Estate Litigation

Holograph Wills in Ontario

In Ontario, a will that is wholly handwritten by a testator is called a holograph will. Holograph wills are exempt from the statutory requirement that a will be witnessed by at least two people, who each subscribe the will in the presence of the testator. [1]

Requirements

The requirements of a valid holograph will are set out in section 6 of the *Succession Law Reform Act* (the "*SLRA*")[2], which states that:

> 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.

i. Wholly in the handwriting of the testator

An essential aspect of a holograph will is that it to be **wholly** in the testator's own handwriting. Partially handwritten wills, such as fill-in-the-blank forms, do not meet the requirements of a holograph will. Whether or not such a document will be admitted into probate will depend on the court's ability to sever the handwritten portions from the written portions so that they themselves form a complete expression of the testator's wishes.

Likewise, it has been determined by the courts in Ontario that typewritten documents cannot be incorporated by reference into a holograph will.[3] Where a holograph will makes reference to a typewritten document, the type-written portion will not be admitted into probate and the handwritten portion must be able to stand on its own as a testamentary document.

ii. Signed by the testator

The signature of the testator will also play a key role in creating a valid holograph will. The signature must be at the end of the document and this will give effect to any disposition that comes before the signature.[4] Anything that follows the signature will not take effect.[5] As well, any disposition or direction inserted after the signature was made will not take effect.[6]

iii. Full and final expression of intention

Separate and apart from the above two formal requirements set out in the *SLRA*, case law has established that the contents of a holograph will must reflect that the testator possessed the necessary intention that it be a fixed and final disposition upon death, and not merely some other expression of their wishes.[7] The onus falls on the party alleging the document to be testamentary to show, by the content or by extrinsic evidence that it reflects this intention.[8]

Handwritten Alterations

Handwritten alterations to wills are governed by section 18 of the *SLRA*.[9] Where a handwritten alteration is made to a formal will, the alteration must meet the same formality requirements set out in s. 4(1) of the *SLRA*, i.e. the alteration must be signed by the testator and witnessed by two witnesses, who each subscribe as witnesses to the alteration.

In the case of alterations to holograph wills, a handwritten alteration will only require the signature of the testator. Where there is no signature (or initials) beside the alteration, the issue becomes one of determining when the alteration was made. If the alteration was made at the time of execution of the holograph will, the change is valid. If the alteration was made after the execution of the holograph will, the alteration would be invalid.

Ontario Case Law

***Laframboise v. Laframboise*[10] (2011)**

In this case, the applicant challenged whether a handwritten document by her deceased husband constituted a valid holograph will. The document in question was entitled "The Informal will and Last Requests of Adam Laframboise", and contained instructions regarding the disposition of his assets.

The issue arose as a result of the inclusion of the words "informal" and "requests" which suggest that the document could not be a full and final disposition. Despite the inclusion of these words, the document began with "Hereby follows my will and last requests" and ended with "please honour what I have stated here." In consideration of the document as a whole, it was found that the document created a fixed and final disposition, and that the use of the word "informal" suggested merely that it was handwritten, unwitnessed, and made without the assistance of a lawyer.

***Niziol v. Allen*[11] (2011)**

This case also dealt with testamentary intention. The testator had executed a formal will in 1998. In 2001, she prepared a hand-written document that changed the distribution of her estate.

The validity of the handwritten document as a holograph will was challenged. The main issue was whether the documents reflected "a deliberate or fixed and final expression of intention as to the disposal of property upon death".[12]

The Court found that the language of the document clearly showed testamentary intent in the following ways:

1. The introductory language was consistent with how testators ordinarily identify themselves.
2. The dispositive language used reflected an intention that the disposition be final.
3. The document identified the beneficiaries and directed that they be the only beneficiaries.
4. The document specifically created a trust for one son but not the other, which suggested testamentary intent.

The handwritten document was found to be a valid holographic testamentary instrument. The Court then found that the 1998 formal will and the 2001 holograph will could not stand together. As a result, by implication, the Court found that the 2001 holograph will revoked the formal 1998 will.

***CIBC Trust Corporation v. Horn* (2008)[13]**

This case involved hand-written alterations to a type-written and properly executed will and codicil. The alterations were neither signed nor dated and therefore did not meet the requirements of the *SLRA*.

The Court addressed the question of whether it had the discretion to dispense with the formal requirements under the *SLRA*, where there is clear evidence of testamentary intention. The Court held that, in contrast to other jurisdictions, Ontario courts have no such discretion. The Court held that the handwritten alterations were therefore not valid, and further that they did not constitute a valid holograph codicil.

Conclusions

The area of holograph wills is rife with acrimonious family disputes and protracted litigation. In the *Niziol* matter discussed above, the litigation lasted over 6 years, with legal fees in the hundreds of thousands of dollars.

While holograph wills can be a quick and inexpensive option, it is evident that there are numerous issues that may affect their validity. As with any legal document, it is always prudent to obtain legal advice about the manner in which a holograph will must be made, and the potential issues that may arise.

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[1] *Succession Law Reform Act*, R.S.O. 1990, c. S.26 ("*SLRA*"), s. 4(1).

[2] *SLRA*, s. 6, R.S.O. 1990, c. S.26.

[3] *Facey v. Smith* 1997 CarswellOnt 1643, at para 14.

[4] *SLRA*, s. 7(1).

[5] *SLRA*, s. 7(3)(a).

[6] *SLRA*, s. 7(3)(b).

[7] *Bennett v. Toronto General Trust Corp* [1958] S.C.R. 392, at para 5.

[8] *Laframboise v. Laframboise* 2011 ONSC 7673, at para 13.

[9] *SLRA* s.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.

(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.

[10] 2011 ONSC 7673.

[11] 2011 ONSC 7457 ("*Niziol*").

[12] *Niziol* at para 11.

[13] 2008 CanLII 39783 (ON SC).

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Pallett Valo Estate Litigation Practice

At Pallett Valo LLP, we understand that disputes related to wills, trusts and estates matters require special skills and sensitivity.

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Where formal conflict resolution is required or litigation is inevitable, our Estate Litigation Group is well-equipped to handle both simple and complex estate disputes. We can help with: disputes with and between executors, trustees, beneficiaries and attorneys for property and personal care; will interpretations; determining issues and disputes in estate administration; will challenges; guardianship applications; support applications; and consent and capacity hearings.

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