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## Handwritten Changes to Wills

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## HULL & HULL LLP BREAKFAST SERIES OCTOBER 14, 2010

### HANDWRITTEN CHANGES TO WILLS

*Sharon Davis*

It is one thing to express one's wishes as to the intended disposition of one's property after death, but what clients often do not appreciate is that there are restrictions imposed by law as to how one may properly achieve their objective.

In preparing a Will, a lawyer must take great care to produce a document that will fulfill the testator's intentions and be acceptable by the Court. This means that great attention must be paid to the language used in the Will right down to the spelling and grammar. The itinerant or misplaced comma has, as we all know, caused great (and legendary) difficulty in legal drafting. Also well known to estates solicitors are the formalities required by the *Succession Law Reform Act (SLRA)*, that to be valid a Will must be in writing and signed by the testator in the presence of two witnesses.<sup>1</sup>

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<sup>1</sup> *Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 3 & 4:

#### **Will to be in writing**

3. A will is valid only when it is in writing.

#### **Execution**

4.(1) Subject to sections 5 and 6, a will is not valid unless,

(a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;

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

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

Any alterations made to a Will must meet the same formality requirements in order to be valid under the *SLRA*. If the alterations are not signed and witnessed by two witnesses in the Will in accordance with section 18(2), the alteration will have no effect except to invalidate the words or effect of the portion of the Will that is no longer apparent<sup>2</sup>.

While a lawyer would be aware that, ideally, no handwritten changes should ever appear on a formal, witnessed Will because a validly executed Codicil is the proper legal mechanism for changes to the Will, this is not common knowledge for your clients. It is surprising how often we see notes in margins and changes in the testator's own handwriting made at a time (or times) well after the Will was first witnessed and signed.

Many "lay" people seem to think that because a Will is a document indicating their last intentions with respect to their property, that they are free to change those intentions by scratching out and scribbling on portions of their Wills. Little does such a testator know that this is an expensive exercise that can cause great difficulty in sorting out his or her estate after death.

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<sup>2</sup> *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 18

### **Alterations in will**

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

### **How validly made**

(2) An alteration that is made in a will after the will has been made is validly made when the signature of the testator and subscription of witnesses to the signature of the testator to the alteration, or, in the case of a will that was made under section 5 or 6, the signature of the testator, are or is made,

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

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

Sometimes, the testator will have a photocopy of a Will and will make handwritten changes on it. What you might have in this situation is a Will that is neither a Holograph Will, as it was not entirely in the handwriting of the deceased, nor a validly executed Will as it does not meet the formalities required to be proven in solemn form.

When advising clients, it would be wise to explain that they should refrain from making any marks of any kind on their Wills or photocopies thereof because this could cause a myriad of issues as to the interpretation of the Will that could require an expensive Court Application to sort out. As most clients are very concerned about avoiding expenses to their estates so as to maximize the benefit to next generations, this should be a motivating factor in preventing such difficulties when it comes time to probate the Will. Furthermore, at the end of the day, their true wishes may not be given legal effect and could even result in squabbling causing permanent family rifts.

Another difficulty is encountered in situations where clients are prolific "note" writers and a variety of handwritten notes are discovered that exist along with a formal Will. The testator may think that they are being helpful if they further explain, iterate or reiterate what they want done with their property. Some might think that the more instruction, explanation and description the better. Ironically, what a testator views as helpful additional advice can actually cause much confusion. What the testator fails to take into consideration is that each document wholly in the handwriting of the testator may stand on its own as testamentary document pursuant to section 6 of the *SLRA* as a Holograph Will<sup>3</sup>.

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<sup>3</sup> *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 6:

#### **Holograph wills**

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

This can muddy the testamentary waters, even if it is well understood by everyone what the testator meant. In circumstances of inconsistency or ambiguity, the only safe route for an estate trustee to avoid liability to potentially disappointed beneficiaries is to apply to the Court for advice and direction so the Court can make a final decision binding on all who would have any cause to complain, whether or not they were parties to the proceeding.

Any lawyer who keeps a Wills bank would do well to check with clients at regular intervals to inquire whether there have been circumstances in the intervening years since their Wills were executed that would require new Wills or Codicils. While an important component of good client service, such a routine check also provides the occasion to update client contact information in a timely manner, remind your clients of the services you provide (a good marketing opportunity) and has the added advantage of providing information that could assist family members to locate the Will should they find your letters.

### **Ontario Case Law**

So what happens if your client passes away and her family brings you her Last Will in which she has attempted to change a bequest to Aunt Eunice by crossing out “diamond ring” and writing in “garden rake”? She may or may not have signed her name or initials and put the date and in the margin.

What follows is how some Ontario Courts have interpreted such markings.

### ***CIBC Trust Corp. v. Horn*, 2008 CarswellOnt 4706 (ON S.C.J)**

The decision in *CIBC Trust Corp. v. Horn* contains a helpful and thorough review of the law with respect to revocation or alteration, Holograph Wills, and the doctrine of substantial compliance as it relates to the requirements for the finding of a valid Will.

CIBC Trust was the named estate trustee in a typewritten and properly executed Will and Codicil. The Will contained specific bequests to number of individuals with residue of the estate to be divided equally among three charitable organizations. Subsequent to execution, the Will and Codicil were substantially altered by handwritten, undated and unsigned notations beside a number of specific bequests and three additional handwritten unnumbered paragraphs were added. The Trustee commenced an application for advice and direction regarding the administration of estate. The Trustee was directed to administer estate in accordance with provisions of typewritten Will and Codicil as originally and properly executed by the testator without regard to any of the handwritten changes or additions.

The Court applied the following principles in finding the markings by the testator to be of no effect:

- To be duly executed, a Will must be in writing and signed pursuant to sections 3 and 4 of the *SLRA*.
- There is a presumption of validity where a Will is regular on its face and apparently duly executed; in absence of evidence to the contrary, it is assumed that the statutory requirements regarding the formalities of execution have been complied with.
- If the revocation or alteration of a Will (or a part thereof) is in issue, sections 15 and 18 of the *SLRA*, respectively, are engaged.
- Intent is a necessary element in revocation; the testator must be of sound mind (i.e., have the requisite testamentary capacity).
- The provisions of a Will may be altered, and thereby wholly or partly revoked, by obliterating or otherwise rendering some provision no longer "apparent" as per section

18 of the *SLRA*. "Apparent" means apparent on an inspection of the testamentary instrument, not by extrinsic evidence.

- An alteration made to a formal Will once it has been executed is valid only if the alteration is signed by the testator and attested and signed by two witnesses.
- Alterations made before the execution of the Will may form part of the Will, though not duly executed or initialled, but the burden is on the person who seeks to rely on them to prove that they were made before the Will was executed.
- Due execution is not required where an "alteration" is made so as to render part of the Will "no longer apparent." Accordingly, an "alteration" may amount to a revocation where it is so complete as to amount to an obliteration or destruction of a part of the Will.
- A testator's signature in a Holograph Will should be at the end of the Will pursuant to subsection 7(1) of the *SLRA* but the Will is not invalid if the signature is someplace else (subsection 7(2)(a)). However, a Holograph Will must include a signature.

The Court further commented that courts in Ontario do not have the same discretion that exists in some other jurisdictions in Canada where the legislation allows courts the discretion to dispense with formal requirements of a Will if there is a document from which the deceased's testamentary intention can be determined. Ontario courts do not have the discretion to dispense with formal requirements imposed by the *SLRA* and so cases from other jurisdictions must be read with some caution.

By way of example, in *Coate Estate, Re (1987)*, 26 E.T.R. 161 (Ont. Surr. Ct.), Sheard J. was unable to admit to probate clear, typewritten instructions sent by a testator to her solicitor regarding changes to be made to a previous Will. Even though the testator's intentions were clear, the typewritten instructions did not constitute either a Will or a Holograph Will. In addition,

the handwritten notes and comments on the original Will did not constitute valid alterations, revocations or a Holograph Codicil. In the absence of the strict observation of the formalities required for Wills and Codicils in the *SLRA*, the Court did not have the discretion to give effect to what could appear to be the intentions of the deceased.

In *CIBC Trust v. Horn* the Court commented that although it might have been possible to determine some of the testator's thoughts from her handwritten changes, they could not be said to represent her firm intentions. The testator had executed more than one formal Will in her lifetime and she knew the procedure for changing her Will. Furthermore, even if a firm intention could be determined from the document, the Court did not have the discretion to give effect to that intention because the changes did not comply with the formalities required by the *SLRA* and were neither valid alterations nor a valid Holograph Codicil.

***Luty v. Magill*, 2004 CanLII 48165 (ON S.C.)**

In *Luty v. Magill* the deceased filled in a pre-printed Will Form. She properly signed her name in the presence of two witnesses in accordance with the requirements of the *SLRA*. The blank spaces were filled in with certain dispositions in the deceased's handwriting. However, the deceased later made changes on the face of the Will after it had been signed and witnessed.

These changes included changing the executor, adding a residue clause and other interlineations, alterations and deletions on the face of the Will, which she initialled. Some of these were dated and others were not. In some cases the text underneath was visible and in others the text was completely obliterated, although with technological assistance, the obliterated portions could be discerned.

The Court found that since the deceased's Will was not a Holograph Will but a formally executed Will, alterations made after it was executed were excluded unless they were made in accordance with the formal requirements of the *SLRA*. Therefore a subsequent holograph



alteration would not be effective to amend a formal Will. However, if such alterations could stand alone as a Holograph Codicil, even if written on the Will, these would be effective testamentary dispositions.

The Court found that the undated alterations for which there was no evidence, extrinsic or otherwise, to prove when they were made, and that did not totally obliterate the name of the beneficiary or the amount of the legacy, were not valid alterations to the Will. Those legacies therefore remained valid as originally made.

The changes that were initialled, dated, marked "delete", and that obliterated the text beneath were Holograph Codicils validly made under the *SLRA*.

The Court in *Luty v. McGill* cited ***King v. King-Fleming (Litigation Guardian of)* (1995), 10 E.T.R. (2d) 258 (Ont. Gen. Div.)**, a case where changes to the Will excluding certain named persons from a class of beneficiaries were in the testator's own handwriting, signed and dated by him. The Court in *King v. King-Fleming* found that the changes were a valid Holograph Codicil, and that it was not necessary for a Codicil to be dispositive of assets. "It could be a change of executors, or a direction to the executor to do something. If the writing is equally capable of being either a Holograph Codicil or an alteration, within the provisions of the *SLRA*, the Court said that it should strive to construe the Will so as to give effect to the testator's actual or subjective intent so as to avoid an intestacy. In *Coate Estate (Re)* [1987] O.J. No. 1492 (Ontario Surrogate Court), the Court noted that initials can constitute a signature for purposes of the applicable legislation."

***Owers v. Hayes* (1983), 43 O.R. (2d) 407 (Ont. H.C.)**

*Owers v. Hayes* is an interesting case where a note written by a mother to her daughter was found to be a Holograph Codicil that revived a Will made prior to marriage. In 1968 the testator, then a widow, executed a formal Will naming her daughter executrix and sole beneficiary

leaving her estate to her daughter, who was her only child. The Will did not mention that it was made in contemplation of marriage. The testator wrote a note to her daughter in 1969 that said "Just in case I do marry Norm & anything ever happens to me — I would like him to live rent free, until he desires to move back to Brockville or passes on...". In 1970 she married Norm and they remained married up to the time of the Testator's death in 1980. The Court found that the note to the testator's daughter constituted a valid Holograph Codicil made in contemplation of marriage that gave a life estate in her home to the man she was planning to marry and revived the earlier Will. The note was addressed to her daughter and although undated it referred to a period when she was recuperating from a bunion operation and thus, the timeframe could be identified. Also, the note was signed "Mom", a signature that one would use in writing to one's daughter.

The Court found that the test of a Holograph is intent and the intent expressed in the note to her daughter was substantiated by the evidence of the daughter who testified that "her mother told her a week before she died that if she were to die, Barbara would find anything she would need in the cedar chest". This intent was also expressed to a friend of the testator who testified that the testator said in her presence and the presence of the defendant, that "everything was to go to her daughter Barb and she wanted Norm to live in the house". Accordingly, the Court was satisfied the note was intended as a testamentary disposition.

### **Case Law in Other Jurisdictions**

A similar approach has been followed in other jurisdictions, such as the recent decision by the Alberta Court of Queen's Bench, *Laidlaw Estate (Re)*, 2010 CarswellAlta 352.

In *Laidlaw Estate (Re)* the testator made a typewritten Will that was properly and formally signed and witnessed under provisions of *Wills Act*. The testator subsequently made handwritten changes to will, and signed at end of changes, though there were no witnesses to

the changes. The Will and handwritten changes contained errors in the spelling of the names of his daughter and granddaughter. The Court found that because there were no witnesses to handwritten changes, section 19 of the *Wills Act*<sup>4</sup> applied to void such changes as an alteration to the Will. However, the handwritten changes could be understood independently of typed text and therefore constituted a valid Holograph Codicil. The spelling errors in beneficiaries' names created no doubt that the testator was referring to his daughter and granddaughter. The testator suffered from dyslexia, which explained rather common spelling mistakes he made.

The Court quoted *Feeney's Canadian Law of Wills, 4th ed.* (Toronto: LexisNexis Canada Inc. Revised in September 2009) in describing how Canadian law allows for the admission to probate of handwritten portions of a stationer's form or the holographic part of any document containing non-holographic writing. The Court must be satisfied of three conditions:

1. The document was intended to have dispositive effect;
2. The spurious writing or printing is superfluous or unessential; and

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<sup>4</sup> Section 19 of the *Wills Act*, RSA 2000 c. W-12 is similar to Ontario's *SLRA*:

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

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

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

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

3. The holographic parts are capable of standing by themselves without the spurious printing or writing.

Court found accordingly that the handwritten changes to the Will stood on their own and were to be probated as a Holograph Will.

In a recent New Brunswick Court of Queen's Bench decision, ***Stackhouse Estate v. LeFler Estate*, 2010 CarswellNB 273 (N.B.Q.B)**, a paragraph of the Will had been marked through with black marker. The marking was not witnessed and initialled or signed by the testator and two appropriate witnesses as required by *Wills Act*.

The decision contains a useful examination of the meaning of "apparent", as being optically apparent on the face of the document itself by natural means such as holding it up to the light or using magnifying glasses. It did not mean capable of being made apparent by extrinsic evidence or by any artificial means. Therefore, any original provision that could be deciphered stood, and the attempted obliteration was disregarded.

In the Will before the Court, the name of the beneficiary could clearly be discerned, though the description of the location where she was from was not so readily apparent. Accordingly, the Will was read to the extent of the words visible to include the bequest to the named beneficiary.

The Court also found that this was an appropriate case in which to award costs out of the estate, as the confusion and expense was occasioned by the conduct of the testator.

### **Summary**

In order for handwritten changes to a duly executed Will pursuant to the *SLRA* to be given effect they must be made at a time when the testator has testamentary capacity and are:

1. Dated and signed by the testator and two witnesses in the presence of one another, somewhere near the changes (or referenced in a memorandum someplace else in the Will); or
2. Capable of standing alone as Holograph Codicils in that they demonstrate testamentary intent and can be understood without reference to the typewritten portions.

Any changes that completely obliterate portions of the Will such that the provisions cannot be discerned from an inspection on the face of the document will be effective to remove said portions from the Will.

### **Procedure**

The normal procedure for dealing with a Will that has been altered is to submit to the Court an Affidavit of Condition<sup>5</sup> sworn by a subscribing witness that sets out the changes made since the Will was originally witnessed and signed.

As a point of interest on Affidavits of Condition, in ***Wallbridge Estate, 2010 ONSC 3409 (CanLII)***, Brown, J. held that one Affidavit containing all the information required for an Affidavit of Condition and most of the information required for an Affidavit of Execution was acceptable on an Application for a Certificate of Appointment of Estate Trustee with a Will, in lieu of the two separate Affidavits required by the *Rules of Civil Procedure*.

In *Wallbridge Estate* two alterations appeared on the face of the Will such that someone had placed asterisks beside the names of two beneficiaries and in the margin of the Will noted “\*Deceased”. The Applicant filed an Affidavit of Condition (Form 74.10) only in support of the Application for probate.

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<sup>5</sup> See precedent attached.

The language of execution was not identical in each form. While paragraph 1 of the Affidavit of Condition tracked the language of the first sentence in paragraph 2 of the prescribed Affidavit of Execution, it lacked the concluding sentence: "We were both present at the same time, and signed the document in the testator's presence as attesting witnesses."

Brown, J. was prepared to relieve the technical non-compliance pursuant to Rule 2.03 because:

1. It was implicit in paragraph 1 of the filed Affidavit of Condition that both witnesses were present when the testator signed the Will;
2. The deficiency notice was not sent to counsel by email and time was wasted as a result;
3. The applicant was dying of cancer and so there was some urgency to processing the application; and
4. This was a finding within the power of the Court that could improve efficiency until the Rules Committee had the opportunity to consider combining certain forms under Rule 74 to simplify the filing process for applicants.

**Ontario**  
**SUPERIOR COURT OF JUSTICE**

IN THE ESTATE OF «name», deceased.

**AFFIDAVIT OF CONDITION OF WILL OR CODICIL**

I, «name of witness», of the City of Toronto, make oath and say/affirm:

1. On «date», I was present and saw the document marked as Exhibit "A" to this affidavit executed by the deceased, in the presence of myself and «name of other witness»
2. The following alterations, erasures, obliterations or interlineations that have not been attested appear in the document:
3. The document is now in the same condition as when it was executed except for .

SWORN BEFORE ME at the City of  
Toronto, on October », 2010.

\_\_\_\_\_  
A Commissioner for Taking Affidavits

\_\_\_\_\_  
Witness

IN THE ESTATE OF «name», deceased

» » and Defendant  
Plaintiff

Court File No: »

*Ontario*  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at «place»

**AFFIDAVIT OF CONDITION OF WILL OR CODICIL**

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