TAB 1F

19th East Region Solicitors Conference

Where There is a Will Without due Execution? No Way!

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Where there is a Will without due execution? No way!

Every estates practitioner knows (or at least should know) that a Will can only be valid if it is signed by the testator in the presence of two witnesses. Historically, due execution of a Will was required in order for the Will to be probated, however that requirement has been relaxed in several provinces and other jurisdictions. Outside of Ontario, lawmakers have recognized "less than perfect" Wills, known as substantial compliance provisions, under certain circumstances. Ontario's legislature has not evolved, but the courts have, in select circumstances, probated Wills that substantially comply. In this paper, I have reviewed the due execution requirements under the *Succession Law Reform Act*, Ontario's jurisprudence on the subject and the legislation and case law in "substantial compliance" provinces.

Purpose of due execution

John H. Langbein, Yale Law professor who has written extensively on the evolution to substantial compliance from the traditional model, names three reasons or functions why due execution persists. First, there is "the evidentiary function" in which the Court is provided with solid evidence of testamentary intention and the terms of the Will.[1] Second, "the channelling function" in which the Will's formal requirements offer certain uniformity in the organization, language and content of the Wills.[2] Third, there is a "protective" function, which guards the testator from undue influence or fraud. Collectively, due execution ensures predictability.

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[1] John H. Langbein, "Substantial Compliance with the Wills Act" (1975). Faculty Scholarship Series. Paper 507 at http://digitalcommons.law.yale.edu/fss_papers/507
[2] *Ibid*.

Succession Law Reform Act

Due execution of a Will is prescribed under sections 3, 4 and 7 of Ontario's *Succession Law Reform Act* ("*SLRA*").[3] These sections state as follows:

> 3. A will is valid only when it is in writing.
>
> 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.
>
> (2) Where witnesses are required by this section, no form of attestation is necessary.
>
> 7. (1) In so far as the position of the signature is concerned, a will, whether holograph or not, is valid if the signature of the testator made either by him or her or the person signing for him or her is placed at, after, following, under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will.
>
> (2) A will is not rendered invalid by the circumstance that,
>
> (a) the signature does not follow or is not immediately after the end of the will:
> (b)a blank space intervenes between the concluding words of the will and the signature;
> (c) the signature,
> (i) is placed among the words of a testimonium clause or of a clause of attestation,
>
> (ii) follows or is after or under a clause of attestation either with or without a blank space intervening or,
>
> (iii) follows or is after, under or beside the name of a subscribing witness;
>
> (d) the signature is on a side, page or other portion of the paper or papers containing the will on which no clause, paragraph or disposing part of the will is written above the signature; or
>
> (e) there appears to be sufficient space on or at the bottom of the preceding side, page or other portion of the same paper on which the will is written to contain the signature.
>
> (3) The generality of subsection (1) is not restricted by the enumeration of circumstances set out in subsection (2), but a signature in conformity with section 4, 5 or 6 or this section does not give effect to,
>
> (a) a disposition or direction that is underneath the signature or that follows the signature; or
>
> (b) a disposition or direction inserted after the signature was made. [4]

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[3] R.S.O. 1990, Chapter S.26 at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90s26_e.htm#BK5

Under section 4 of the *SLRA*, the testator must sign the Will in front of two witnesses who are present at the same time. Testators who are unable to physically sign the Will can direct other persons to do so on their behalf. Note that the *SLRA* does not require that the testator sign first or that the witnesses be aware that they are attesting to a Will.[5] Subsection (2) allows the testator to sign the Will without the witnesses being present if, at a later time in the presence of both witnesses, the testator acknowledges the signature. In this situation, the testator would show the signature to the witnesses and advise that it is his own. The witnesses would then sign the Will in the testator's presence. The inclusion of an acknowledgement under the *SLRA* no doubt recognizes a physical infirmity on the part of a testator or the unavailability of witnesses at the exact time of execution. However, it can be safely assumed that an acknowledgement (as opposed to a signature) will cause problems at the time of probate. The problem is that the language of the Affidavit of Execution of a Will (Form 74.8), which is submitted as part of the application for appointment of Estate Trustee with a Will, states that the testator "executed the document in the presence of" the two witnesses. Without the option of an acknowledgement in the Affidavit of Execution, one could reasonably expect the Estates Office to reject "acknowledgement language" in the supporting affidavit with a reference to the Court.[6]

With respect to signatures, according to section 7 of the *SLRA*, a testator's signature can be anywhere on the document *i.e.* at, after, following, under, beside or opposite to the end of the

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[4] *Ibid*. at sections 3, 4 and 7
[5] *William Grey* v. *Norman Boyd*, 2011 ONSC 7288 (CanLII) at http://canlii.ca/t/fp86h; *Blumenthal* v. *Simkins*, 1992 CanLII 2032 (BC SC) at http://canlii.ca/t/1df11. Section 4 of British Columbia's *Wills Act* is practically identical to the *SLRA*.
[6] On different grounds in *Wallbridge Estate*,2010 ONSC 3409 (CanLII) at http://canlii.ca/t/2b2cp, Justice Brown was required to relieve non-compliance with the rules regarding the submission of an Affidavit of Execution.

Will. However, a disposition in a testamentary document located after the signature will not be valid unless the requirements under section 18 of the *SLRA* are met. It provides that these alterations are valid if the testator signs the Will "opposite or near" the alterations in the presence of two witnesses who must also validate these changes in or about the same location on the Will. Alterations made before the Will has been executed (even if they are not initialled by the testator or witnesses) are presumed to be valid if the Will is duly executed.[7]

Exceptions within the *SLRA*

Section 5 of the *SLRA* allows military personnel on active service to make a Will in writing or by a direction to a person in his or her presence "without any further formality or any requirement of the presence of or attestation or signature by a witness.[8]

Section 6 of the *SLRA* is the holograph Wills provision, which allows for non-conforming Wills or those in the testator's "own handwriting and signature" without witnesses.[9] A discussion of the validity and case law on holograph Wills is beyond the scope of this paper.

Burden of proof

Where a Will appears to be duly executed, absent evidence to the contrary, a Court can assume that it has been duly executed.[10] In Latin, this presumption is known as *omnia praesumuntur rite esse acta*. The maxim has broader legal relevance. The idea is that once there is evidence that an act has been performed, there is a presumption that an action has been

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[7] *Law* v. *Law* 1989 CarswellOnt 527 (H.C.J.)
[8] *SLRA*, section 5(1).
[9] *SLRA*, section 6.
[10] *CIBC Trust Corporation* v. *Horn*, 2008 CanLII 39783 (ON SC) citing *Lloyd* v. *Roberts* (1858), 12 Moo. P.C. 158, 14 E.R. 871; *Re Mitchell*, (1960), 32 W.W.R. 337, 25 D.L.R. (2d) 399 (Alta.); *Re Kane* (1979), 5 E.T.R. 44 (N.S. Prob.Ct.) at http://canlii.ca/t/20660

performed properly. In the due execution of Wills context, this presumption exists even when there is no attestation clause, the witnesses could not be traced or their signatures could not be verified.[11] In other words, a Will that looks valid on its face is presumed to be valid unless proven otherwise. To defeat this presumption requires "clear, positive and reliable" evidence of a defect in execution, according to the Court of Appeal in its 1968 decision *Re Laxer*.[12] Courts are loath to defeat a testator's true intentions.

In *Vout* v. *Hay*[13] ("*Vout*"), a case which primarily dealt with testamentary disposition under suspicious circumstances, the Supreme Court of Canada held that once due execution is established, there is also a presumption of the testator's knowledge and approval of the Will as well as testamentary capacity. At trial in *Vout*, Justice Byers accepted the testimony of the legal secretaries in which they specifically remembered that the Will was executed in the proper fashion. However, the courts have also accepted Wills without a specific recollection of execution. Recently, in *Estate of David Bruce Tate*,[14] Justice Whitaker found a Will to be duly executed where the testator signed the Will using a different signature than he had used in the past and where one of the witnesses did not have a specific recollection of the Will's execution.

Ontario's jurisprudence

The courts have rarely departed from the due execution requirements under the *SLRA*.[15] Ontario's courts are very unlikely to correct a technical error, such as an unsigned Will,[16] a Will

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[11] *Re Riva* (1979), 3 E.T.R. 307 (Ont.Surr.Ct.)
[12] [1963] 1 O.R. 343-358
[13] 1995 CanLII 105 (SCC) at http://canlii.ca/t/1frj3 ADD LOWER COURT CITATIONS
[14] 2012 ONSC 6890 (CanLII) at http://canlii.ca/t/fvj3z
[15] *Ettore Estate* v. *Ettore* 2004CanLII 22087 (ON SC) ("*Ettore*") at http://canlii.ca/t/1hrhg
[16] *Papageorgiou* v. *Walstaff Estate* 2008 CanLII 32305 (ON SC) at http://canlii.ca/t/1z912

signed by only one witness[17] or, for example a Will where the witnesses were not present at the same time.[18] While other provinces have enacted "substantial compliance" requirements for due execution, Ontario courts have in most instances stood firm. Justice Cullity in *Ettore* v. *Ettore Estate*[19] ("*Ettore Estate*") wrote that:

> I would be reluctant to apply the principle of substantial compliance in the absence of a legislative mandate, or its endorsement by an appellate court. To do so would be to depart radically from the interpretation that section 4 and its predecessors in the *Wills Act* R.S.O. 1970, c. 499 and the *Wills Act*, 1837 (UK) have received in the past and introduce uncertainty and, thereby, encourage even more litigation in a context in which it is notoriously endemic.[20]

Nevertheless, there are a couple of Ontario decisions where the Court has not required due execution. In *Sisson* v. *Park Street Baptist Church*,[21] ("*Sisson*") the executors sought to probate a Will with only one witness. This was an unopposed application where the lawyer inadvertently failed to witness the Will. Upon reviewing the substantial compliance legislation in Manitoba, Saskatchewan and Alberta, Justice Murphy held that the Will reflected the intentions of the testator and should be probated. Furthermore, the Court found that "the absence of legislation on point should not stop the court from developing the common law where, in circumstances like this, there has been substantial compliance, given that the dangers which two witnesses are to guard against does not exist here."[22] Note Justice Cullity in *Ettore Estate*, *supra* adopted the opposite reasoning in refusing to depart from the legislation.

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[17] *Sills* v. *Daley*, (2002), 64 O.R. (3d) 19, E.T.R. (3d) 297 (S.C.)
[18] *Ibid*.
[19] *Ettore*, supra note 15
[20] *Ibid.* at para. 37
[21] 1998 CarswellOnt 3704 (S.C.J.)
[22] *Ibid*. at para 40.

In *Sisson,* the Court relied on *Re Riva*.[23] In that case, the testator and the witnesses' signatures were on different pages in the document. At the time of probate, the witnesses could not be located. Even without evidence of due execution, the Court allowed this Will to be probated based on the facts that:

- There was insufficient space for the signature of the testator in the place designated by Will, which was a form;
- The Will generally conformed to extrinsic evidence regarding the intended disposition of property;
- It was unnecessary for the testator to have signed on the fourth page merely for the purpose of identifying the document as her Will and that the testatrix would not have gone to the trouble she did unless she intended the document to be her Will; and
- The signature was at the end of the Will and therefore satisfied the statutory requirement regarding placement of signature.

Also cited by Justice Murphy in *Sisson* is *Malichen Estate, Re*[24] ("*Malichen Estate*") where a husband and wife both mistakenly executed the other person's Will. Each Will was identical in the event that one predeceased the other except that the wife's Will granted the disposition of her personal property to her daughter. When the husband died, the error was discovered. On application to the Court by the wife, the Court ordered that the Will admitted for probate be corrected in that the wife's name in the Will be changed to the husband.

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[23] (1978), 3 E.T.R. 307 (Ont. Surr. Ct.)
[24] (1994), 6 E.T.R. (2d) 217 (Ont. Gen. Div.)

In recent years, Ontario's "substantial compliance" decisions have not been followed by the courts. In *Sills* v. *Daley*,[25] ("*Daley*") the deceased executed a Will with only one witness. This witness signed the document before she did. There was a second witness available to sign the Will, but she refused to do so because she was a beneficiary. The evidence indicated that the deceased was aware of the second witness' refusal to sign. In this application, the Applicants sought to probate an earlier Will, which appeared to conform to the statutory requirements, and the Respondent filed an objection seeking probate of the defective Will on the basis of "substantial compliance" with the *SLRA*.

Justice O'Flynn reviewed *Sisson, Re Riva* and *Malichen Estate* as well as the out-of-province substantial compliance precedents, but ultimately refused to allow probate of the later Will because the deceased "appeared to know" that two witnesses were required. Based on that ruling, the Court did not decide whether the deceased's signature prior to the witness rendered the Will invalid.

Clearly prudent practice dictates due execution of the Will under all circumstances, however, there is a small window for corrections where the matter is unopposed and the mistake is the result of true inadvertence. Where there is a whiff of controversy *i.e.* competing Wills or the advantage of an intestacy claim, a Court is unlikely to correct any mistake.

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[25] *Supra* note 17

Substantial compliance provinces

The Uniform Law Conference of Canada included a substantial compliance provision in its *Wills Amendment Act*[26] modeled after the wills legislation in Manitoba, New Brunswick, Prince Edward Island, Saskatchewan and Alberta. The courts are granted certain discretion to probate documents, which do not comply with certain formalities. For example, section 23 of Manitoba's *Wills Act*,[27] which arguably offers the broadest correcting power, grants the court discretion to order that a document or writing that "was not executed in compliance with any or all of the formal requirements imposed by this Act…be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased."[28]

If a testamentary document does not conform to the technical requirements, a Court will first examine whether there is sufficient evidence that "the testamentary intention of the deceased is evident in the document."[29] In *Re Bunn*,[30] the Saskatchewan Court of Appeal admitted to probate an unsigned, handwritten document giving instructions for the testator's funeral and certain bequests as well as a printed Will, which only named an executor and revoked all former Wills. Only the second document was signed by the testator in the presence of two witnesses. Both documents (along with a third document, which was identical to the second document but unsigned) were in a single envelope marked as the deceased's last Will. The lower Court found

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[26] Jeremy Goldsmith, "The frustration of genuine wills", STEP Journal at http://www.stepjournal.org/journal_archive/2013/tqr_march_2013/the_frustration_of_genuine_wil.aspx
[27] C. C. S. M. 1988, c. W150 at http://canlii.ca/t/8gjk
[28] *Ibid*.
[29] (1992), 100 Sask. R. 231, [1992] 4 W.W.R. 240 (SCA) at 248
[30] *Ibid*.

and the Court of Appeal agreed that the two documents submitted together constituted the deceased's testamentary intentions.

While in *Re Dunn* there was a signature on one of the testamentary documents, the requirement for a signature varies from province to province. In Manitoba and New Brunswick, the courts have admitted to probate unsigned documents.[31] The legislation in Saskatchewan is less permissive requiring some attempt at execution.[32] Not all attempts will be satisfactory as the applicants in *Re Buckmeyer*[33] discovered. In that case, the Court disqualified an e-mail signature as proper execution. Not surprisingly, what will and will not be considered substantial compliance varies from province to province and, of course, each scenario has its own wrinkles.

Even with a substantial compliance provision in force or the opportunity (even in Ontario) to correct deficiencies, a duly executed Will is the ideal. While most estates practitioners can safely assume that the Wills that they have prepared and witnessed are duly executed, what about those draft Wills sent out prior to execution? Prudent advice would be to eliminate that practice altogether, but if a draft Will must be sent out ahead of time, a lawyer must take reasonable care or make reasonable efforts to ensure that Will is duly executed. An improperly signed Will prepared by the deceased's solicitor is not a holograph Will because such Wills must be entirely in the testator's own handwriting and signed by the testator: see section 6 of the *SLRA*. But an improperly executed Will that is found among the deceased's possessions

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[31] *George* v. *Daily,* 1997 CanLII 3007 (MB CA) at http://canlii.ca/t/1flkb; *Furlotte* v. *McAllister*, [2005] N.B.J. No. 367 (Q.B.)
[32] *Nerstine Estate (Re)*, 2012 SKQB 15 (CanLII) at http://canlii.ca/t/fq1g7
[33] 2008 SKQB 260 (CanLII) at http://canlii.ca/t/1zhmf

can useful in at least one respect: the disappointed beneficiaries will use it as against the drafter in a claim for solicitor's negligence.[34]

[34] See *Ross* v. *Caunters*, [1979] 3 All ER 580 (Ch D) and ***Makhan*** v. *McCawley*, 1998 CanLII 14915 (ON SC) at http://canlii.ca/t/1wckj

List of best practices[35]

1. Testator and the two witnesses should be present in the room.
2. Identify the witnesses and ascertain their identities and relationship to the testator.
3. Inform all parties that the testator will be signing his or her Will.
4. Remove the witnesses from the room.
5. Show the testator the Will and ensure that he has seen it before and has had legal advice.
6. Read the Will to the testator.
7. Bring the two witnesses back into the room.
8. Have the testator initial and sign the Will. Each witness, in the presence of the testator and each other, should initial the front and each page of the will and sign the last page.
9. Only one document should be signed.
10. Each witness will swear an affidavit of execution (Form 74.8 of the *Rules of Civil Procedure*).
11. The Will and affidavits should be placed in secure storage.
12. Provide the testator with a draft copy of the Will and a reporting letter.
13. Make notes of execution process.
14. Follow the same procedure every time.

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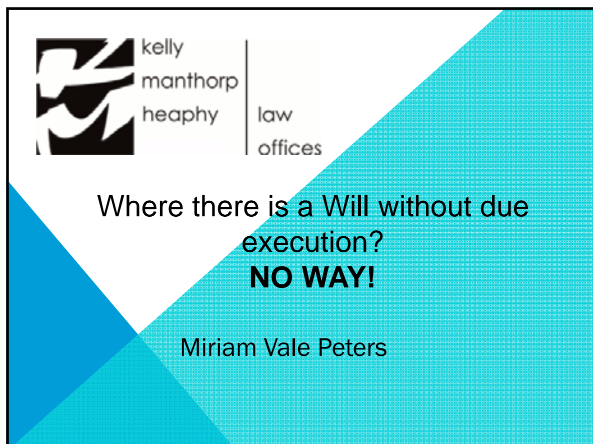
[35] Adapted from David Freedman's list of best practices. Faculty of Law, Queen's University.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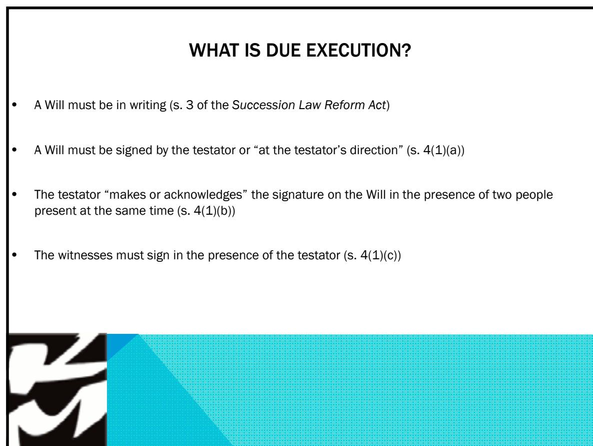
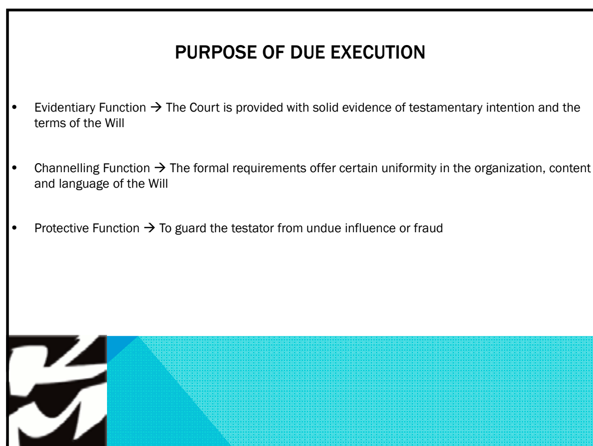
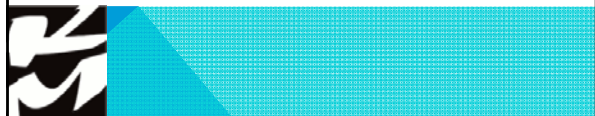
Where there is a Will without due execution?
NO WAY!
Miriam Vale Peters


WHAT IS DUE EXECUTION?
A Will must be in writing (s. 3 of the Succession Law Reform Act)
A Will must be signed by the testator or "at the testator's direction" (s. 4(1)(a))
The testator "makes or acknowledges" the signature on the Will in the presence of two people present at the same time (s. 4(1)(b))
The witnesses must sign in the presence of the testator (s. 4(1)(c))


PURPOSE OF DUE EXECUTION
Evidentiary Function → The Court is provided with solid evidence of testamentary intention and the terms of the Will
Channelling Function → The formal requirements offer certain uniformity in the organization, content and language of the Will
Protective Function → To guard the testator from undue influence or fraud

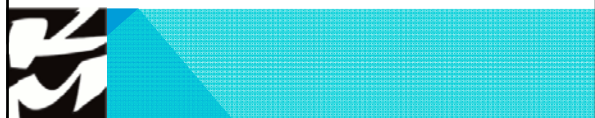
THE SIGNATURE

- Testator can sign the Will without the witnesses being present if, at a later time in the presence of both witnesses, the testator acknowledges the signature
- BUT language in the Affidavit of Execution doesn't acknowledge an acknowledgement
- Signature can be anywhere on the Will (s. 7 of *SLRA*)
- A disposition in a testamentary document located after the signature will not be valid unless the alterations are "opposite or near" the signature and are made in the presence of two witnesses (s. 18)



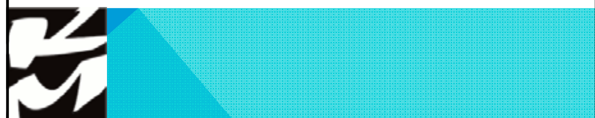
BURDEN OF PROOF

- *Omnia praesumuntur rite esse acta*
- Where a Will appears to be duly executed, absent "clear, positive and reliable" evidence to the contrary, it has been duly executed
- Wills are presumed to be duly executed even if the witnesses do not have a specific recollection of execution *(Estate of David Bruce Tate,* 2012 ONSC*)*



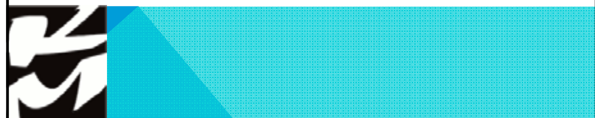
ONTARIO

- Ontario courts will likely not correct technical errors such as:
  - An unsigned Will;
  - A Will witnessed by one person; or
  - A Will where the witnesses were not present at the same time.



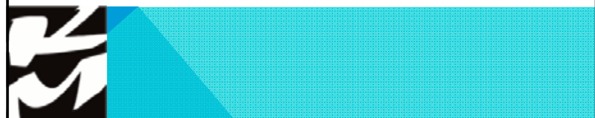
WHERE THERE IS A WILL, THERE IS AN EXCEPTION TO DUE EXECUTION

- *Sisson* v. *Baptist Street Baptist Church* (1998 ON SCJ)
  - Lawyer inadvertently failed to witness the Will
- *Re Riva* (1978 ON Surr. Ct.)
  - Testator and witnesses' signatures were on different pages, and at the time of probate, the witnesses could not be located
- *Re Malichen Estate* (1994 ON Gen. Div.)
  - Husband and wife mistakenly executed the other person's Will



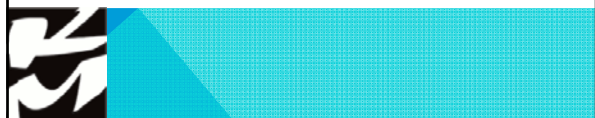
BUT RECENTLY…

- *Sills v. Daley* (2002, ON SCJ)
  - One witness and the testator did not sign in her presence



SUBSTANTIAL COMPLIANCE LEGISLATION

- Prince Edward Island, New Brunswick, Saskatchewan and Alberta permit the Court to probate an imperfectly executed Will
- Substantial compliance legislation or "dispensation power"



SUBSTANTIAL COMPLIANCE LEGISLATION

Section 23 of Manitoba's *Wills Act:*

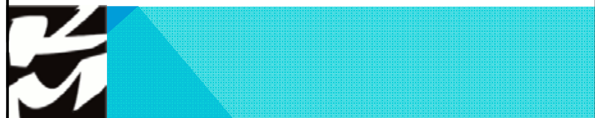
Dispensation power

23 Where, upon application, if the court is satisfied that a document or any writing on a document embodies

(a) the testamentary intentions of a deceased; or

(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;

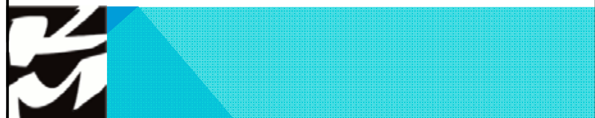
the court may, notwithstanding that the document or writing was not executed in compliance **with any or all of the formal requirements** imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.



SUBSTANTIAL COMPLIANCE LEGISLATION

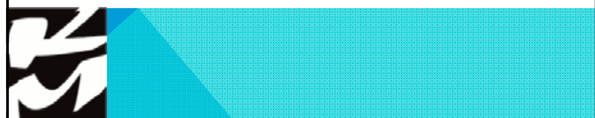
Section 37 of Saskatchewan's *Wills Act:*

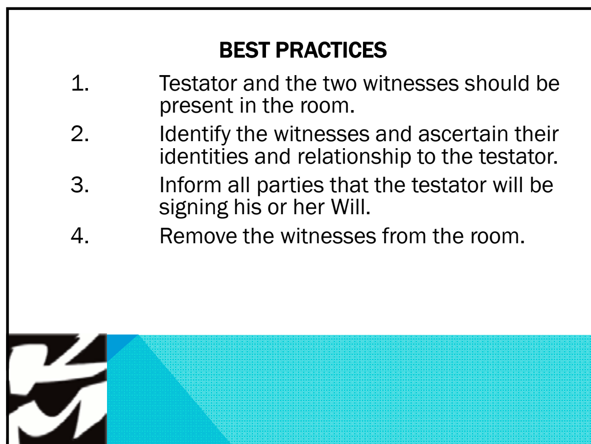
37 The court may, notwithstanding that a document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing be fully effective as though it had been properly executed as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, where a court, on application is satisfied that the document or writing embodies: (a) the testamentary intentions of a deceased; or (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will.

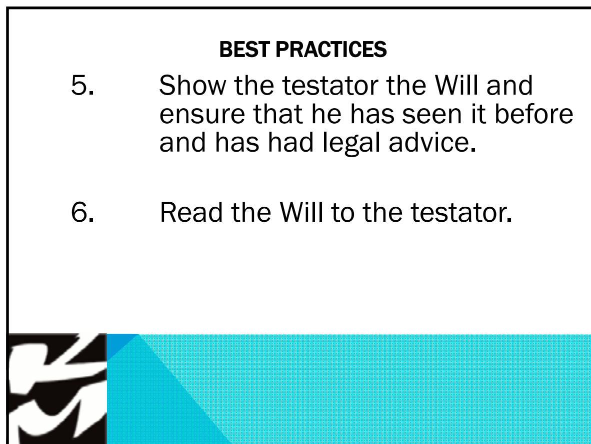


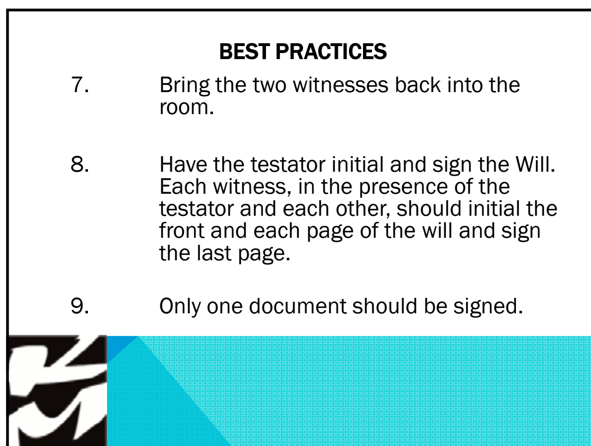
EXAMPLES

- An unsigned, handwritten document with instructions for a funeral and certain bequests together with a printed Will (duly executed) which named an executor and contained a revocation clause. ADMITTED TO PROBATE
- An unsigned document, which clearly set out the testator's testamentary intentions. ADMITTED TO PROBATE
- A Will together with an e-mail and an amendment signed by hand by the testator. E-MAIL NOT ADMITTED TO PROBATE




BEST PRACTICES
1. Testator and the two witnesses should be present in the room.
2. Identify the witnesses and ascertain their identities and relationship to the testator.
3. Inform all parties that the testator will be signing his or her Will.
4. Remove the witnesses from the room.


BEST PRACTICES
5. Show the testator the Will and ensure that he has seen it before and has had legal advice.
6. Read the Will to the testator.

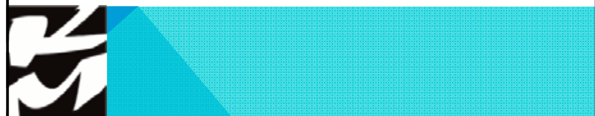

BEST PRACTICES
7. Bring the two witnesses back into the room.
8. Have the testator initial and sign the Will. Each witness, in the presence of the testator and each other, should initial the front and each page of the will and sign the last page.
9. Only one document should be signed.

BEST PRACTICES

10. Each witness will swear an affidavit of execution (Form 74.8 of the *Rules of Civil Procedure*).

11. The Will and affidavits should be placed in secure storage.

12. Provide the testator with a draft copy of the Will and a reporting letter.



BEST PRACTICES

13. Make notes of execution process.
14. Follow the same procedure every time.