities are the evidentiary and cautionary functions. The statutory formalities also serve a channeling function. They also serve a protective function, but do so quite imperfectly. Each of these four functions is discussed in John H. Langbein, Substantial Compliance With the Wills Act, 88 Harv. L. Rev. 489, 492-97 (1975); Ashbel G. Gulliver & Catherine J. Tilson, Classification of Gratuitous Transfers, 51 Yale L.J. 1 (1941).

2. *Comment b. Excusing harmless errors.* The adoption of the harmless-error rule carries forward the position taken in the Restatement Second, Property (Donative Transfers) § 33.1, Comment *g*. Comment *g* provides:

> *g. Will not in strict compliance with statutory formalities.* Because the purpose of the statutory formalities is to give effect to the testator's intention, law-reform organizations, commentators, and legislatures in a variety of common-law jurisdictions have been moving to the view that innocent defects in compliance with

> the formalities should be excused under a harmless-error rule. To be sure, many American courts have taken the position that any defect in compliance with the statutory formalities is fatal to the validity of a will, no matter how innocent the decedent's mistake. This strict compliance approach has led to harsh results in many cases. In some of these cases, the court's own opinion has openly acknowledged that the result defeated the decedent's intention. Courts have also long been troubled by the fact that the opposite result is reached in will substitute cases. Consequently, an effort should be made to adopt a rule that excuses harmless errors in the execution of a will—a rule that unifies the law of wills and the law of will substitutes by extending to will formalities the harmless-error principle that has long been applied to defective compliance with the formal requirements for will-substitute transfers. In the absence of a legislative corrective such as that described in the next paragraph, the court should apply a rule of substantial compliance, under which a will is found validly executed if the document was executed in substantial compliance with the statutory formalities and if the proponent establishes by clear and convincing evidence that the decedent intended the document to constitute his or her will.

The harmless-error rule effectively reduces the presumption of invalidity applicable to a defectively executed will from a conclusive one to one that is rebuttable by clear and convincing evidence. See John H. Langbein, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 Colum. L. Rev. 1, 4 (1987).

The harmless-error rule does not increase litigation. An Israeli authority has described experience with a comparable reform:

> [I]t has been my experience that Advocates are gradually attaching less and less importance to defects of form in a will since they are aware of the Court's approach, and will not oppose probate merely on grounds of such defects. I am, therefore, of the opinion that [the harmless-error rule] actually prevents a great deal of unnecessary litigation and saves time and expense in cases before the Court. Its effect is to limit the battleground to issues which should be the foremost if not the only ones, i.e., to the question: Is the will a true expression of the testator's intent?

Letter from Judge I. S. Shiloh to the British Columbia Law Reform Commission (Oct. 18, 1979), quoted in Langbein, supra, at 50.

In Alleged Will of Ranney, 589 A.2d 1339 (N.J. 1991), the Supreme Court of New Jersey took the lead in embracing a harmless-error approach. Citing the tentative-draft version of the Restatement Second, Property (Donative Transfers) and § 2-503 of the Revised UPC, the court upheld a will signed by the attesting witnesses on the self-proving affidavit rather than on the will itself:

> Rigid insistence on literal compliance often frustrates [the] purposes [of the formalities].... Compliance with statutory formalities is important not because of the inherent value that those formalities posses, but because of the purposes they serve.... It would be ironic to insist on literal compliance with statutory formalities when that insistence would invalidate a will that is the deliberate and voluntary act of the testator. Such a result would frustrate rather than further the purpose of the formalities.... Generally, when strict construction would frustrate the purposes of the statute, the spirit of the law should control over its letter.... Accordingly, we believe that the Legislature did not intend that a will should be denied probate because the witnesses signed in the wrong place....
>
> The execution of a last will and testament, however, remains a solemn event. A careful practitioner will still observe the formalities surrounding the execution of wills. When formal defects occur, proponents should prove by clear and convincing evidence that the will substantially complies with statutory requirements. See Uniform Probate Code ... § 2-503; Restatement Second, Property, Donative Transfers § 33.1 comment g. Our adoption of the doctrine of substantial compliance should not be construed as an invitation either to carelessness or chicanery. The purpose of the doctrine is to remove procedural peccadillos as a bar to probate.

Earlier cases adopting a harmless-error rule include Estate of Black, 181 Cal.Rptr. 222, 641 P.2d 754 (Cal. 1982), and Kajut Will, 2 Fiduc. 2d 197, 22 Pa. D. & C. 3d 123 (Orphans' Ct. 1981). In *Black*, the court upheld a holographic will that was on a fill-in-the-blanks printed will form, despite the fact that the holographic-will statute then in effect required a holographic will to be "entirely written, dated and signed by the hand of the testator himself." Cal. Prob. Code § 53 (now repealed and replaced by a statute similar to the Original UPC holographic will provision; see Statutory Note to § 3.2). The court said (641 P.2d at 759):

> No sound purpose or policy is served by invalidating a holograph where every statutorily required element of the will is concededly expressed in the testatrix' s own handwriting and where her testamentary intent is clearly revealed in the words as

> she wrote them. Frances Black's sole mistake was her superfluous utilization of a small portion of the language of the preprinted form. Nullification of her carefully expressed testamentary purpose because of such error is unnecessary to preserve the sanctity of the statute.

In *Kajut*, the court was presented with the will of a blind testator who had signed by making his mark. A Pennsylvania statute required that a will signed by mark have the testators name “subscribed in his presence before or after he makes his mark...” 20 Pa. Cons. Stat. Ann. § 2502(2). The drafting attorney had the testator's name typed on the will in advance of the execution ceremony and outside of the testator's presence. The court upheld the will, reasoning that the purposes of the formality had been achieved despite the formal defect. “The intent of the testator was plain,” the court said, and “no useful purpose can be served by destroying the will he created by a technical adherence to the Wills Act, the principal purpose of which is to make certain that the intent of a testator is effectuated.” 2 Pa. Fiduc. 2d at 204, 22 Pa. D. & C. 3d at 136; see also id. at 201-02, 22 Pa. D. & C. 3d at 129-31. Additional cases are collected in Restatement Second, Property (Donative Transfers) § 33.1, Reporter's
Note, item 6.

As noted in the Statutory Note, a legislative harmless-error rule has been enacted in several Australian and Canadian jurisdictions and in Israel. Although the statutes differ in detail, the predominant rule adopted is that a document is treated as in compliance with the Statutory formalities if the proponent establishes (usually by a higher than normal standard of proof) that the decedent intended the document to constitute his or her will. Experience in these jurisdictions appears to show that the statutes have worked well. See John I. Langbein, Excusing Harmless Errors In the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 Colum. L. Rev. 1 (1987). Partly on the basis of this experience, in 1990 the National Conference of Commissioners on Uniform State Laws approved such a
statutory provision for inclusion in Uniform Probate Code. In 1987 Uniform Laws Conference of Canada approved a comparable measure for the Canadian Wills Act. See Statutory Note. In 1998, the Ontario Court of Justice adopted a harmless-error rule as part of the common law. See Sisson v. Park Street Baptist Church, 1998 Ont. C.J. Lexis 1128, described below in connection with Illustration 3.

The facts of Illustration 2 are based on the case of Theodore W. Dwight, the founder of the modern Columbia Law School. Dwight had neglected to make a will until he was near death. After giving instructions for the

preparation of his will, he had the draft brought to his bedside on the morning of June 18, 1892. Witnesses were present as the will execution began. Professor Dwight had written "Theodore W. Dwi" and a part of the letter "g" when he suddenly fell back and died. The story is reported in Samuel F. Howard & Julius Geobel, Jr., A History of the School of Law: Columbia University 132 (1955). The harmless-error doctrine was not recognized at this time, and Dwight's will was not enforced.

Illustration 3 is based on Sisson v. Park Street Baptist Church, 1998 Ont. C.J. Lexis 1128. William Taylor and Lilian Taylor, husband and wife, arrived at their attorney's office to execute their wills, which had been prepared in accordance with their instructions. Shirley Walton, a legal secretary, and William Lech, the drafting attorney, were to act as attesting witnesses. Both witnesses were present when William and Lilian signed their wills. Both witnesses signed William's will in William's presence. Shirley also signed Lilian's will in Lilian's presence, but for some unexplained reason, Lech neglected to sign Lilian's will as a witness. So far as relevant to this case, the Ontario Succession Law Reform Act 1990, § 26, subsection 4(1), contains three requirements for executing a will: (1) the testator must sign the will; (2) the testator must sign the will in the presence of two attesting witnesses present at the same time; and (3) two or more of the attesting witnesses must subscribe the will in the presence of the testator. Although two other Canadian provinces, Manitoba and Saskatchewan, had adopted a harmless-error rule by statute (see Statutory Note), Ontario had not done so. Nevertheless, the Ontario Court of Justice adopted a harmless-error rule, and upheld Lilian's will. The judge found that Lilian had adopted the document as her will, that the purposes of the statutory formalities had been served, and that the first two of the three statutory requirements had been complied with:

> I am satisfied that the will actually reflects, the intention of the testatrix....
>
> ...
>
> I find that the ... absence of legislation on point should not stop the court from developing the common law where, in circumstances like this, there has been substantial compliance, given that the dangers which two witnesses are to guard against does not exist here.

A similar case is In re Estate of Peters, 526 A.2d 1005 (N.J.1987), a case decided before the New Jersey Supreme Court adopted a harmless-error rule in the *Ranney* case, described above. Conrad Peters suffered a stroke that put him into the hospital. Conrad was married to Marie. Conrad and Marie had no children, but Marie had an adult son, Joseph, by a prior marriage. The stroke affected Conrad physically but not mentally. At Marie's request, her

sister-in-law, Sophia, an insurance agent and notary public, prepared wills for Conrad and Marie. Marie, Sophia, and Marie's brother (Sophie's husband) came to Conrad's hospital room with Conrad's will, Sophia read the will to Conrad, who then assented to it and signed it. None of the individuals who witnessed Conrad's signing of the will signed the will as witness, the apparent intention being to await the arrival of two of Sophia's employees, Mary and Kristen. Later in the afternoon, after Mary and Kristen arrived, Sophia reviewed the will briefly with Conrad, who in the presence of Mary and Kristen, indicated his approval and acknowleged his signature. Sophia then signed the will as a notary, but, due to confusion in the room, neither Mary nor Kristen placed her signature on the will. Sophia then folded the will and handed it to Marie. When Conrad died 15 months later, the two witnesses Mary and Kristen, had still not signed the will. Marie predeceased Conrad. Marie's will devised her entire estate to Conrad if he survived her (which he did), but if not to her son, Joseph. Conrad's will devised his entire estate to Marie if she survived him (which she did not), but if not, to Joseph. Conrad had no blood or adoptive relatives. The court held that the will was invalid. In Edward C. Halbach, Jr. & Lawrence W. Waggoner, The UPC's New Survivorship and Antilapse Provision, 55 Alb. L. Rev. 1091, 1099 (1992), the authors state their belief that the will in *Peters* would have been upheld under a harmless-error rule:

> The solution in *Peters*, then, lies in section 2-503, the ... section that authorizes defects in compliance with will formalities to be excused if the proponent of the will can establish by clear and convincing evidence that the decedent intended the document to constitute his or her will. Under that section Conrad's will most likely would have been upheld and both Marie and Conrad's property would have gone to Joseph, as intended.

Illustration 4 is based on the facts (but not the result) of Estate of Jefferson, 349 So.2d 1032 (Miss. 1977), described in the Reporter's Note to § 3.1, item 11.

APPENDIX B

SOME CANADIAN CASES ON NON-COMPLYING WILLS

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

ALBERTA CASES

DOCUMENTS AND ALTERATIONS ADMITTED TO PROBATE

Re Knott Estate (1959) 27 WWR 382 (Alta DC). 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 WWR (NS) 702 (BCSC) (below).

DOCUMENTS AND ALTERATIONS EXCLUDED FROM PROBATE

In Re Wozciechowiecz Estate [1931] 3 WWR 283 (Alta AD). Will properly executed except that testator was too ill to turn to see witnesses sign in the same room. Probate refused.

Brandrick* v. *Cockle (1997) 17 ETR (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. (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 SCR 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

In re Brander Estate (1952) 6 WWR (NS) 702 (BCSC). 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.

Re Fiszhaut (1966) 56 DLR (2d) 38 (BCSC). A person signed on behalf of testator but in the person's name, not the testator's. Act did not preclude signature of other person when signing for testator.

Simkins Estate v. Simkins (1992 42 ETR 287 (BCSC). 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.

DOCUMENTS AND ALTERATIONS EXCLUDED FROM PROBATE

Valentine v. Whitehead (1990) 37 ETR 253 (BCSC). 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.)

Ellis v. Turner (1997) 43 BCLR (3d) 283 (CA). Will on stationer's form created by testator. Her handwritten name at top, not at end. 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 discretion in court which is not there.

BRITISH COLUMBIA CASES

DOCUMENTS AND ALTERATIONS ADMITTED TO PROBATE

Beniston Estate v. Shepherd (1996) 16 ETR (2d) 71 (BCSC). Will signed before two witnesses, the sons of testator's "significant other" who was partially deprived of inheritance under 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.

Kraus v. Tuni (1999) BCJ 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 other column) 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

ONTARIO CASES

DOCUMENTS AND ALTERATIONS ADMITTED TO PROBATE

Re Krushel Estate (1991) ETR 129 (OCJ) Holograph will torn up by another person. Pieces retrieved. Probated as valid holograph will.

Re Malichen Estate (1995) 6 ETR (2d) 217 (OGD). Husband and wife signed each other's wills. Admitted to probate.

Sisson v. Park Street Baptist Church (1999) 24 ETR (2d) 18 (OCJ) 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

Re Coate Estate (1987) 26 ETR 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 ADMITTED TO PROBATE

DOCUMENTS AND ALTERATIONS EXCLUDED FROM PROBATE

Re Murphy Estate [1999] NJ No. 136 (QL) (Nfld SC) Will written out for illiterate testator by daughter-in-law. Taken by testator and son to priest. Read over 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 Kane (1978) 5 ETR (NSPC) Two large Xs drawn on two pages of will and initialed 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.

Re Jackson's Estate (1991) 288 APR 55 (NS Probate). Will admitted to probate with alterations on will initialed by testator and 2 witnesses. Other notes on will made by testator not signed by testator or witnesses and not valid.

Re Murphy Estate (1998) 170 NSR (2d) 1 (NS Probate). Deceased change name of one legatee and initialed the change. Presumption that changes were not made until after will was executed. Will probated without the change.

Re Gallant Estate (1984) 59 NBR (2d) 72 (NB 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 Ley Estate (1988) 208 APR (NB Probate) Holograph will had lines drawn through it and names substituted. Text remained clearly legible so there was no revocation. Alterations not signed so not effective. Will probated without alterations.

II. CASES ON HOLOGRAPH WILLS

DOCUMENT ADMITTED TO PROBATE

Re Moir (1942) 1 DLR 337 (Alta AD). 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.

In Re Ford Estate (1954) 13 WWR 604 (Alta DC). Preprinted will form. Portions written by testator constituted a holograph will. Preprinted words deleted.

Sunrise Gospel Hour et al* v. *Twiss ([1967] 59 DLR 321 (Alta AD). 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.

DOCUMENT NOT ADMITTED TO PROBATE

In re Brown Estate(1953) 10 WWR 163 (Alta SC].
Pre-printed will form filled in 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.

Re Coughlan Estate (1955) 16 WWR 14 (Alta DC). 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.

DOCUMENT ADMITTED TO PROBATE	DOCUMENT NOT ADMITTED TO PROBATE
Re Romaniuk Estate (1986) 23 ETR 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.	
Re Neilson Estate (1989) 243 APR 1 (NB Probate) Handwritten instructions to lawyer admitted to probate, though signed only with testator's first name.	
Re Carr Estate: Re Brown (1990) 40 ETR 163 (NB 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.	
Re Chevarie Estate [1996] NBJ No. 433 (QB) 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.	

APPENDIX C

SOME CASES ON A SUBSTANTIAL COMPLIANCE PROVISION
Queensland being the only jurisdiction surveyed

Queensland

DOCUMENT ADMITTED TO PROBATE

1. *Re Matthews* (1989) 1 Qd. R. 300 (SC.). 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

1. *Re Grosert* (1985) 1 Qd. R. 513 (SC.).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.

2. *Re Johnston* (1985) 1 Qd. R. 516 (SC.). 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.

3. *Re the Will of Eagles* (1990) 2 Qd. R. 501 (SC.). 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 D

SOME CASES UNDER DISPENSING POWERS

Saskatchewan cases

DOCUMENT ADMITTED TO PROBATE

1. *Re Bunn Estate* (1992) 45 ETR 254 (Sask CA). Sealed envelope labeled 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 admitted to probate. No attempt to comply with formalities required by Sask. Sec. 35.1 (dispensing power). Disagreed with majority in *Langseth* (see under Manitoba cases.) Not necessary to consider the rule of attachment.

2. *Re Lang Estate* (1992) 45 ETR 136 (Sask Surr. Ct.). Formal will. Alterations in 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 represents testator's intentions.

DOCUMENT EXCLUDED FROM PROBATE

1. *Re Balfour Estate* (1990) 38 ETR 108 (Sask. QB.). "Whatever my daughter decides is O.K. if anyone else doesn't like it too bad.". Not shown to be testamentary.

Saskatchewan cases

DOCUMENT ADMITTED TO PROBATE	DOCUMENT EXCLUDED FROM PROBATE
3. *Re Jensen Estate* (1993) 49 ETR 114 (Sask. QB). Alterations dated and signed. Statements that testatrix wanted to make changes to her will, and that she wanted to leave all her money to Chris, which was effect of alterations. Alterations admitted.	
4. *Re McDermid Estate* (1994) 5 ETR (2d) 238 (Sask. QB.). 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.	
5. *Re Warren Estate* (1994) 112 Sask R. 62 (Sask. QB.). 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.	

Manitoba Cases

DOCUMENT ADMITTED TO PROBATE

1. ***Re Pouliot; National Trust Co.*** **v.** ***Sutton et al*** (1984) 17 ETR 224 (Man. QB.). .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.

2. ***Re Briggs*** (1986) 21 ETR 127 (Man. QB). 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.

3. ***Martineau*** **v.** ***Manitoba (Public Trustee)*** (1993) 50 ETR 87 (Man. QB.). Unsigned document in testator's handwriting , saying at beginning "Harold Myers' Will" and using testamentary language. Admitted to probate. Represented testamentary intention.

4. ***Kuszak*** **v.** ***Smoley*** (1986) 23 ETR 237 (Man. QB.). 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 embodies testamentary intentions.

DOCUMENT EXCLUDED FROM PROBATE

1. ***Re Langseth Estate; McKie et al.*** **v.** ***Gardiner et al.*** (1990) 39 ETR 217 (Man. CA.). 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.)

2. ***Montreal Trust Co. of Canada*** **v.** ***Andrezejewski (Committee of)*** (1994) 6 ETR (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.

Manitoba Cases

DOCUMENT ADMITTED TO PROBATE	DOCUMENT EXCLUDED FROM PROBATE
	3. Re Chersak Estate (1995) 99 Man. R. (2d) 169 (QB.). 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.
5. *Re Shorrock Estate* (1996) 109 Man. R. (2d) 104 (Man. QB.). 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.	**5. *George* v. *Daily*** (1997) 15 ETR (2d) 1 (Man. CA.). 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 a third-party document left open.

AUSTRALIAN CASES

SOUTH AUSTRALIAN CASES*

DOCUMENT ADMITTED TO PROBATE

In the Estate of Graham, deceased (1978) 20 SASR 198 (SC). Testator signed will and asked nephew to get it witnessed. He 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 SASR 374 (SC). 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 SASR 153 (SC). 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.

DOCUMENT EXCLUDED FROM PROBATE

Baumanis v. Praulin(1980) 25 SASR 423 (SC). 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 SASR 449 (SC). Additional legacy inserted into body of executed will, without signature or formality. Legacy excluded from probated will. Not executed at all.

SOUTH AUSTRALIAN CASES*

DOCUMENT ADMITTED TO PROBATE	DOCUMENT EXCLUDED FROM PROBATE
In the Estate of Standley, deceased (1982) 29 SASR 490 (SC). Testator and Witness 1 signed in each other's presence. Witness 2 signed without knowledge of content and not in testator's presence. Court satisfied that it was intended as will, and admitted it to probate. Court also accepted alterations made to the will and initialed by testator.	
In the Estate of Dale, deceased; Dale v. Wills (1983(32 SASR 215 (SC). 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 SASR 473 (SC) 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.	

SOUTH AUSTRALIAN CASES*

DOCUMENT ADMITTED TO PROBATE	DOCUMENT EXCLUDED FROM PROBATE
In the Estate of Williams, Deceased (1984) 36 SASR 423 (SC). 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 SASR 227 (SC). Testator made and initialed 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 SASR 30 (SC). 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.	

SOUTH AUSTRALIAN CASES*

DOCUMENT ADMITTED TO PROBATE	DOCUMENT EXCLUDED FROM PROBATE
In the Estate of Ryan, Deceased (1986) SASR 305 (SC). 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.	

SOUTH AUSTRALIAN CASES*

DOCUMENT ADMITTED TO PROBATE	DOCUMENT EXCLUDED FROM PROBATE
In the Estate of Pantelij Slavinskyi, Deceased (1988) 53 SASR 221 (SC). 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.)	

SOUTH AUSTRALIAN CASES*

DOCUMENT ADMITTED TO PROBATE	DOCUMENT EXCLUDED FROM PROBATE
In the Estate of Sutton, Deceased (1989) 51 SASR 150 SC). 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).	

* Sec. 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 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.

WEST AUSTRALIAN CASES**

DOCUMENT ADMITTED TO PROBATE

In the Estate of Crossley (deceased): Crossley v. Crossley [1989] WAR 227 (SC). 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 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.

DOCUMENT EXCLUDED FROM PROBATE

Henwood v. Publiic Trustee [1993] 9 WAR 22 (SC). 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.

WEST AUSTRALIAN CASES**

DOCUMENT ADMITTED TO PROBATE

In the Matter of the Will of Lobato: Shields v. Caratozzolo [1991] 6 WAR 1 (SC). 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.

Public Trustee (WA) v. Reid [1993] ACL Rep. 395 WA 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

Re Barfield [1993] ACL Rep. 395 WA 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.

Malatesta v. Scott [1994] ACL Rep 395 WA 9.

** 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.

NEW SOUTH WALES CASES***

DOCUMENT ADMITTED TO PROBATE

In the Estate of Masters; Hill v. Plummer (1994) 33 NSWLR 446 (CA). (See opposite column 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 NSWLR 535 (SC).The deceased dictated testamentary intentions to an 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 NSWLR 446 (CA). 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 opposite column re Document 2.)

***Sec. 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.

AUSTRALIAN CAPITAL TERRITORY CASE****

DOCUMENT ADMITTED TO PROBATE	DOCUMENT EXCLUDED FROM PROBATE
Re Letcher [1993] ACL Rep 395 ACT 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.	

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

APPENDIX E

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

CANADIAN LEGISLATION AND PROPOSED LEGISLATION

***MANITOBA WILLS ACT*, sec. 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 al 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, order that the document or writing, as the cas e may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act s the will of te 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.

PRINCE EDWARD ISLAND PROBATE ACT, sec. 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 te 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*, sec. 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*, sec. 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 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.

TASMANIAN 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.

WILLS ACT 1997 (STATE OF VICTORIA)

(a) *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 sec. 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 bene 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.