#L-603 2/21/82

First Supplement to Memorandum 82-9

Subject: Study L-603 - Probate Law (Wills--Substantial Compliance Doctrine)

An important policy issue for determination in the probate law study is whether the court should be given some discretion to admit documents to probate even though the formal requirements for a will have not been satisfied. The Commission has recommended to the 1982 session of the Legislature that a holographic will be admitted to probate if it satisfies the requirements that the signature and material provisions of the will are in the handwriting of the testator. These requirements are considered sufficient to justify the omission of the requirement for a formal will that there be two witnesses. The Commission also has tentatively concluded to eliminate most of the formal requirements for a will; a will need only (1) be in writing, (2) be signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and (3) be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgement of the signature or of the will. The policy issue is whether and to what extent the court should be authorized to admit a document to probate that does not qualify as a holographic will and does not satisfy the minimum requirements for a formal will.

Attached is an extract from an excellent Report on The Making and Revocation of Wills, published by the Law Reform Commission of British Columbia. We have just received this report. You should read this extract with care prior to the meeting.

The Law Reform Commission of British Columbia concludes that the court should not be authorized to dispense with the writing or signature requirements but should be authorized to dispense with the witness requirement. The practical considerations that are relevant to whether a substantial compliance provision should be made applicable to wills are discussed in some detail in the attached extract and are not repeated here. However, if the Commission concludes that a substantial compliance provision should be included in the revised California statute, the staff recommends that we follow the recommendation of the Law Reform Commission of British Columbia and permit only the witness requirement

to be dispensed with. For the reasons given in the extract, the staff believes that the "will" should be in writing, and that the writing should be signed by the testator (or by someone else in compliance with the statutory requirement for a formal will). In this connection, see the letter attached as Exhibit 1 from Robert T. Dunn.

The staff further recommends that, if such a substantial compliance provision is included, that the writing may be admitted to probate only if the court finds by clear and convincing evidence all of the following:

(1) The testator had the capacity to execute a will at the time the writing offered for probate was executed and intended the writing to be his or her will.

(2) There is no evidence of undue influence, fraud, duress, or mistake in connection with the execution of the writing offered for probate and the circumstances of the particular case do not give rise to an inference of undue influence, fraud, duress, or mistake.

The above provision would change the burden of proof on the issue of intent and the issues included under paragraph (2) (above); the burden of proof on these issues normally is placed on the contestant of a will. See UPC § 3-407.

The staff believes that the changes in existing law should apply only to cases where the testator dies after the operative date of the new legislation. To give the changes effect to cases where the testator dies before the operative date would create many practical problems and would probably be unconstitutional. Retroactive application of the changes would take property that vests by intestate succession prior to the operative date and give the property to persons that take under a will that was invalid when the decedent died.

Respecfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

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February 16, 1982

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Dear Ms. Love:

By virtue of Vol 46, No. 3, for Friday, January 15, 1982, of the Weekly Law Digest, this office was informed of your election as chairperson of the California Law Revision Commission. Congratulations. The digest article further revealed that the Commission was in the process of the revision of the California Probate Law. The purpose of this letter is to mention some factors which should be considered with regard to Section 53 of the Probate Code, which reads:

> "A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form and need not be witnessed. No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, should be considered as any part of the will."

Initially, there is little room for the argument that this section of the code should not be rewritten. Perry Evans, who drafted the Probate Code which took effect on August 14, 1941, has the following comments to make in 19 California Law Review, page 609-610:

> "The effect of a holographic will is destroyed if any word is incorporated which is not in the handwriting of the testator. Why should not the statute be liberalized so as to ignore any word or phrase not in the handwriting of the decedent which makes no difference in the meaning of the will, that is, if the will must be given the same interpretation and effect whether the printed or stamped words are in the will or not? See Estate of Thorn, where the whimsical use of a rubber stamp with the word "Cragthorn" was held to invalidate the will, although the property designated by this name was otherwise completely identified by words in the testator's own handwriting. Such liberalization of the statute would prevent any future will being denied probate upon such an aimless technicality as upset the Thorn will."

To the same effect is the following conclusion from 29 California Law Review, page 555, (1941):

> "There may be those who feel that justification for more liberal statutory construction sufficient to sustain wills containing printed matter is afforded by such generalizations. The preferable solution of the problem, however, would be by legislative action. A statute providing the printed words are to be disregarded when they make no difference to the meaning or effect of a holographic will has long been overdue."

Revision of the statute was long overdue in 1941, and still, no legislative action has been taken. Undeniably, then, Section 53 should be revised. The question then becomes one of how best to rewrite it. Many states, including Alaska, Arizona, Colorado, Idaho, Maine, Montana, Nebraska, New Jersey, North Dakota and Utah, have adopted Section 2-503 of the Uniform Probate Code. This section provides:

> "A will which does not comply with Section 2-503 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator. The official comment to Section 2-503 provides:
>
> 'By requiring only the "material provisions" to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be "entirely" in the testator's handwriting), a holograph may be valid even though immaterial parts such as date or introductory wording be printed or stamped. A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will. For persons unable to obtain legal assistance, the holographic will may be adequate."

The U.P.C. formula, while certainly an improvement over Section 53, remains a trap for the unwary and ill-advised. For example, a will written on a printed form obtained from an office supply store was held not to satisfy the U.P.C. requirements for holographic wills in a recent Arizona case. The form contained certain printed provisions followed by blanks where the testator inserted additional provisions. The Arizona Court of Appeals, after

quoting the official comment to Section 2-503, decided that the handwritten portion of the will must evidence the testator's intent to devise his estate. All of the words in the will in question which express the testator's intent, the court noted, were printed. Although the testator had referred to his "estate" in his own handwriting, the court concluded that his use of this word alone was insufficient to show that he actually intended the document to be his will. (Estate of Johnson, 1981, Ariz. App., 630 P2d 1039.

The specially concurring opinion of Judge Contreras, is pointedly relevant to your task of revising Section 53, and is, therefore, quoted in full:

> "I find myself compelled to concur in this decision because established legal principles clearly indicate that the trial court did not err in refusing to admit the document to probate. Nonetheless, I feel similarly compelled to tender the observation that the intended simplification of our statutes regarding holographic wills has perhaps created more problems than it has solved.
>
> The most basic purpose of the Uniform Probate Code is to 'discover and make effective the intent of a decendent in distribution of his property.' U.P.C. §1-102(b)(2). With respect to the execution of wills, the purpose of the Code is to simplify the requirements of execution and validate the will whenever possible. The general comment to the Uniform Probate Code Part 5 relating to wills provides in part:
>
> > If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible.
>
> The result in this case is contrary to all of these expressed purposes. The document before us is clearly demoninated as "THE LAST WILL AND TESTAMENT" and the first paragraph in which the decedent, in his own handwriting, placed his name and residence in the appropriate blanks, clearly and unequivocally establishes testatmentary intent. However, when the printed portion of the first paragraph is excised, testamentary intent is not established and the document fails as a valid will. Based upon case law and the official comment relating to the holographic will section of the probate code, this is the legal result which must obtain. But it is an illogical result which defeats the intent of the decendent and fails to uphold the proferred will. In addition, it ignores the practical consideration of a lay person who desires to dispose

> of his small estate without the assistance of an attorney. Such a person would consider a form will to be a viable alternative to seeking the services of an attorney, but unless that document is witnessed, it will fail to dispose of the decedent's estate as he desired. See, A.R.S. § 14-2502. And since the material provisions are not in the testator's handwriting, the document fails to meet the requirements as set forth in A.R.S. §14-2503 in order to serve as a valid holographic will.
>
> The result in this case defeats the purposes of effectuating the intent of the decedent and simplifying the execution of wills and, in my opinion, justifies a reappraisal of the statutorily expressed requirements of a holographic will in light of realistic and practical considerations."
>
> Johnson, 630 P2d at 1043 - 1044.

In order to avoid the problems so clearly enunciated by Judge Contreras, an approach like that taken in South Australia is recommended. Section 9 of the Wills Act Amendment Act (No. 2.) which came into effect in January, 1976, amends the South Australian Wills Act to provide:

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

This would eliminate the pitfalls made obvious by the official comment to Section 2-503 of the U.P.C. which states that a valid holograph might even be executed on some printed will forms.

Finally, it is suggested that the provison like that adopted by South Australia, be made expressly retoactive in California. To do so would give effect to the intent of those recently deceased who failed to satisfy the formal requirements of the Probate Code.

Thank you for your consideration of these comments.

Very truly yours,

Robert T. Dunn

ROBERT T. DUNN

RTD:ry

EXTRACT from Report on The Making and Revocation of Wills, Law Reform Commission of British Columbia (1981).

F. Informal Wills

One method of decreasing the frequency of technically invalid wills is to permit a court to admit a document to probate even though it fails to comply with the formalities required for formal wills. For convenience we refer to such documents as "informal wills."

The acceptance of informal wills into modern law has come in two stages. First, a number of jurisdictions permit unwitnessed wills which are wholly in the testator's handwriting. These are known as "holograph wills." Secondly, several jurisdictions have enacted legislation that would permit informal wills of any description to be admitted to probate so long as certain tests are satisfied. We will examine both of these concepts.

1. Holograph Wills

In a number of Canadian and foreign jurisdictions, a testator can make a will by writing out his testamentary wishes in his own handwriting and signing this document. This type of will has come to be known as a "holograph will" and has been adopted by many civil law jurisdictions since the introduction of the *Napoleonic Code* in France. In areas where the civil law has exerted a great influence upon the common law, such as the southwestern United States, holograph wills have been recognized as an alternative and valid form for many years.

The introduction of "autograph wills" into English law was first considered in 1833 by the Real Property Commissioners.[55] While they were initially attracted by the concept, they did not recommend enactment of a provision validating unwitnessed handwritten wills.

In Canada wills which do not meet the formal execution requirements have been permitted in an increasing number of jurisdictions. Seven provinces and the two territories currently make provision for "holograph" wills.[56] The remaining three provinces,[57] including British Columbia, permit such wills only under their conflict of laws rules or as privileged wills.

It is unclear why holograph wills have been so widely accepted in Canada. The availability of such a provision in neighbouring states in the United States as well as in the Province of Quebec[58] may have encouraged its adoption. The inclusion of a provision validating holograph wills in the Uniform Wills Act undoubtedly contributed to their acceptability.[59]

The arguments in favour of permitting holograph wills in British Columbia may be summarized as follows:[60]

> (i) Such a provision will assist those in circumstances where it is difficult to comply with the formal attestation requirements, *viz*:
> (a) those living in remote areas without access to solicitors;
> (b) those *in extremis* who have no opportunity to arrange for the preparation or formal execution of a will;

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[55] *Supra* n. 45 at 21.

[56] Alberta: R.S.A. 1970, c. 393, s. 7.
Saskatchewan: R.S.S. 1965, c. 127, s. 7 (2).
Manitoba: R.S.M. 1970, c. W150, s. 7.
Ontario: S.O. 1977, c. 40, s. 6.
Quebec: C.C. Art. 842, 850.
New Brunswick: R.S.N.B. 1973, c. W-9, s. 6.
Newfoundland: R.S.N. 1970, c. 401, s. 2.
Northwest Territories: R.O.N.T. 1974, c. W-3, s. 6 (2).
Yukon: R.O.Y.T. 1971, c. W-3, s. 6 (2).

[57] Nova Scotia, Prince Edward Island and British Columbia.

[58] Civil Code of Quebec, Art. 850.

[59] The Uniform Wills Act, s. 6.

[60] *See* Law Reform Commission of Ontario, Report on the Proposed Adoption in Ontario of the Uniform Wills Act (1968) at 10.

(c) those who, because of poverty, ignorance or prejudice, cannot or will not consult a solicitor.

(ii) The majority of Canadian provinces provide for holograph wills, and such an enactment promotes uniformity of legislation in Canada.

(iii) The stated policy of the law is to validate wills where possible.[61]

A holograph will tends to serve as evidence that the testator knew of the contents of his will, the handwriting identifies the maker of the will, and indicates that the contents represent the testator's true desires concerning the disposition of his estate.

In 1968 the Ontario Law Reform Commission explored the possibility of adopting holograph wills in Ontario. The Commission noted the following arguments against permitting holograph wills:[62]

(i) The presence of witnesses lessens the possibility of forgery and makes it easier to prove that the will is the will of the testator;

(ii) The provision for holograph wills would raise new problems requiring litigation to resolve; and

(iii) A holograph will lends itself more readily to fraud or undue influence than does a will executed in the English form with the safeguard of witnesses.

In spite of these criticisms the Ontario Commission were of the view that a holograph will could more easily be proved to be the will of the testator than a typewritten document which he merely signs, notwithstanding the presence of witnesses. They suggested that a determined forger with accomplices would probably find it easier to forge a "formal" will under present law than he would to forge a holograph will.

In reply to the more serious suggestion that a testator making a holograph will may be susceptible to undue influence or fraud, the Ontario Commission argued as follows:[63]

> Jurisdictions in Canada, the United States and throughout the world (including Scotland), which have had holograph wills for many years, have not found it necessary to insist on further safeguards. It would be very difficult to induce a testator by fraud or trickery to make a holograph will through ignorance of its contents. If the testators writes out the provisions of the will in his own handwriting, he must, if he is capable, understand what he is writing, whereas if he is merely asked to sign a typed document even though in the presence of witnesses, he may well be under some misapprehension as to the nature or contents of the document. The presence of witnesses is no guarantee against fraud. The real value of witnesses in guarding against undue influence is open to considerable doubt.

In response to the argument that holograph wills would lead to increased litigation the Ontario Commission pointed out:[64]

> While it is probably true that holograph wills would bring more interpretation cases to the courts, no one can say how substantial the increase might be, and, in any event, it is difficult to accept this as an argument against them. A more cogent argument could be that the persons most likely to attempt a holograph will would also be those with the fewest assets available to pay for the cost of interpreting the will. But against that, such circumstances would be likely to diminish the economic justification of litigation. One could, by the same token, substantially

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[61] On the validation of wills, *see e.g.*, Lord Esher M.R. in *In re Harrison-Turner v. Hellard*, [1885] 30 Ch. D. 390, 393: "There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce,—that he did not intend to die intestate when he had gone through the form of making a will. You ought, if possible, to read the will to lead to a testacy, not an intestacy." Mr. Justice Montague stated the principle in *Re Eames*, [1934] 2 W.W.R. 364, 42 Man. R. 474, as follows: "The Court owes a sacred duty to protect a man's last will. The guiding principle is to give effect if possible, to his intentions. Where the law designates a form in which such must be expressed this latter limits the operation of the principle, but the instrument itself is not destroyed. It is still the act of the deceased, and if the will is bad in one form it is good in another, the court must enforce it. Our statute encourages testators to draw their own wills. That being so the statute in any such will should be construed benignly and every effort made to avoid any construction which would invalidate the will."

[62] *Supra* n. 60.

[63] *Ibid.*

[64] *Ibid.*

> reduce the number of contract cases before the courts by making it obligatory for every contract to be prepared by a solicitor.

The Commission also commented that a survey of Canadian provinces which permit holograph wills found only 70 reported cases involving holograph wills between 1931 and 1963. A computer-assisted search indicates that there have been a further two dozen cases since that survey. One hundred reported cases spread over half a century does not indicate a substantial increase in the volume of estate litigation.

The objection that the introduction of holograph wills will result in new problems is well taken. Although the problems so generated are far from insoluble, their existence detracts somewhat from the desirability of holograph wills. For that reason, a brief survey of some of the problems which have arisen in other jurisdictions which have introduced such provisions is in order.

(a) Uncertain Interaction with the Provisions Respecting Formal Wills

Should holograph wills be subject to the same requirements as formal wills, save for the need for witnesses? This question is raised in large measure by the tendency of legislation merely to validate holograph wills without specifying the relationship between that form of will and the traditional form.

The point has arisen in several contexts. In *Re Chapman*,[65] the Manitoba Surrogate Court per Lindal, Surr. Ct. J., held that a formally attested will could be altered by an unattested holograph codicil. In so holding he declined to follow the Saskatchewan case of *Re Violet Bennie Estate*.[66] In that case Mr. Justice Taylor of the Court of Queen's Bench, stated the issue as follows:[67]

> The requirements for the execution of a will had been set out in the 1930 revision and in previous Acts respecting the execution of wills and were carried into the Act of 1931 verbatim . . . In 1931 a new subsection, designated as "new" (2), was added to sec. 6:
>
> (2) "A holograph will wholly in the hand-writing of the testator and signed by him may be made, without any further formality or any requirement as to the presence of or attestation or signature by any witness."
>
> The question now to be determined is whether the wording in this subsec. (2) "a holograph will" carries with it the definition that "will" includes a testament, a codicil, etc., as above quoted. Does the definition of the word "will" include a holograph codicil to a will? It will be noted that if such had been the intention of the legislature, the intention could have been expressed by referring to a holograph will or holograph codicil to a will. I note particularly that in the definition clause the word "will" is set apart as I have written it; and this singles it out specifically.

Mr. Justice Taylor refused to give effect to the holograph codicil. He held that in the absence of legislation specifically authorizing holograph codicils, the definition of "will" should not be extended to holograph wills so as to permit holograph codicils.

A similar issue arose before the Manitoba Court of Appeal in *Re Tachibana*.[68] There, the testator's signature appeared on two places in the unattested holograph will, although unfortunately not at its end. Accordingly, the will did not satisfy the requirements of section 6 of the Manitoba *Wills Act* then in force[69] which required that a will be signed at its "end or foot." Mr. Justice Freedman, speaking for the Court, held:

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[65] (1959) 18 D.L.R. (2d) 745.
[66] (1957) 22 W.W.R. 118.
[67] *Ibid.* 120-121.
[68] (1968) 66 D.L.R. (2d) 567.
[69] R.S.M. 1954 c. 293.

> A holograph will very properly stands on a different footing from that of an ordinary will and should not be subject to the formalities required of the latter. When a person proceeds to write out his will in his own hand one does not expect, nor does the law exact from him, the same strict compliance with statutory provisions of form as is imposed upon a testator who, in a much more formal manner and usually with the aid of a lawyer, has his will drawn up, to be solemnly executed in the presence of two witnesses. That is precisely why s. 6(2) dispenses with any further formality beyond the requirement that a holograph will be wholly in the handwriting of the testator and signed by him. The subsection, it may be noted, is silent as to the location where the testator's signature must be placed. To say that the signature must appear at the end or foot of the will is only possible if we conclude that s. 6 (1) and s. 7 of the *Wills Act* apply to holograph wills. In my view they do not.

(b) Is the Document a Will?

Not every handwritten document is necessarily a will. It is not sufficient that a document be in the handwriting of a deceased person and signed by him if it does not also evince a testamentary intent. It must express an unconditional desire on the part of its author that the document operate to direct the passing of his property upon his death.

The question of testamentary intent is rarely an issue in a will executed in accordance with the present *Wills Act*. When informally prepared documents are submitted to probate, however, it is sometimes difficult to attribute testamentary intent to their author. The most common situation where testamentary intent is questioned involves bequests made in a letter or series of letters. These writings may take effect as a series of mutually consistent wills. The issue which must then be faced is whether, and to what extent, the letters reflect a settled testamentary intent. It may be necessary to prove the testator's intention by extrinsic evidence.

As a general rule the courts in Canada will admit extrinsic evidence in an effort to determine whether a testator intended the impugned documents to have testamentary effect. In *Re Gray; Bennett* v. *Toronto General Trusts Corporation*, the Supreme Court of Canada stated:[70]

> There is no controversy, either in the reasons for judgment in the Courts below, or between the parties, that under the authorities, a holographic paper is not testamentary unless it contains a deliberate or fixed and final expression of intention as to the disposal of property upon death, and that it is incumbent upon the parties setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of that character and nature . . .

Thus the courts are free to take into account any evidence probative of testamentary intent. Such a practice obviously accords with the general policy of the law to validate wills where possible.[71] There is no pressing reason to restrict courts to the four corners of a document alleged to be a holograph will or to restrain them from admitting evidence which they would otherwise hold to be probative of testamentary intent.[72]

(c) Pre-printed forms

Civil law jurisdictions traditionally require the whole of a holograph will to be in the handwriting of the testator. For example, the new draft *Civil Code* of Quebec provides:[73]

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[70] [1958] S.C.R. 392, 396 *per* Fauteux J.

[71] The Supreme Court of Canada affirmed that extrinsic evidence was admissible on the question of testamentary intent in *Molinari* v. *Winfrey*, [1961] S.C.R. 91; *Canada Permanent Trust Co.* v. *Bowman*, [1962] S.C.R. 711. On the question of testamentary intent *see also Re Benton's Will*, (1959) 29 W.W.R. 657, (Alta. S.C. App.Div.); *Rudolph* v. *Public Trustee*, [1972] 4 W.W.R. 248 (Alta S.C.); *Re Williams*, [1973] 5 W.W.R. 84 (Man. Surr. Ct.).

[72] For other cases concerning testamentary intent in holograph wills *see McMurtry* v. *Scarrow et al.*, [1938] 2 W.W.R. 39; *Re Williams*, [1973] 5 W.W.R. 84. In *Re Soole Estate*, [1952] 5 W.W.R. 416 (Alta. D.C.) the oral declarations made by the testator were admitted as evidence of testamentary intent.

[73] Civil Code Revision Office, Report on the Quebec Civil Code, (1977) Vol. I, p. 177, Art. 268.

> A holograph will must be written entirely in the hand of the testator and signed by him.

Canadian common law jurisdictions which permit holograph wills also require them to be wholly in the handwriting of the testator. The *Uniform Wills Act* provides, for example:[74]

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

Where a testator attempts to make a will on a preprinted form but fails to execute it properly, so that it cannot be probated as a formal will, an objection may be taken to the admission of the document to probate as a holograph will on the ground that it is not wholly in the testator's handwriting. It may nevertheless be possible to argue that the handwritten portion of the document constitutes a holograph will and that such parts of the will which are wholly in the testator's handwriting should be admitted to probate. The options open to the courts in Canada are to refuse probate to the document, to admit the will to probate, or to admit only the portions written in the testator's own handwriting. In the face of the strict language of statutes providing that the will must be wholly in the handwriting of the testator, no Canadian court has yet admitted the complete document to probate. Two lines of authority have discussed the problem, the first line refusing probate, and the second granting probate to the handwritten portions only.

The first series of authorities is based on the case of *Re Rigden Estate*.[75] In that case the testator had filled in the blanks in a standard form will. The will was held to be invalid as it was not wholly in the handwriting of the testator. The Saskatchewan Surrogate Court was not, however, in any doubt as to the authenticity of the document or as to its being an expression of the testator's actual testamentary intent. This case was followed by the Saskatchewan Surrogate Court in *Re Griffiths Estate*,[76] where the Court posed the question:

> To bring the document within subsection (2) above, as a holograph will, it must be established that it is 'wholly in the handwriting of the testator and signed by him.' Can a document such as this, which is only partly in the handwriting of the testator and the remaining part printed, be said to be wholly in his handwriting?

The answer was in the negative, and the document was not admitted to probate. The Court did not appear to consider the possibility of admitting only the handwritten portions of the will.

Under the second line of authority the handwritten portion of the document has been admitted to probate as a will. In the cases of *Re Ford Estate*,[77] *Re Austin*,[78] and *Re Laver Estate*,[79] the court admitted to probate such parts of the document as were in the handwriting of the testator, exempting from probate those parts which were printed. The difficulty which would undoubtedly arise as to the interpretation of incomplete sentences in the handwritten portions was left to a court of construction.

In a recent Manitoba case, *Re Philip*,[80] the Surrogate Court, while reviewing this line of authority, specifically examined the three western Canadian cases referred to above and concluded as follows:

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[74] S. 6. This provision is found in several statutes.
[75] [1941] 1 W.W.R. 566.
[76] [1945] 3 W.W.R. 46.
[77] [1954] 13 W.W.R. 804 (Alta. D.C.).
[78] (1967) 61 D.L.R. (2d) 582 (Alta. S.C. App. Div.).
[79] (1957) 10 D.L.R. (2d) 279 (Sask. Q.B.).
[80] [1978] 4 W.W.R. 148 at 160.

> With respect, I am of the view that the *Ford*, *Laver* and *Sunrise Gospel Hour [Austin]* decisions were wrongly decided. They appear to be decisions of convenience in which the courts, having perceived the apparent intentions of the testator, have given effect to those intentions in spite of the lack of compliance with statutory requirements of formality. As the old saw puts it: 'Hard cases make bad law.'

On appeal Mr. Justice O'Sullivan, while noting that the Surrogate Court had subjected the earlier decisions to "trenchant criticism," held that Mrs. Philip did not intend to incorporate the printed words contained on the form into her will but merely intended to use the printed form as a guide. As a result, the Court admitted the handwritten portions of the will to probate on the ground that the testatrix did not intend to incorporate the printed words into the will. It specifically refrained from deciding whether printed words should be ignored in cases where the testator intended to adopt or incorporate such printed words but where the court concludes that these words are surplusage.[81] In contrast, the Saskatchewan Court of Appeal in *Re Forest*[82] held that the written words themselves could not be probated as a holograph will unless they were effective to implement a dispositive intent. The law is therefore unsettled.

2. Other Informal Wills

(a) Generally

A holograph will is merely a type of informal will which, by virtue of its attributes, contains on its face sufficient evidence of testamentary intent and authorship to displace any fear that such a document might not truly express the intentions of the testator. A proposal which extends only to holograph wills, although it may be carefully drafted to avoid problems which have arisen in other jurisidictions, nevertheless involves making an arbitrary distinction between holograph wills and other possible informal wills.

Excessive reliance on compliance with statutory requirements respecting form without regard to the functions performed by those requirements leads in our view to undesirable rigidity. Earlier in this paper we referred to the four functions of formal requirements. If a document undeniably expresses the deceased's testamentary intent, none of the policies to which we referred is served by refusing to accept it for probate. Formalities are designed to produce a document easily recognizable as an expression of testamentary intent. If the document in issue undeniably expresses the testator's true intent, then it possesses the very characteristics which the imposition of a standard form is designed to produce, and there seems little reason in such a case to insist upon strict compliance with the prescribed form.

We believe that the policies which support the introduction of holograph wills equally support a broader proposal. A recommendation restricted to holographs wills has a major drawback: the new form of will would itself be subject to a rule of strict compliance which could result in the refusal to give effect to a testator's undeniable wishes. This view is buttressed by Lord Mansfield who, as long ago as 1757, opined:[83]

> I am persuaded many more fair wills have been overturned for want of the form, than fraudulent have been prevented by introducing it. I have had a good deal of experience at the delegates; and hardly recollect a case of a forged or fraudulent will, where it has not been solemnly attested. It is clear that Judges should lean against objections to the formality. They have always done so, in

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[81] *Ibid.*

[82] [1981] 2 W.W.R. 116 (Sask. C.A.).

[83] *Windham v. Chetwynd*, (1757) 1 Burr 420, 97 E.R. 377.

> every construction upon the words of the statute . . . and still more ought they to do so, if that system would spread a snare, in which many honest wills must unavoidably be entangled.

A recommendation which concentrates on the substantial questions which concern a court on an application for probate—the authorship of the will and testamentary intent—rather than the sterile question of compliance with form, would no longer require the strict compliance with any particular form.

(b) Substantial Compliance

Current law requires the formalities stipulated by the *Wills Act* for the execution of wills to be strictly followed. Failure to observe the formalities stipulated by that Act renders a will invalid even if the mistake was entirely harmless. Our courts have taken this strict approach for two reasons. First, the testator is dead and cannot assist in ascertaining the validity of the will. Second, even if the will is declared invalid, on the resulting intestacy a distribution is provided for under the *Estate Administration Act*.

The 1974 English case of *Re Beadle*[84] is an example of a document to which probate was refused on the sole ground that it failed to meet the requisite formalities. The testatrix had dictated her wishes to a friend, who transcribed them onto one piece of paper. The testatrix then signed the top corner of the paper and the husband of her friend signed as a witness. The purported will was placed in an envelope and both acquaintances signed the envelope. R.W. Goff, J. held that although there was no doubt at all that the paper contained the testatrix's true testamentary wishes, and that she fully understood its effect, probate of the will had to be refused on a strict interpretation of the statute and the authorities.

Responses to the strict compliance rules have taken at least three different forms, as legislatures, the courts, and law reform advocates have suggested methods to prevent the harsh results which come from the strict application of formal requirements. Soon after the introduction in 1837 of the provision which required that a will be signed at its "end," Parliament relaxed it. This was accomplished by deeming a will to be signed at its foot or end even though it was signed in any one of a number of different places.[85] This modification is part of the *Wills Act* of this Province.[86]

The judicial response has been to uphold the rule on the one hand, and on the other to be permissive in allowing various activities to meet the requirements of the statute. For example, even the slightest of "indications" by an ill testator has been held to constitute an acknowledgement of his signature permitting witnesses to attest. In another case the term "presence" was extended to include a testator who did not see the witnesses sign the will but could have done so if he had cared to look.

Courts have also had to rule on the validity of a will where the parties have used the proper procedure but have executed the wrong documents. For example, spouses occasionally sign each other's will by accident. If the mistake is not noticed until after the death of one spouse, then the court is faced with three options. It may refuse to admit the will to probate, admit part of the spouse's will to probate, deleting references to that spouse, or admit the executed will to probate and correct the document by inserting the proper

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[84] *Supra* n. 38.

[85] The *Wills Act Amendment Act*, 1852 15 Vict. c. 24.

[86] *Wills Act*, R.S.B.C. 1979, c. 434, s. 6.

names. Courts in all of the western Canadian provinces have chosen the third option and have rectified and replaced the wording contained in the will.[87]

Thirdly, advocates of law reform have recently criticized the rule requiring strict compliance with the *Wills Act, 1837*. In the United Kingdom the Law Reform Committee has suggested that attacks on form may have ulterior motives:[88]

> A further relevant point is that it seems that the validity of wills in general, and of their attestation in particular, is often challenged for reasons which have no connection with the question whether the will represents the testator's true intentions. In other words, the challenger is not concerned to give effect to what the testator wanted: he dislikes the provisions of the will—no doubt because it deprives him of benefits which he would have had under an earlier will or under the rule of intestate succession—and wants to upset it by any means that lie to hand. It has been suggested that the present attestation rules lend themselves to behaviour of this kind.

In the United States several writers have suggested that a will which does not conform with the formalities of the *Wills Act* might still be validated. For example, one commentator has concluded:[89]

> That some forms of expression are *prima facie* valid does not, however, require that all other forms of expression be held invalid. Even though many other forms of testamentary transfer are presently allowed under trust, contract, or other theory, many indications of testamentary intent, not articulated in traditional legal forms, are denied validity solely because of their failure to meet the formal requirements of a will, notwithstanding total absence of question as to their being true expressions of testamentary desire. Many of these expressions it is suggested, could reasonably be validated, so long as the basic elements of a valid testament—testamentary intent, dispositive scheme, and lack of influence—could be proved by clear and convincing evidence.

In a 1975 article which has attracted much attention, another American scholar, John Langbein, called for the introduction of the doctrine of "substantial compliance" to the law of wills. Professor Langbein has expressed the view that:[90]

> The rule of literal compliance with the Wills Act is a snare for the ignorant and the ill-advised, a needless hangover from a time when the law of proof was in its infancy. In the three centuries since the first *Wills Act* we have developed the means to adjudicate whether formal defects are harmless to the statutory purpose. We are reminded "that legal technicality is a disease, not of the old age, but of the infancy of societies." The rule of literal compliance has outlived whatever utility it may have had. The time for the substantial compliance doctrine has come.

Since this call for substantial compliance was published, Professor Langbein reports that he has received only favourable response. He advises that he has yet to meet a scholar in the field of trust and estate law who has expressed disagreement on the merits of a substantial compliance doctrine.[91] In another recently published article Professor Langbein reiterated his view that courts in the United States should adopt a substantial compliance doctrine and admit wills to probate despite technical defects.[92]

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[87] *See Re Brander*, (1952) 4 D.L.R. 688 *per* Wilson J. (B.C.S.C.) and by the same judge, *Re Duck* [unreported] but cited in (1953) 31 B.C.R. 444. In Saskatchewan, *see Re Rohatchewski Estate*, (1967) 60 W.W.R. 635 (Sask. Surr. Ct.) per Maher J. In Alberta, *see Re Knott*, (1959) 27 W.W.R. 382, a decision of the Alberta District court involving spouses executing each other's wills. The British Columbia decisions have been commented on by Dr. G. Kennedy; *Case and Comment*, (1953) 31 Can. B. Rev., 185 and 444. The Australian State of Queensland recently proposed to amend their succession law by including specific provision permitting a court to insert the necessary correcting language in a will instead of merely deleting certain words. (Working Paper on a Bill to Consolidate and Amend the Law of Succession and the Administration of Estates, (1975) section 31, *Power of Court to Rectify Wills*.)

[88] *Supra* n. 47.

[89] Gaubatz, John, *Notes toward a Truly Modern Wills Act*, (1977) 31 U. of Miami L. Rev. 497 at 560.

[90] Langbein, *Substantial Compliance with the Wills Act*, (1975) 88 Harv. Rev. 489 at 531.

[91] Correspondence, John Langbein to Law Reform Commission, April, 1979.

[92] Langbein, *The Crumbling of the Wills Act*, (1979), 65 A.B.A.J. 1192–1195.

The adoption of a rule of substantial compliance has been proposed for Queensland. The Law Reform Commission of Queensland in their Report No. 22 suggested the enactment of the following provision:

> 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 expressed the testamentary intention of the testator.

In some respects even this reform has a fairly limited scope. A doctrine of "substantial compliance" presumes that the testator or witnesses attempted a standard form will, but erred in its execution in some technical aspect. In most cases in which an executor propounding a will would rely on a doctrine of "substantial compliance" the will would closely resemble a standard form will.

A proposal merely to abolish strict compliance with the *Wills Act* raises difficult questions concerning when a defect is a mere technical failure to fully comply with the Act, and when it is a result of the parties completely ignoring formal requirements altogether. Does a will attested by only one witness "substantially comply" with the present *Wills Act*? A proposal for reform which concentrates on an attempted compliance with technical rules leaves open cases where, because the document in issue in no way resembles a standard form will, the court must refuse it probate even though convinced that the document truly represents the testator's last wishes.

It has been suggested that it is only necessary to relax those requirements which have been found to give the most problems to testators.[93] This is, in our view, tantamount to a type of "ad hoc" substantial compliance doctrine. It does not address the fundamental problem posed by an undue reliance on formalities without regard to the purposes which they serve. Moreover, one might argue that such an approach is inconsistent. If formalities fulfill a valuable function, then it is inevitable that documents which fail to comply with the *Wills Act* will be refused probate. However, a proposal to relax certain formalities is, in effect, an acknowledgement that in some cases, insisting on strict compliance can cause hardship. If, for example, the justification for two witnesses is that it helps prevent fraud, reducing the requirement to one witness is an acknowledgement that the protection offered by the original formality was not as important as the hardship in an individual case. From this point, it is only a small step to adopt a dispensing power in which that determination can be made on a case by case basis.

(c) A Dispensing Power

(i) Generally

Several jurisdictions have either enacted, or considered enacting, a provision giving a court the discretion to admit documents to probate, even though the *Wills Act* formalities have not been observed. Such a power may, but need not be, framed in terms of "substantial compliance." We shall examine individually the dispensing powers enacted in, or proposed for, a number of jurisdictions.

(ii) Canada: The Indian Act[94]

Sections 42 to 50 of *The Indian Act* vest broad powers in the Minister of Indian Affairs and Northern Development to regulate the manner in which the property of an Indian resident on a reserve[95] devolves upon death. Section 45 of the Act provides:

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[93] *See, e.g.*, The Law Reform Committee, 22nd Report, 1980, W.F. Ormiston, *Formalities and Wills: A Plea for Caution* (1980) 54 Aust. L.J. 45.

[94] R.S.C. 1970, c. I-6. *See A.G. Can. and Rees* v. *Canard*, [1975] 3 W.W.R. 1 (S.C.C.) in which the relevant sections of this Act were held to be *intra vires*.

[95] *See ibid.* section 4 (1).

> **45.** (1) Nothing in this Act shall be construed to prevent or prohibit an Indian from devising or bequeathing his property by will.
>
> (2) The Minister may accept as a will any written instrument signed by an Indian in which he indicates his wishes or intention with respect to the disposition of his property upon his death.
>
> (3) No will executed by an Indian is of any legal force or effect as a dispostion of property until the Minister has approved the will or a court has granted probate thereof pursuant to this Act.

The discretion vested in the Minister under section 45 (2) operates in precisely the same fashion as a dispensing power would in practice. The Minister may, but is not required to, accept an informal will for probate. His discretion is limited by two threshold requirements: there must be a written instrument and it must be signed by the testator.

In response to our query concerning departmental practice under this section, we were advised that the Minister generally approves any testamentary document in writing. It need not be handwritten by the testator. Unwitnessed wills are rare, and only four have been submitted for the Minister's approval in the last four years. Witnessed holograph wills appear to be fairly common. On the whole, it would appear that informal wills have caused few problems.[96]

(iii) South Australia

On the recommendation of the Law Reform Commission of South Australia, the Supreme Court in that jurisdiction has been given the power to admit a document to probate even though it may not have been executed with all of the formalities required by the *Wills Act*. In 1975, the governing statute was amended to provide that:

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

As far as we are aware, only one reported case deals with the South Australian Supreme Court's power to admit defective wills to probate under this dispensing power.[97] In the 1977 case of *Re Graham*,[98] detailed consideration was given to the South Australian provision. The facts of the case are simple. On April 4, 1977, an estate administration officer for Bagot's Executor and Trustee called on the recently widowed Mrs. Graham to discuss her late husband's estate. While he was at her home, the trust officer also received and recorded Mrs. Graham's instructions for her own will. He then returned to his office, had a will prepared in accordance with the instructions and returned to Mrs. Graham's house the following day. As there was no one at home, instructions for execution were noted on the document and he left it there to be signed by Mrs. Graham.

Mrs. Graham subsequently signed the will and then gave it to her nephew and requested that he "get it witnessed." The nephew took the will to two neighbours who signed as witnesses in his presence but not in Mrs. Graham's presence. The will was returned to Mrs. Graham by the nephew. On May 18, 1977 Mrs. Graham died leaving approximately $10,000 to her nephew in the impugned will. The procedure adopted did not meet the statutory requirements for execution, as the deceased had not signed the will in the presence of either witness, nor had the witnesses signed in Mrs. Graham's presence.

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[96] Letter from P.M. Tellier, Deputy Minister, to the Commission, February 26, 1981.

[97] Letter dated 2nd January, 1979, from the Chairman, Law Reform Committee of South Australia.

[98] *Re Graham*, (1978) 20 S.A.S.R. 200, per Jacobs J.

When the document was presented for probate, Jacobs J. stated:[99]

> Upon these facts, I have not the slightest doubt that the deceased intended the document which is before me to constitute her will. Accordingly, if the words of s. 12(2) of the Wills Act are to be given their plain and natural meaning, there is no reason at all why the document should not be deemed to be the will of the deceased, and admitted to probate as such, notwithstanding that it has not been executed with the formalities required by the Act.

The court in admitting the will to probate was of the opinion that the section should be given a broad and remedial interpretation. Jacobs J., who had assisted the South Australian Law Reform Commission in formulating its proposal that the court be granted such a power, concluded:[100]

> But if there is one proposition that may be stated with reasonable confidence, it is that s. 12(2) is remedial in intent, that is to say, that its purpose is to avoid the hardship and injustice which has so often arisen from a strict application of the formal requirements of a valid will, as dictated by s. 8 of the Act. This conclusion is, I think, clearly justified upon a review of the legislative history of the relevant sections of the Act, and the cases.

(iv) Israel

Since 1965, the Israeli Succession Law has contained a remedial provision enabling the courts to admit to probate a technically defective will. It provides:[101]

> 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 in sections 20 to 23 or the capacity of the witnesses.

No comprehensive studies are yet available on the Israeli experience with this provision. We are advised that there are few reported cases concerning the application of this section.[102]

The following comments are an approximate translation of remarks contained in the 1952 official draft Succession Law:

> The purpose of the requirements of the Act concerning the form of a will is to verify the wishes of the testator and to safeguard against forgeries and frauds. The details of form do not serve as a perfect or sole guardian against mischiefs and they should not be considered as being of overriding importance or absolute value. The courts should therefore be granted some discretion to alleviate rigid compliance with formal requirements as long as the genuineness of the will is beyond doubt. Our proposal is inspired by the general tendency to get rid of extensive formalism and prefer substance to form.
>
> Jewish Law dictates on the one hand strict compliance with certain formulae . . . on the other hand it developed the concept of "*Mitzvah* to carry out the wishes of the deceased". No such provision has been found in foreign law.

The leading Israeli case on the application of this provision is the 1977 decision, *Briel* v. *The Attorney-General*.[103] In this case, the District Court had refused to grant probate even though it had no doubt as to the genuineness of the will. The will was in breach of the succession law because it did not contain the date on which it was made. The Supreme Court allowed an appeal from the District Court's decision and made the following comments on the scope of the statute:[104]

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[99] *Ibid.*

[100] *Ibid.*

[101] Section 25 of the Israeli Succession Law 5725-1965.

[102] Letter from Dr. E.S. Perles, Advocate of Tel-Aviv, Jaffa, Israel dated December 18th, 1979.

[103] Israel C.A. 869/75, 32 P.D. 98.

[104] Since none of the cases interpreting section 25 have been officially translated from the Hebrew, this version is not authoritative. The concept of "mitzvah" is not readily translatable. It is literally a religious obligation, although in some contexts it may denote only a moral obligation or even merely a general obligation to assist others. We are advised that the "mitzvah" to carry out the wishes of a deceased person is a religious obligation: in effect a command from God.

> The question of all questions regarding the scope and operation of section 25 is always the "genuineness of the will." The court has to be first convinced, beyond all doubt, that it is indeed faced with a genuine will. Were it so convinced, the [formal] defects should not prevent it from granting probate of the will. Were it not convinced, even one defect requires it to abstain from granting probate.
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> It was already decided that a will which has no formal defect is presumed to be genuine and the one alleging invalidity carries the burden of proof . . . The presumption does not apply to a will which contains a formal defect and the one seeking grant of probate carries the burden of proving the genuineness of the will.
>
> In each and every case in which this Court has refused to grant probate to a will for formal defects, doubt existed as to the genuineness of the will and it is insignificant whether the doubt was raised for the formal defect itself . . . or for one of the matters dealt with in Art. 8 . . .
>
> Even the absence of a date [of making the will] might in certain cases raise a doubt as to the genuineness of the will . . . as, for example, in a case of several conflicting wills . . .
>
> The legislator's "guide-line" in the Law of Wills is the *Mitzvah* to carry out the wish of the deceased: Where the intent of the testator is expressed in a will, and no doubt exists as to the genuineness of the will, then his intentions should be ascertained (Sec. 54 (a)) in order to uphold the wishes of the deceased and not to frustrate them merely for a formal defect.

It should be noted, however, that that case also sets out certain threshold requirements which must exist before section 25 can be invoked in aid of a defective will. The court stated:[105]

> The discretion granted to the Court by Section 25 is a very wide one, and if there is no doubt as to the veracity of the will, there are three things only that cannot be remedied by Section 25: The testator, two witnesses, and a document in writing.

In contrast, in one case the Supreme Court allowed an appeal from the confirmation of a will whose two pages were typed by different typewriters. It was held that that raised sufficient doubt as to exclude the operation of section 25.[106] In other cases section 25 has received an even stricter interpretation. In commenting on one such case, one of our correspondents stated:[107]

> In Civil Appeal 679/76 the deceased had instructed his banker to open a joint account in the names of himself and another person, who was now the appellant. This appellant wanted the instruction to the bank to be construed as a kind of will, and he tried to rely on Section 25. The Supreme Court, dismissing the appeal, ruled that Section 25 comes to remedy defects in a will which was lawfully made, but does not create a new way to make a will.

Israeli experience with the provision has therefore been mixed. In particular, it does not yet appear to have been finally established whether section 25 can be called in aid only in respect of wills where there has been at least some attempt to comply with the *Wills Act* formalities. Although any legal analysis of the Israeli law is somewhat difficult owing to the lack of source material and the necessity of relying on the opinions of our correspondents, it would appear that Civil Appeal 679/76 is not necessarily inconsistent with *Briel* v. *The Attorney-General*, as in the former case the threshold requirements set out in *Briel* were not satisfied because the instructions to the bank were unwitnessed.

Qualitative assessments of section 25 vary. One commentator suggested that the majority of applications are rejected owing to the requirement that the genuineness of the will must be established before the court can exercise its discretion.[108] Less pessimistic are the comments of an Israeli judge who wrote

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[105] Translation of case supplied by Dr. E. S. Perles, *supra* n. 102.

[106] *Supra* n. 102.

[107] *Ibid.*

[108] Letter from Professor Uriel Reichman, Tel-Aviv University to Professor J. Langbein, July 26, 1979, copy on file at Law Reform Commission of British Columbia.

to us in response to an inquiry whether the provision had made the law less certain and impeded the administration of estates. He stated:

> [T]he law is definitely not "less certain" . . . The provisions of s. 25 do not tend to "increase litigation, expense and delay." On the very contrary it has been my experience that Advocates are gradually attaching less and less importance to defects in the form of 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 opinion that s. 25 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 would be the foremost if not the only ones, i.e. to the question: Is the will a true expression of the testator's intent?
>
> Court statistics do not reveal the frequency of invocation of s. 25 in applications before the Court. Every contested will comes before a District Court Judge. The reasons for opposing a will are not always based on adequate legal grounds for such opposition. Dissatisfied parties will often file an opposition on the most slender legal grounds, sometimes even only with a view to extracting some benefits from the beneficiares by moral pressure. In such cases every possible point will be taken and no trifling deviation from prescribed procedure will be overlooked. However, when the case comes up for hearing all unwarranted pleas as to form melt away mostly even before the Court pronounces on them. Section 25 is like a sword. Its very presence suffices and it has rarely to be unsheathed.

On balance, the Israeli experience is encouraging.

(v) Manitoba

Subsequent to the release of our Working Paper No. 28, in which we proposed the enactment of a dispensing power in British Columbia, the Law Reform Commission of Manitoba released a Report on the Wills Act and the Doctrine of Substantial Compliance.[109] They recommended that:

> 1. A remedial provision should be introduced in "*The Wills Act*" allowing the probate courts in Manitoba to admit a document to probate despite a defect in form, if it is proved on the balance of probabilities, that the document embodies the testamentary intent of the deceased person.
>
> 2. The provision should be worded so as to apply to defects in execution, alteration and revocation.
>
> 3. A further section should be enacted to allow the probate court to save a gift to a beneficiary who has signed for the testator or as a witness to a will, where the court is satisfied that no improper or undue influence was employed.

This proposal is limited to defects in a "document." It is likely that it was intended that "document" be restricted to written embodiments of testamentary intent, although the possibility that "document" might be read to include means of storing information as diverse as videotape or floppy disk was not considered.

This recommendation if implemented would vest a very broad discretion in the court. The only threshold requirement is apparently that the testamentary wishes must be in the form of a "document." The exercise of the power is, moreover, not contingent upon substantial compliance.

(vi) England

In a consultative document released in 1977 the English Law Reform Committee solicited comment on the possibility of introducing a "general dispensing power" into the English *Wills Act*.[110] However, in their 22nd report, issued in 1980, that option was rejected:[111]

> While the idea of a dispensing power has attractions, most of us were more impressed by the argument against it, namely that by making it less certain whether or not an informally executed will is capable of being admitted to

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[109] September 8, 1980, Report No. 43.

[110] The Law Reform Committee, Consultative Document on The Making and Revocation of Wills, 1977 at 6.

[111] May 1980, Cmnd. 7902 at 3. For a critique of their recommendations, *see The Making and Revocation of Wills—I*, (1981) 125 Sol. J. 263.

> probate, it could lead to litigation, expense and delay, often in cases where it could least be afforded, for it is the home-made wills which most often go wrong. . . . We think that an attempt to cure the tiny minority of cases where things go wrong in this way might create more problems than it would solve and we have therefore concluded that a general dispensing power should not be introduced into our law of succession.

The English Committee went on to advocate certain limited reforms designed to relax the execution requirements contained in the English Wills Act.

3. A Dispensing Power for British Columbia

(a) Issues Bearing on the Introduction of a Dispensing Power

(i) Will the Provision Result in a Multiplicity of Forms of Wills?

An argument can be made that the problems associated with testamentary documents which existed in England prior to the formalities imposed in 1837 would be revived by the introduction of a remedial power. The *Wills Act, 1837* was designed to reduce the volume of estate-related litigation and to provide a means of readily identifying a document as a will. In fact, the South Australian provision has been criticized as being so broadly drafted as to extend to every citizen the right to make a privileged will.[112]

A number of our correspondents expressed some concern that the introduction of a dispensing power would result in a certain amount of confusion about the form a will must take to be valid. One correspondent noted:

> The Wills Act formalities have introduced the necessary self-discipline into the making of wills, if I may put it that way. My fear is that the proposals . . . will lead to the dissipation of that self-discipline, the belief that one can do it one's self will grow apace, and the volume of litigation will grow also. When I think of the serious attitudes of those groups to which I speak about will-making, and their desires "to get it right", and I compare that attitude with the easy and ambiguous way in which they write letters to their relatives and their friends, I find my concern put in a nutshell.

This is perhaps the most difficult argument to overcome for proponents of a dispensing power. It can be met partially by imposing mandatory threshold requirements, as in Israel, or by imposing an onerous burden of proof. The South Australian provision requires that the court be satisfied beyond a reasonable doubt that the document was intended by the testator to be his will. In the *Graham* case referred to previously, Jacobs J. was of the opinion that this requirement imposed some limits on the permissible form, but was loathe to specify them. He felt that the greater the departure from the requirements of the statute, then the harder it would be for the court to reach the required degree of satisfaction.

Whether this objection is practical is open to question. Even where a court may exercise a dispensing power, a premium is still placed upon executing a will in the traditional form. Such a document is instantly recognizable as a will and would generally be admitted to probate without the need for proof in solemn form. For this reason we expect that the vast majority of wills will continue to be executed in the traditional form. Both the South Australian and Israeli experience bear this out. The Manitoba Law Reform Commission noted:[113]

> It is argued that introduction of such a provision would discourage the use of the proper formalities thereby impairing performance of all the valuable functions. It is submitted that this argument is flawed. The provision recommended is a remedial provision. It will be used only at final stages to save a will which is defectively executed, revoked or altered. The doctrine is not applicable at initial

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[112] Palk, Simon N.J., *Informal Wills: From Soldiers to Citizens*, [1976] Adel. L. Rev. 382.

[113] Report on *The Wills Act* and the Doctrine of Substantial Compliance, 1980, No. 43 at 19-20.

stages of execution. Reliance on it at that stage would mean subjecting an estate to needless litigation. A remedial provision should not discourage or in any way affect the use of formalities.

(ii) Will the Result be Increased Litigation Due to the Possibility of Numerous Contending Testamentary Documents?

At the time of the introduction of the South Australian provision, a prediction was made that the floodgates of litigation would be opened. This has not in fact occurred in Australia and only one case involving the remedial provision has been reported. Our Israeli correspondents have also indicated that there has not been a significant increase in the number of contested wills. In fact, one of our correspondents expressed the view that litigation has been reduced due to the unprofitability of taking technical formal objections.

It is undeniable that a dispensing power does increase the possibility that competing testamentary instruments may be produced for probate. However, we are not convinced that such conflicts will arise often enough to constitute a serious drawback. Moreover, where a personal representative is faced with a number of documents which could be construed as having testamentary effect, and concludes that he should not propound any particular document, it is open to him or to a person who alleges that the rejected document is valid as a will, to issue a citation to propound an alleged will under Rule 61 (45) of the 1976 Rules of Court. That rule provides:

> (45) (a) Where there is or may be a document which may be alleged to be a will of a deceased person, a citation to propound the document as a will may be issued by any person interested.
> (b) The citation shall be in Form 76 and shall be supported by affidavit and shall be directed to the executor and any other person named in the document.
> (c) An answer shall be in Form 77.

Where an answer is entered to such a citation, the validity of the document will be litigated.

There appears to be no authority, however, concerning the effect of a grant of probate made in default of an answer by those cited. The sanction contemplated by the rule itself is the issuance of probate without regard to the document in respect of which the citation issued. Upon the issuance of such probate, the executor is entitled to act upon the grant unless and until it is revoked.[114] Even if a person who failed to answer a citation is able to satisfy what would probably be the onerous burden of displacing the prior will, it is likely that any claims he may raise against the executor or beneficiaries under the first will would be defeated by laches, estoppel, or the defence of change of position. In any event the whole question of the effect of the revocation of a grant of letters probate at the instance of a person who fails to propound a will when cited to do so is one which can also arise under the current law, and the enactment of a remedial provision does not therefore give rise to any new problems.

On balance we feel that the remedies available to an executor who questions the effect of any document, and the protection offered to him by law, strike an adequate balance between the flexibility offered by a dispensing power and the executor's need to have some basis upon which to assess his position. As one of our correspondents noted:

> The obvious argument against the proposal is that it would encourage both fraud and litigation. As I said above, I do not think the opportunity for fraud would be any greater than it is at present. I think the fact that in the case of suspicious circumstances the onus of proving that the testator knew and approved of the

[114] See *Kerr* v. *McLennan*, (1875) 9 N.S.R. 502 (C.A.). It was regarded as a judgment *in rem* in *Irwin* v. *Bank of Montreal*, (1876) 38 U.C.Q.B. 375, see *Book* v. *Book*, (1887) 15 O.R. 119.

contents of the will is on the propounder is as great, if not a greater protection against fraud, than are the present formalities. It is true that there may be more litigation. But it will also be true that the testator's intention will be less often defeated, and that is a result worth paying for.

(iii) Will the Provision Result in Undue Delay in the Administration of Estates?

Such a delay might arise, for example, where beneficiaries must await the result of a contested probate action before receiving their interests under the intestacy. If another will is in existence, distribution must await the court's decision on the validity of a faulty will executed after a formally valid will.

On the other hand, such a delay can be justified on the grounds that it would provide an opportunity to give effect to the testator's intentions. Distribution of estates in British Columbia is already postponed for six months in order to permit applications to be made under the *Wills Variation Act*. The granting of a dispensing power to the court would not likely extend this period significantly, if at all. Even if it does, we think that the execution of the testator's actual intent is a more important consideration.

(iv) Are There Other Superior Methods of Accomplishing the Same Ends?

The granting of a dispensing power to the Supreme Court is not the only method of giving effect to the imperfectly expressed wishes of a testator. As we pointed out earlier, one could adopt the approach of reducing the number and type of formalities required. In addition, Professor Langbein has called on courts in the United States to develop their own "doctrine of substantial compliance" apart from legislation.[115] It is likely that Canadian courts would be very reluctant to develop such a doctrine without authorizing legislation. We have already outlined our objections to both these courses. Merely amending the formalities or relaxing the rule of strict compliance would not remedy the injustice created by the rejection of a document which although it does not meet the new formalities, nevertheless expresses the testator's true intent.

(v) Will a Dispensing Power Prevent the Frustration of Testamentary Intent?

The primary argument advanced in favour of a dispensing power is that it allows the court to give effect to a testator's wishes when it is certain that the document is meant to be the last will of the deceased. The failure of a testator to comply with the requirements of the *Wills Act* occasionally leads to a court expressing regret that it must reject a will on a technical point, since the court also finds that the document represented the true wishes of the testator. A dispensing power would provide the court with a back-stop to prevent the sort of injustice which can occur when a genuine will must be rejected.

We feel that no policy ground save that of convenience is served by rejecting a will which undoubtedly expresses the testator's true intent, and on balance find the argument based on convenience unconvincing. Although a study of probate procedure is beyond the scope of this paper, it is perfectly possible to devise a scheme which will make the task of a person propounding a faulty will easier. Under the current Supreme Court Rules, for example, an executor or administrator with or without will annexed is already obliged under Rule 61 (3) to swear an affidavit in form 66, 67 or 68. The latter two

[115] Langbein, The Crumbling of the Wills Act, *supra* n. 92.

forms require the deponent to set out either his belief that the document represents the last will of the deceased, or alternatively that despite a diligent search, no will was found. It would not be a large step for him to also have to set out the circumstances in which the will came to be defectively executed. Alternatively, the rules could provide that certain types of informal wills (e.g. holograph wills) should be admitted as a matter of course upon conditions. Such conditions might include the filing of affidavits concerning the genuineness of the handwriting. Later in this chapter we shall canvass a number of possible approaches to probating technically defective wills.

(vi) Will Uncertainty be Increased or Reduced?

As Professor Langbein points out, it is difficult to predict when the equities of a particular case will induce a court to try to avoid formal requirements. He notes that the strict compliance rule has achieved, what is in many respects, the worst of both worlds. When it is enforced unjust harshness may result, and when it is not, it may be as a result of judicial artifice.[116] The Israeli experience suggests that a dispensing power may reduce uncertainty by clarifying the issues between parties to a dispute. Many attacks on form are motivated not by any suspicion that the will does not represent the testator's true intent, but rather because the person challenging the will does not like its substantive provisions. The existence of a dispensing power forces the parties to litigate the real issues between them, and thereby simplifies proceedings.

(b) The Scope of a Remedial Power

An essential element of any decision to provide the court with a jurisdiction to admit wills to probate under a dispensing power is the scope of the power which the court may exercise. Must there be an attempted compliance with the *Wills Act*? A court could be restricted to remedying those wills executed under circumstances in which the testator had substantially complied with the Act. Thus a signature in the wrong position would not necessarily lead to the invalidity of the will.

In Professor Langbein's view the courts should as a matter of law require only substantial compliance with formal requirements. This presumes some attempt to comply with the requisite forms. The exact nature of any attempts to comply with formal requirements which would satisfy the "substantial compliance" doctrine is a question for argument. It would appear that Israeli law adopts this limited scope for its dispensing power; at least one court having held that there must have been some compliance with the Israeli *Wills Act*.

On the other hand, a broader dispensing power could be given to the court. Such a provision would not be restricted to cases where the testator had "substantially complied" with the formalities. It is this approach which has been adopted in South Australia. The statute provides that a testamentary document may be deemed to be the will of a deceased if the court is satisfied beyond a reasonable doubt that the testator meant the document to be his will. The language of the legislation is broad enough to permit the court to admit a will to probate although no attempt is made to comply with the statute.

We are of the opinion that the Supreme Court of British Columbia should be given the power to admit a will to probate notwithstanding that no attempt has been made by the testator to comply with the *Wills Act*, as long as the court is satisfied that the deceased intended the document to constitute his will.

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[116] *Ibid.*

(c) Threshold Requirements

(i) Generally

Although we have concluded that as a general rule, effect should be given to a testamentary instrument which undoubtedly embodies the testator's true intent, we are also firmly of the view that a general dispensing power may be cast too broadly. Certain forms of testamentary dispositions are so inherently suspicious that the benefits which might be derived from admitting them to probate are clearly outweighed by the inevitability of litigation and the probability of confusion. At the same time, if the law is to be perceived as arriving at defensible results, it must correspond to public expectations. Wills have always been regarded as documents particularly vulnerable to fraud, and hence the formalities of execution have been particularly onerous. The recognition that the application of these formal requirements is not justified in every case does not lead to the inevitable conclusion that every alleged embodiment of testamentary intent should be admissible to probate. Wills are generally recognized to be important documents. We therefore think it appropriate that the law recognize their special status by setting out certain threshold requirements for the invocation of a dispensing power.

We are of the view that the general public recognizes that most important documents should be evidenced in writing, and signed. At the same time, the law has traditionally regarded unusual circumstances surrounding the execution of a will with suspicion, and this view probably reflects a genuine public concern that suspicious wills be closely scrutinized. This suggests three possible threshold requirements — writing, a signature, and an onerous burden of proof.

(ii) Writing

We are of the view that no embodiment of testamentary intent should be admissible to probate unless it is in writing. We would not limit our recommendation to handwritten documents. We prefer to leave the question of wills otherwise reproduced to individual cases, rather than formulating a general rule. Earlier in this report we noted that in some jurisdictions which adopt holograph wills, controversy has arisen whether a holograph will need be wholly in the testator's handwriting, or whether such a will is admissible if only its material parts are handwritten. We wish to avoid this controversy completely. While handwriting itself may be a valuable indicator of the writer's identity, that in itself does not justify refusing probate to a will adequately proven by other evidence.

In recent years modern technology has brought methods of storing data, undreamt of by the draftsman of the *Wills Act, 1837*, well within the reach of the average testator. Home computers, tape recorders and videotape recorders, while not ubiquitous, are easily accessible. Should a testator be able to videotape his wills, or to program his computer to reproduce his will on its screen at a given command?

The provisions of the *Wills Act* and the *Interpretation Act*, when read together, leave open the possibility that a will may be probated even though the "writing" consists of images mechanically or electronically reproduced. "Writing" is defined in section 29 of the *Interpretation Act* as follows:

> "writing," "written" or a term of similar import includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form.

The inherent limitation in this definition is that the words be reproduced "in visible form." This would, for example, rule out videotapes, tape record-

ings and various devices (e.g. floppy disks, programming cards) used to program computers, which in turn reproduce the words on a television screen or machine written copy. Although the end product of videotapes or floppy disks may be legible on a screen, the words themselves cannot be executed by the testator as required by sections 4 and 6 of the *Wills Act*, and by our recommendation. The floppy disc or videotape may be signed, but the words of the will, although reproduced on the tape or disc, are not in visible form. The tape or disc would not therefore constitute the "writing" required by the *Wills Act*, section 3, or the "writing" which must be signed under our recommendation.

One novel form of will is arguably sanctioned by section 29 of the *Interpretation Act*. It would be possible to prepare a filmed will using animated letters and words. The words on the film would be in visible form without the intervention of any electronic or mechanical device, although the use of a projector would make viewing easier. The testator could then sign the film at its end, together with the two witnesses required by section 4.

Although it is possible to foresee that in a relatively short period of time, storing wills electronically, or on tape, may be advantageous, we have concluded that provision for such wills in a modern *Wills Act* would be premature. We are advised that the detection of tampering with electronic means of storing information would likely be a lengthy and expensive process, and that experts qualified to testify on such matters would not be readily accessible to executors in British Columbia. Moreover, the electronic storage and transmission of data is a rapidly changing field of technology, and for that reason we are not prepared to attempt to identify any new and acceptable medium for recording testamentary intentions. We therefore make no recommendation to expand the definition of "writing."

(iii) Signature

In the Working Paper we proposed, as a threshold requirement, that the document bear the testator's signature. Most people would readily accept the notion that affixing one's signature to a document is the usual means of approving and adopting its contents. We have concluded that the dispensing power we propose for British Columbia should require that the document be signed.

This aspect of our proposal attracted some comment from the Manitoba Law Reform Commission. They stated:[117]

> The British Columbia approach is beneficial in that it is broader than the Queensland approach and it does cover most of the difficulties currently encountered. Yet, circumstances can still be envisioned where strict adherence to even these minimal formalities could defeat the testator's intention. As Prof. Langbein points out what of the testator who is about to sign his will in front of witnesses, when an "interloper's bullet or a coronary seizure fells him". The likelihood of such an occurrence is small but the fact remains there is no necessity for such limitations to the proposed section. In effect such requirements do not conform with the functional analysis on which the remedial provision is based. For this reason such a limitation is not recommendable.

We are not of the view that the possibility of an interloper's bullet, or other similar and equally unlikely possibilities warrant the deletion of the requirement of a signature. We find more persuasive the case of a careful testator who, in striving to keep his testamentary dispositions up to date, writes out several alternative drafts. He decides in the end not to change his will, but retains his final draft for future reference. It is, of course, unsigned, and is

[117] *Supra* n. 113 at 19-20.

found at his death among his papers. Is it valid or not? The inevitable result must be litigation. As we are convinced that this situation is many times more likely than that which worried the Manitoba Commission, we have concluded that insisting on a signature is a valuable safeguard which will prevent injustice, confusion and unnecessary expense far more often than it will cause hardship.

We are not swayed by the argument that such a requirement "does not conform with the functional analysis." In fact, we believe quite the opposite. We acknowledge that formality has some purpose. Here the requirement of a signature performs a valuable channelling and evidentiary function. The point of introducing a dispensing power is to temper the arbitrariness with which rules respecting formalities have been applied, and not to deny the general desirability of formalities. We have simply concluded that the harm which would ensue from relaxing this particular requirement outweighs any benefit which would accrue from its abolition. In short, far from abandoning any functional analysis, in our view adopting the requirement of a signature recognizes that in some respects formalities serve a valuable function. It restricts the application of a dispensing power to documents which are most likely to represent attempts to communicate a settled testamentary intent.

In recommendation 4, we proposed that a general provision respecting signature by a person acting at the testator's direction should be enacted. We see no reason why this provision should not apply equally to a testator's signature on an informal will.

(iv) Burden of Proof

The South Australian provision requiring proof beyond a reasonable doubt raises the issue of whether a similar requirement should be imported into British Columbia law. We have concluded that the standard of proof should be the civil litigation standard of proof on the balance of probabilities. It is this standard which generally applies in probate matters.

A consideration in arriving at such a conclusion was the fact that the civil litigation standard is not itself immutable. In a lawsuit "proof" is inextricably intertwined with "belief", and the readiness of a court to be persuaded of the existence of a certain state of affairs will depend upon factors other than the mere mechanical weighing up of evidence. The point was put by Dixon J. in *Briginshaw* v. *Briginshaw*[118] as follows:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty: and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

It has long been held that where the circumstances surrounding the execution of a will give rise to a suspicion that it may not represent the

[118] (1938) 60 C.L.R. 336.

testator's true intent, a burden is placed upon the person propounding the will to dispel that suspicion by affirmative evidence. It is likely that the problem of determining testamentary intent where a document is defectively executed will be treated similarly. The cases respecting the dispelling of a suspicion establish that although the burden is only to establish testamentary intent on the balance of probabilities, the court will closely scrutinize the evidence before deciding to act upon it. In *Re Martin; MacGregor* v. *Ryan*[119] Ritchie J. held *per curia*:

> Counsel for the appellant contended that in all cases where the circumstances surrounding the preparation or execution of the will give rise to a suspicion, the burden lying on the proponents of that will to show that it was the testator's free act is an unusually heavy one, but it would be a mistake, in my view, to treat all such cases as if they called for the meeting of some standard of proof of a more than ordinarily onerous character. The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case. It is true that there are expressions in some of the judgments to which I have referred which are capable of being construed as meaning that a particularly heavy burden lies upon the proponents in all such cases, but in my view nothing which has been said should be taken to have established the requirements of a higher degree of proof.

There can be no closed list of circumstances which will cause the court to scrutinize the evidence jealously. The less the document resembles a standard will, the stricter the proof that will be required. Where the will contains unusual types of dispositions, or legatees whose inclusion as objects of the testator's bounty is unexpected, the court's suspicion may be aroused. Undoubtedly the court will also be concerned with the physical condition of the will, and in the case of informal documents such as letters, any recital of unusual facts may make it more difficult to establish the requisite testamentary intent.

(d) Transition

We think it important to specify that a dispensing power should apply only to documents signed by a testator who died after the legislation implementing our recommendation comes into force. Otherwise, it is possible that executors and beneficiaries who have acted in reliance on the invalidity of an informal or defectively executed document would be prejudiced. We do not wish to create a retroactive right to seek probate of an informal will where letters of administration or a grant of letters probate have already issued.

(e) Recommendation

The Commission recommends that:

5. The Wills Act *be amended by adding a section comparable to the following:*

Dispensing Power

Notwithstanding section 4, a document is valid as a will if

(a) it is in writing,

(b) it is signed by the testator,

(c) the testator dies after this section comes into force,

and the court is satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect.

6. The definition of "will" contained in section 1 of the Wills Act *be amended to include a document valid as a will under Recommendation 5.*

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[119] [1965] S.C.R. 757.

(f) The Probate of Informal Wills

Some of our correspondents were concerned that a dispensing power such as we recommend could unduly lengthen probate proceedings. Although we have concluded that the general beneficial effects of a dispensing power warrant running this risk, we are concerned that, where possible, measures be taken to minimize expense and litigation.

Under our recommendation, a number of documents may be tendered for probate. Some will be the holograph wills, i.e., wholly in the handwriting of the testator, and unwitnessed. Others may be partially printed or typed, and partially handwritten. In other cases, it may be contended that a series of letters constitute a "will." Some of these forms will obviously cause fewer problems than others. Holograph wills are probated expeditiously in other jurisdictions without undue difficulty, and it would be possible to stipulate, for example, that a will entirely in the handwriting of the testator and signed by him should be admitted to probate in British Columbia in common form, while other informal wills would have to be probated in solemn form.

In Alberta, holograph wills are probated in common form in the same fashion as formal wills. Proof of execution is by affidavit. Rule 10 (5) of the Alberta *Surrogate Rules* states:

> When a holograph will is presented for probate or with an application for administration with will annexed the applicant shall submit proof of execution thereof in Form 12 or in such other form as the judge may require to satisfy him that the entire will, including the signature thereto, is in the proper handwriting of the deceased.

Form 12 provides:

> AFFIDAVIT PROVING EXECUTION OF A HOLOGRAPH WILL
>
> In the Surrogate Court of ..... Alberta,
> Judicial District of .....
> In the estate of ..... deceased.
> I, C.D. of the ..... of .....
> in the ..... of .....
> (occupation)
>
> make oath and say:"
>
> 1. That I knew the said deceased in his lifetime and was present and did see the said deceased write and sign with his own hand the paper writing hereunto annexed and marked as Exhibit "A" to this my affidavit.
>
> or
>
> 2. That I knew and was well acquainted with the said deceased for many years before and down to the time of this death and that during such period I have frequently seen him write and also subscribe his name to documents whereby I have become well acquainted with his handwriting and have now carefully perused and inspected the paper writing hereunto annexed and marked Exhibit "A" to this my Affidavit which purports to be and contain the last will and testament of the deceased and bearing date ..... and subscribed thus .....
>
> 3. That I verily believe the whole of the will together with the signature .....
> subscribed thereto to be of the true and proper handwriting of the deceased.
>
> Sworn before me at the .....
> ..... of .....
> in the Province of .....
> this ..... day of .....
> .....
> A Commissioner for Oaths

In Manitoba, the Surrogate Court Rules also provide that holograph wills are generally admitted to probate in the same fashion as formal wills. Rule 39 (5) of the Surrogate Court Rules provides:

> **Evidence as to holograph will.**
>
> **39 (5)** Upon application for probate or administration with will annexed of a holograph will, evidence shall be given satisfactory to the judge
>
> (a) as to the handwriting and signature of the testator, and that the entire will is wholly in the handwriting of the testator; and
>
> (b) as to the validity of the will, including evidence that
>
> (i) at the time or apparent time of the signing of the will, the testator was of the full age of eighteen years; and
>
> (ii) at or about that time or apparent time, he appeared to be of sound mind, memory, and understanding.

Similar provisions might be adopted in British Columbia. However, in our Working Paper we did not canvass the manner in which informal wills should be probated, and for that reason we do not feel it appropriate to make a recommendation in this Report. In a later Report, we hope to examine probate procedure and administration, and the possibility of singling out certain forms of informal wills for probate in common form might usefully be discussed in that context.