
KEEPING IN TOUCH

HIGHLIGHTS

This edition of *Keeping In Touch* focuses on:

- validity and effect of handwritten or holographic wills
- pitfalls of printed form wills
- the impact of intestacy on estate distributions

INTRODUCTION

Everyone knows that making a will customarily involves instructing a lawyer to prepare a document which expresses the intentions of the testator in archaic, verbose and often unintelligible language, signing the document in the presence of two independent witnesses and verifying its due execution by the sworn affidavit of one of the witnesses. Although wills are one of the least costly services supplied by the legal profession many individuals delay or refrain from making a will for fear of incurring substantial legal expense. In reality those costs seldom exceed a few hundred dollars and the costs involved in resolving the legal problems arising from an intestacy, an invalid will, an interpretation question or a dependant's relief claim can be in the thousands and even tens of thousands of dollars.

Since self-help is currently in vogue and is quite appropriate in certain situations we think it would be worthwhile to draw the reader's attention to the self-help devices available and the pitfalls which may result from their uncritical use.

HOLOGRAPHIC WILLS

A holograph, or handwritten will, is a statutory creation recognized by most Canadian provinces, including Ontario, as a valid form of testamentary instrument provided they satisfy the form and substance requirements of the enabling statute in each particular province.

To be a valid will, the holograph must:

1. be written entirely in the testator's own handwriting and be signed by the testator; and
2. contain sufficient evidence that the testator had a deliberate or fixed and final expression of intention regarding disposal of his or her property upon death to make it effective.

British Columbia, Nova Scotia and Prince Edward Island generally recognize a holographic instrument as valid only if it is prepared by an active member of the armed forces or a seaman at sea. The other provinces do not impose this limitation.

IN BRIEF

Failure to undertake proper estate planning can often lead to an intestacy, which may have far reaching and unwanted consequences for the family and/or dependants of a deceased person. Holographs and printed form wills are potential solutions but do-it-yourself wills frequently fail to comply with strict legal requirements thereby being invalid. Even if they are valid these devices may create serious interpretation problems for the survivors.

The advantage of a holograph is that the testator prepares the instrument himself or herself at his or her convenience. Additionally, witnesses are not required for such a will to be considered valid. If a document is by chance witnessed, this fact will be ignored and the document may be otherwise found valid.

The disadvantage of a holograph or printed form will is that the testator may not have the requisite knowledge to properly prepare such a document and may have failed to get sound legal advice in that regard, which could result in the will ultimately being deemed invalid and the estate being distributed as if on an intestacy. Furthermore, the testator may create serious interpretation problems by using imprecise language or by expressing himself or herself incompletely or vaguely. Accordingly, while a holograph may be convenient for the testator to prepare, the testator's last wishes may not be carried out if there is ultimately a finding that the document does not qualify as a testamentary instrument.

It is therefore incumbent upon the person asserting the validity of a holograph to show, by its contents or by extrinsic evidence, that it is of the required nature and character to be a valid testamentary document. The use of "extrinsic" evidence or evidence other than the document itself is very important when a court makes its determination on the validity of a holograph instrument. Where the court can find evidence of a fixed and final expression of "intention" the balance often tilts in favour of finding a valid holographic will. The courts are, however, severely constrained by statutory provisions which can often lead to anomalous results.

The most common reason for a court to reject a purported holograph is based on the strict statutory requirement that it must be wholly "in the testator's handwriting". This requirement has resulted in inconsistent decisions from province to province despite similarity of statutory language. In general, most provinces do not recognize typewritten holograph instruments as valid wills and even in those provinces where typewriting is permitted, a holograph may be invalidated by the mere fact that it was partially typewritten.

As with formally executed testamentary instruments when determining whether a document is signed properly, the courts consider the location of and the actual mark purporting to be the testator's signature. What will qualify as a signature is broadly construed by the courts. Most provincial legislation requires that the signature must be somewhere at the end of the document. All words found after the mark or signature (absent statutory provision to the contrary) will be ignored in determining both whether the document is a valid holograph instrument and, if so found, in interpreting the document itself. A court will presume that a testator completes the document first and that the signature is penned last.

PRINTED FORM WILLS

The use of printed forms containing standard provisions in the preparation of wills applicable to straightforward family situations has created significant problems associated with the validity of

holograph instruments. Printed forms of wills are intended to be formally executed in the presence of two witnesses. Unfortunately, these printed forms are frequently completed by the testator who intends it to be a holograph and consequently fails to have it witnessed. The result is that documents that are clearly testamentary instruments are often declared invalid because they do not meet strict statutory requirements.

In most cases, the handwritten portions are insufficient on their own to be valid holograph instruments as the deceased has simply filled in the blanks and therefore the document cannot be construed to be wholly "in the testator's handwriting". A court may nonetheless undertake the artificial exercise of separating the printed form into its handwritten and printed parts in an attempt to determine if sufficient testamentary effect exists in the handwritten part alone to find a valid holograph instrument. But the court is usually unable to implement the presumption of validity in these cases and has no choice but to make a finding of intestacy.

Furthermore the layperson who properly completes the printed form and has it witnessed also faces many risks. For example, a beneficiary or a spouse thereof cannot be a witness; the word "child" is often misused when "lineal decedent" is meant and words like "house and contents" can be interpreted to include securities in an on-premises safe. Wills are a virtual minefield of potential interpretation problems so the risks for even a very knowledgeable layperson are great!

INTESTACY

Intestacy describes the situation where a person dies without having prepared a valid will or where all or part of a testamentary instrument is declared to be invalid. If the court determines a document which purports to be a will is inadequate or invalid, a finding of intestacy is made and the court deals with the estate of the deceased as if the deceased died without leaving a will at all. The intentions of the deceased, which may have been expressed in the invalid document, have no bearing on the distribution of the deceased's estate. Rather the estate is distributed in accordance with the appropriate statutory regime.

Where a person dies intestate, the court must appoint a person called an estate trustee or an "administrator" to perform the duties and responsibilities carried out by "executors", persons named in a valid will to distribute the assets in the estate. The appointment of the estate trustee is in the discretion of the court, but the order of priority of those eligible to be appointed begins with the spouse (including common-law spouses in Ontario) and is followed by children, grandchildren, great-grandchildren, father or mother and brothers or sisters. In addition, appointment as estate administrator may also be granted to the Public

Guardian and Trustee in appropriate cases where no other person appears available or willing to assume the responsibility.

Unlike a situation where the deceased has determined who benefits from the estate, in an intestacy the statute provides a fixed legislative scheme that determines who inherits the deceased's estate. In Ontario, for example, the following is the order of inheritance on an intestacy as set out in the *Succession Law Reform Act*: spouse, children and other descendants, parents, brothers or sisters, nieces or nephews and, if the deceased does not leave any of the foregoing relatives, the remaining next of kin are entitled to the deceased's estate. A spouse has a preferential claim on the first \$200,000.00 of estate assets and any dependant can apply to the court for relief if the statutory scheme fails to provide for him or her.

The effect of this statutory regime for both administration and distribution of an estate on an intestacy is that the testator's wishes may not be carried out and the testator's estate may be administered and distributed in a manner that is entirely different than that which the deceased had in fact intended. For example, if the deceased wished to leave everything to his or her children and grandchildren but died intestate, the legislative scheme would have the effect of providing for some, if not all, of the estate to go to the deceased's spouse, potentially leaving nothing for those who were really intended to benefit.

A final and most unwanted consequence of an intestacy is a concept known as escheat and *bona vacantia*, which occurs when a person dies intestate and without any lawful heirs under the statute. As a consequence, the estate is forfeited to the Crown in right of the Province. With a valid will, a deceased with no next of kin could otherwise have made dispositions to friends and/or made charitable and philanthropic gifts rather than allowing a lifetime of accumulation to be forfeited to the province.

AN EXAMPLE

In a recent case handled by the Firm, a situation arose in which a printed form will had been prepared by the testator and executed. However, the document was not properly witnessed at the time of its creation and consequently it failed to comply with the formalities prescribed by statute to be a valid will. The intention of the deceased was clearly to make a proper, valid will, but the seemingly innocent mistake of not having it properly witnessed resulted in an invalid testamentary document.

An investigation as to whether the document could be characterized as a holograph instrument was undertaken. The deceased had filled in the blanks in the printed form will in his own handwriting and thus, it might potentially have been characterized as a holograph instrument. The document was partially

printed and therefore, was not wholly "in the testator's handwriting" and the handwritten portions alone did not demonstrate a "fixed and final expression of intention regarding disposal of his property". As is commonly the case, the form and substance requirements of a holograph instrument could not be clearly established by the person asserting the validity of the will. The result was an unwanted intestacy which had dramatic consequences for the distribution of the deceased's estate.

The deceased's intention was to leave all his property to his common-law spouse of 30 years. The deceased's only other surviving relative was his estranged adult son who was to receive nothing under the terms of the invalid testamentary document. As a result of the intestacy, his son would receive the entire estate being the only surviving relative under the applicable Ontario law. In Ontario, a common-law spouse is not considered a "spouse" for purposes of intestate succession but due to other legal and statutory entitlements (which are beyond the scope of this newsletter) the surviving common-law spouse was able to preserve her entitlement to the bulk of the estate. However, the son who would have received nothing under the terms of the invalid will was able to successfully maintain a claim against the estate for over 10% of its total value. Clearly, the testamentary intention of the deceased was partially frustrated and his assets were not distributed fully in accordance with his wishes. In addition his estate incurred substantial legal costs resulting in further reducing the amount available for distribution.

Although this situation was resolved through negotiation, it could certainly have escalated into full-blown estate litigation with the son and the common-law spouse looking to the courts for an answer. If this had been the case, distribution of the estate would have been delayed for a lengthy period of time and the costs of such estate litigation, which are usually paid out of the estate, would have even further depleted the amount available for distribution to the beneficiaries.

The deceased could have easily avoided this unfortunate and complicated situation by consulting with his legal advisor. This would have ensured that he had proper, valid and effective testamentary documents that would carry out his testamentary wishes.

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