



TIPS FOR AFFIDAVITS ATTESTING TO HOLOGRAPH INSTRUMENTS

By Suzana Popovic-Montag - February 2024

If you follow our blog, you may already know that two estate forms currently used in Ontario are being updated.¹ In fact, the new versions of Forms 74F and 74G can already be found on the Ontario Court Services website.² In light of the introduction of these new forms, the rest of this Solicitor's Tip focuses on Form 74F and information that ought to be included in an affidavit attesting to the deceased's handwriting on a holograph instrument.

Handwriting of the Deceased Must be Confirmed

When submitting a holograph instrument to probate, it is necessary to provide evidence confirming that it was actually written by the deceased. An affidavit ought to be sworn by someone who is "well-acquainted" with the deceased and frequently saw their signature and handwriting.³

Evidence of the Deponent's Relationship to the Deceased is Required

An application for a Certificate of Appointment of Estate Trustee (probate) in respect of a holograph instrument may be denied, even if the application is uncontested, if insufficient information is provided regarding the relationship between the deceased and the person attesting to the deceased's handwriting.⁴ As such, it is good practice to provide information to the court regarding the deponent's relationship with the deceased and, if applicable, how the deponent is connected to the deceased's estate and/or the applicant seeking probate.

Whereas the current version of Form 74F does not really touch on such information,⁵ the new version of Form 74F does, requesting much more information than its predecessor, including whether the deponent:

¹ See Megan Zquette, "Upcoming Amendments to Estate Court Forms" (22 January 2024), online: Hull & Hull LLP, Knowledge <<https://hullandhull.com/Knowledge/2024/01/upcoming-amendments-to-estate-court-forms/>>.

² See Form 74F (Affidavit Regarding a Holograph Will or Codicil), online: Ontario Court Services <<https://ontariocourtforms.on.ca/static/media/uploads/courtforms/civil/74f/rcp-e-74f-1123.docx>> and Form 74G (Renunciation and Consent), online: Ontario Court Services. <<https://ontariocourtforms.on.ca/static/media/uploads/courtforms/civil/74g/rcp-e-74g-1123.docx>>.

³ See Ian M. Hull and Suzana Popovic-Montag, *Macdonell, Sheard and Hull on Probate Practice*, 5th edition (Toronto: Thomson Reuters, 2016) at 307.

⁴ See *Re Welgan (Estate of)*, 2004 ABQB 935.

⁵ See Form 74F (Affidavit Attesting to the Handwriting and Signature of a Holograph Will or Codicil), online: Ontario Court Services <<https://ontariocourtforms.on.ca/static/media/uploads/courtforms/civil/74f/rcp-e-74f-0921.docx>>.

- is applying to be estate trustee with respect to the estate;
- is related to the person applying to be appointed estate trustee or in a personal relationship with that person;
- has a personal interest in the estate as a beneficiary;
- is married to a beneficiary of the estate; or
- has an interest in the estate pursuant to the will, or would have an interest in the estate if it were to be distributed on intestacy.⁶

Ideal Deponent Remains a Neutral Third Party

The affidavit attesting to the deceased’s handwriting on a holograph instrument ought to be sworn by a neutral third party, if possible.⁷

Arguably, having the testator’s handwriting and signature affirmed by a person who has an interest in the estate is inconsistent with the spirit of the *Succession Law Reform Act* – after all, under the *SLRA*, gifts to beneficiaries who witness a testator’s signature on a will are void without a court order.⁸

While, traditionally, such affidavit evidence would often be obtained from bank-tellers, with the rise in online banking and fewer personal relationships, we often need to consider other sources. If there is no neutral third party who can attest to the deceased’s handwriting, it is advisable to include evidence with the probate application addressing what steps were taken to find a neutral third party and that no neutral party could be found.⁹ Under such circumstances, an application for probate may still be granted – as noted in *Probate Practice*, “[w]here the matter is not contentious, an affidavit from a member of the deceased’s immediate family ... should usually suffice.”¹⁰ However, an affidavit from a person with an interest in an estate may also be acceptable, even if the will is later contested.¹¹

Key Take-Aways

When preparing a probate application in respect of a holograph instrument, the affidavit attesting to the deceased’s handwriting ought to:

- confirm that the instrument was written by the deceased;

⁶ Form 74F (Affidavit Regarding a Holograph Will or Codicil), online: Ontario Court Services <<https://ontariocourtforms.on.ca/static/media/uploads/courtforms/civil/74f/rcp-e-74f-1123.docx>>.

⁷ See *Re Welgan (Estate of)*, 2004 ABQB 961 at para. 15.

⁸ *Succession Law Reform Act*, R.S.O. 1990, c S.26, ss. 4, 12.

⁹ See *Re Welgan (Estate of)*, 2004 ABQB 961 at para. 15.

¹⁰ Ian M. Hull and Suzana Popovic-Montag, *Macdonell, Sheard and Hull on Probate Practice*, 5th edition (Toronto: Thomson Reuters, 2016) at 307.

¹¹ See, for example, *Delongchamp v. Fex-Tinkis*, 2007 CanLII 29961 (ON SC). In this case, the party applying to be appointed estate trustee swore the affidavit attesting to the deceased’s handwriting. The will was later challenged, but this “conflict” did not affect the outcome.

- establish how the deponent knew the deceased; and
- indicate whether the deponent has any connection with the application for a Certificate of Appointment of Estate Trustee or, alternatively, any connection to the estate.

The addition of a checklist to the new Form 74F should be helpful in assisting applicants to ensure that this information is covered and will highlight whether the deponent is neutral. If a neutral third party without any connection to the application or the estate cannot be found to swear the affidavit, this information also ought to be provided to the court with the application.

While an application for a Certificate of Appointment of Estate Trustee can be submitted for filing with the prior version of Form 74F until April 1, 2024, it may be a good idea to start using the new version of Form 74F now, given the additional pertinent information it provides to the court.