TAB 6

Is That a Will?
Holograph Writings and Testamentary Intent

Jordan M. Atin, C.S.
Julia Evans
Paul Trudelle
Atin Professional Corporation

13th ***Annual*** **Estates and Trusts Summit**
Day Two - November 18, 2010

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IS THIS A WILL?

Holograph Writings and Testamentary Intent

Julia Evans*
Paul Trudelle*
Jordan Atin*

For many, the word, "Will", connotes an image of a formal document that begins with the words, "This is the Last Will and Testament of …". The truth is, however, a Will often presents in a much less obvious form. This paper is intended to draw the reader's attention to a few categories of holograph writings that courts have found to be Wills and Codicils and which may often be overlooked, at first glance, by wills and estates counsel and their clients.

An awareness of the scope and possible legal effects of handwritten documents that relate to the disposition of property upon death informs every stage of lawyering in an estates practice. At the outset of her retainer, when a drafting solicitor requests that her client provide all prior Wills and Codicils for her to review, she may be well advised to also ask her client to provide any lists, instructions or notes that relate to the disposition of his property upon his death. At the time of execution of the Will, it would be helpful if the solicitor discussed with the testator the potential legal effects of subsequent handwritten notes, lists and instructions that he may prepare. The solicitor may also advise the testator of the kinds of problems that may arise if the testator makes handwritten alterations to the existing formal Will. She can point out that such alternations may require expensive and time consuming court processes to interpret how they ought to be applied and that such alterations may ultimately cause his estate to be distributed in a way that is not in accordance with his wishes. Of course, the discussion is confirmed in the reporting letter to the client.

A solicitor acting for an estate trustee must alert her client to the broad range of writings that might alter or revoke a document otherwise considered to be the Last Will and Testament

of the deceased. She should encourage the estate trustee to search for handwritten documents that may relate to the distribution of property of the deceased upon death. Such writings often include suicide notes. The reporting letter to the estate trustee could then include a discussion of the potential impact of holograph instruments of the deceased on the validity and effect of the document purporting to be the Last Will and Testament of the deceased. It is important that the solicitor be aware of all possible relevant testamentary documents early on in her retainer in order to advise the estate trustee as to whether or not the estate trustee should bring an application for the advice, opinion and direction of the court in administering the estate.

In order to provide a comprehensive analysis and assessment of a client's case, the estate litigator should be aware of and review all the holograph documents of a deceased that relate to the disposition of his property upon his death.

When determining whether a handwritten instrument of a testator has the effect of a Will or Codicil or is a valid alteration to an existing Will or Codicil, the court considers both the form of the writing and the evidence of the intention of the testator to gift his property upon his death, *animus testandi*. Both of these are discussed in turn.

THE "FORM"

A useful starting point in this discussion is the definition of a "Will" in the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (hereinafter referred to as the *SLRA*):

"**will**" includes,

(a) a testament;
(b) a codicil;
(c) an appointment by will or by writing in the nature of a will in exercise of a power; and
(d) any other testamentary disposition. ("testament")

There are four kinds of wills that are recognized in Ontario including: a will subscribed by attesting witness which is referred to as a "formal will"; a holograph will, which is an instrument wholly in the handwriting of the testator; wills of the members of the forces, mariners or seamen; and international wills.[1]

The formal validity of a will, concerned with the particulars of its execution, is governed by statute and depends on the kind of instrument purporting to be a will. In Ontario, sections 3 through 8 of the *SLRA* prescribe the requirements for the proper execution of wills. It is noted that s. 6 of the *SLRA*, dealing with holograph wills, reads: "A testator may make a valid will by his or her own handwriting and signature, without formality, and without the presence, attestation or signature of a witness".

The test for the formal validity of a holograph will or codicil is much simpler than that which must be met for a will that is not in the handwriting of the deceased. A holograph will must be signed by the testator and does not require a witness. It is important to note, however, that, "a witness's signature, which is not necessary to the validity of a holograph will, does not make a holograph will any less valid"[2]

There is no shortage of cases confirming that the signature required of a testator does not have to be a written signature. The testator's signature may simply be his mark, his initials or his printed name.[3] Section 7 of the *SLRA* provides that the signature of the testator must be at the end of the will and it has been held that, "the only interpretation is that a signature in an

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1 R. Hull, I. Hull, *Macdonell, Sheard and Hull on Probate Practice*, 4th ed., (Toronto: Carswell,1996) at 53

2 *Eames Estate, Re,* [1934] 3 W.W.R. 364 (Man. K.B.),

3 *Re Clarke*, (1982), 39 O.R. (2d) 392

alleged holograph will cannot give effect to the disposition or direction that is underneath or after the signature."[4]

THE INTENTION ("*ANIMUS TESTANDI*")

Even where the form of the document complies with the *SLRA*, the document may still not be a "Will".[5]

In some ways, a Will is a state of mind. To have legal effect post-mortem, the document-maker must have been of a certain mind-set. That is to say, the author must have intended the document:

(a) to have a disposing effect;

(b) not to take effect until death and to be entirely dependent on death for its operation; and

(c) to be revocable (and revocable in fact)[6]

It is not necessarily determinative that the deceased may not have thought he was writing a "Will". The author need not know he was making a will as such. He must intend, however, that the document express his wishes as to what is to be done with his property in the event of his death and that it operate on his death. [7]

Testamentary intent is the vital ingredient in determining whether or not a document can be given effect as a Will. The requisite intent, *animus testandi*, is a deliberate and final intention as to the distribution of a testator's property on death. "*Animo testandi*" means much more than a person's expression of how he would like his property to be disposed of after death. The essential

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[4] *Re Clarke*, (1982), 39 O.R. (2d) 392 ; *Oliver Estate v. Reid,* 1994, 4 E.T.R. (2d) 105; but see also *Martineau v. Manitoba (Public Trustee)* 1993 , 50 E.T.R. 87.

5 Naturally, issues of testamentary capacity and undue influence are to be considered as well.
6 *Feeney's Canadian Law of Wills,* 4th ed. (Toronto: Lexis Nexis Canada Inc. Revised in September 2009)
7 *Kavanagh Estate v. Kavanagh* (1998), 159 D.L.R. (4th) 629 (Nfld. C.A.); *Milnes v. Foden* (1890), 15 P.D. 105 (Eng. P.D.A.)

quality of the term is that there must be a deliberate or fixed and final expression of intention as to the disposal of his property on death.[8]

Extrinsic evidence a court will take into account may include statements made by the author that confirmed his or her intentions.

In *Re Toole Estate*[9], the testator left a note with the manager of the trust company that held his Will. In the note, the testator asked the trust company to add a Codicil to his Will and he set out the details of the addition in his note. Then the testator told the manager later, "That is a Codicil to my Will, have it typewritten". Then later still, the testator told the manager, "There is no hurry, it is legal the way it is." The court held that the note was a valid holograph Codicil.

Declarations made by the deceased that he or she has a Will have been held to be relevant.[10]

Similarly, not returning to see a solicitor to update a Will can indicate that the deceased, "was not concerned and was satisfied with what he had."[11]

The burden of proving a document to be a Will rests on the party propounding the document as a Will.

> "It is incumbent upon the party setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of that character and nature."[12]

That being said, Courts are careful not to ignore documents just because they may not look like a Will:

6Bennett v. Toronto General Trusts Corp., Re (1958), 14 D.L.R. (2d) 1 (S.C.C.)
9 (1952), 5 W.W.R. (N.S.) 416
10 *MacLennan Estate, Re* (1986), 22 E.T.R. 22 (Ont. Surr. Ct.)
11 *MacLennan Estate*, Re, supra
12 *Bennett v. Toronto General Trusts Corp., Re* supra ;*Facey v. Smith* (1997), 17 E.T.R. (2d) 72, (sub nom. Facey v. Galbuogis Estate) 35 O.T.C. 372, 1997 CarswellOnt 1643 (Gen. Div).

> The Court owes a sacred duty to protect a man's last will. The guiding principle is to give effect, if possible, to his intentions. Where the law designates a form in which such must be expressed this latter limits the operation of the principle, but the instrument itself is not destroyed. It is still the act of the deceased, and if though it is bad in one form it is good in another, the Court must enforce it. Our statute encourages testators to draw their own wills. That being so, the statute and any such will should be construed benignly and every effort made to avoid any construction which would invalidate the will.[13]

The language in home-made wills may be less than perfect. Courts are often confronted with the question as to whether the written words of the testator are meant to be binding or merely express a wish and they are careful not to enforce precatory language. Thus, in order for a handwritten document to have effect as a Will or Codicil, its language must be imperative, compulsory and dispositive. "A wish is not a command". Courts must ensure that the permissive is not converted to the mandatory.[14]

Some Examples

A holograph document which stated: "If anything should happen to me - I leave at my death - this house, contents, bank account and whatever I die possessed to (name)..." was found to be a valid Will.[15]

"I want to leave my house and my money to (Name)", was similarly found to be testamentary.[16]

Where the deceased's handwriting included the words, "I want to leave my house and my money to Ed Jones", it was considered testamentary in nature because it was held to

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[13] *Supra* note 2

14 *Rudaczyk Estate v. Ukrainian Evangelical Baptist Assn. of Eastern Canada* (1989), 69 O.R. (2d) 613, 34 E.T.R. 231 (H.C.)

15 *Dilts v. Roman Catholic Episcopal Corp. of the Diocese of London in Ontario*, 1998 CarswellOnt 1610, 22 E.T.R. (2d) 284

16 *Krushel Estate, Re*, 1990 CarswellOnt 506, 40 E.T.R. 129

express a deliberate or fixed and final intention of the testator as to the disposal of property upon death.[17]

A handwritten document was held to be a Will where the author stated that he had no Will, but stated that, "everything I have belongs to you anyways" :

> "Oh yes you better put this number down someplace, where you'll remember it. In case anything should happen to me. Its in my name but in care of Frontier Fishing Lodge. Should I kick the bucket, then it goes to Frontier Fishing Lodge. That's were any money or yours, I have, and what money of mine is. I also carry one or two hundred dollars in my pocket, for change or cashing checks. But you remember that number. Not that anything is going to happen just yet, but you never know when. And its best you know now. In fact you can put this letter away to, for safekeeping. I have no will, and everything I have belongs to you anyways. This way there will be no Red Tape for you to go through.[18]

Alterations to Wills[19]

In *Laidlaw Estate*,[20] the testator had left a typewritten will made with the assistance of a lawyer and had made changes to it after it was executed which consisted of handwritten words and numbers. All of the changes were in the testator's handwriting, dated and signed by the testator. The Court held that, "if it is not necessary to include both the formal typed portions of the ...formally executed will in order to understand the "handwritten Codicil", (referring to the handwritten changes throughout the formal will), it can be determined that the handwritten alterations ...constitute a valid holograph codicil to the original will".

Feeney's explains that Canadian law allows handwritten portions of a preprinted form will or the holographic part of any document containing non-holographic writing if the following three conditions are satisfied:

1. the document was intended to have dispositive effect;

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17 *Krushel Estate, Re* (1990), 1 O.R. (3d) 552

18 *Henderson (Seekey), Re,* 1982 CarswellNWT 21, [1982] 2 W.W.R. 262

19 See also, S. Davis, *Handwritten Changes Wills*, Hull & Hull Breakfast Series, October 14, 2010

20 [2010] A.J. No. 217 at para. 21

2. the spurious writing or printing if superfluous or unessential; and
3. the holographic parts are capable of standing by themselves without the spurious printing or writing.

Printed forms of Wills

There are several reported cases where a testator has filled in and signed a preprinted will form and then made changes to it at a later date. In different cases, the form may or may not have been witnessed by two witnesses in accordance with s. 4 of the *SLRA*. The cases reveal the following principles:

(i) if the preprinted form was signed in the presence of two witnesses and so is found to be a formal will, then the alterations are valid, legally effective and accord with s. 18 of the *SLRA if* the testator and two attesting witnesses sign near the alteration[21];

(ii) if the preprinted form was signed in the presence of two witnesses and so is found to be a formal will, and the testator and two attesting witnesses did *not* sign near the alterations in accordance with s. 18 of the *SLRA*, then the alterations are not effective. If the changes, however, are signed by the testator, they may form a valid holograph codicil to the formal will if, as the authors of *Probate Practice* point out, the changes make sense on their own, unlike a mere alteration[22];

(iii) holograph codicils do not have to be dispositive of assets but can relate to the change of executors or executors' powers.[23]

In *Luty v. McGill*, a testatrix filled in and signed a preprinted form will which was attested to by two witnesses. Later, she made changes to the form will. The changes that were unsigned were held to be invalid alterations to the formal will, while the changes that were signed by the testatrix, while not valid alterations, were found to be a holograph codicil to the formal will. In

21 *Luty v. McGill*, (2004) 246 D.L.R. (4th) 762
22 *CIBC Trust Corp. v. Horn*, 2008 CarswellOnt 4706 (ON S.C.J.)
23 *Supra* note 17

this case, Justice Greer cited *King v. King-Fleming*[24] for the principle that holograph codicils do not have to relate to the disposition of assets.

Revocation by holograph writings

"...a holograph will or codicil can revoke or be revoked by a formal will or codicil. ..the question is always one of intention."[25] Revocation can be express or implied by the words of a holograph document where the necessary *animus testandi* to create a completely new will is present.[26]

Bates v. Oryshchuk[27] ("*Bates*") is a recent Alberta case that provides a useful review of the law concerning the implied revocation of wills. Many holograph instruments do not contain an express revocation of a prior testamentary instrument. In *Bates*, Ross J. canvasses case law dating back to 1688 as well as academic commentary. He cites McKeown C.J.'s words in *Re McNeill*[28] that, "the second will, partially inconsistent, revokes a former one to the extent to which it is so inconsistent. Consequently, the first and second wills may well be admitted to probate, reading the provisions of the former as modified by those of the latter testament". He also notes that Oosterhoff[29] writes,

> [I]t is not necessary that the testator in a subsequent will or codicil declare that he or she is revoking his or her previous wills. ... Normally, however, if there is no express revocation clause, both testamentary documents are admitted to probate and the first is regarded as having been revoked to the extent that it is inconsistent with the second. ... Clearly, a revocation, whether express or implied can revoke either a whole will or part thereof.

Justice Ross concludes that,

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24 10 E.T.R. (2d) 258
25 *Probate Practice* at 97
26 *Caule v. Brophy*, 1993 CarswellNfld 39
27 54 E.T.R. (3d) 207, 18 Alta. L. R. (5th) 306
28 (1918) N.S.J. No. 4, [1939] 2 D.L.R. 50 at para 13
29 A.H. Oosterhoff, *Oosterhoff on Wills and Succession*, 6th ed. (Toronto:Thompson Canada Limited, 2007) at 335-336

> " implied revocation, like express revocation, derives from the intention of the testator, and therefore it is possible that even when a second will does not dispose of all of a testator's property, the testator's intention to revoke an earlier will in its entirety may still be inferred. The presumption against intestacy is only a presumption. It is defeated where by the terms of a later will it is clear that the testator intended to revoke a prior will. Generally, in the absence of an express revocation clause, an earlier will is revoked only to the extent that it is inconsistent with a second will. However, where a subsequent will disposes of, or shows an intention to dispose of, all the testator's property, the Court may infer that the testator has impliedly revoked the whole of the first will.

Where a testator had signed a handwritten will that did not contain a revocation clause and did not deal with all of the assets of the testator, Ross J. found the holograph will revoked the prior formal will and the assets not covered in the later will would pass by intestacy. He found that the intentions of the testator were very comprehensive and very different in effect from his intentions at the time of the prior will. Justice Ross found that the intended dispositions of the testator in his holograph will revoked the whole of the prior will and left a part of his estate to pass on intestacy. He was, "satisfied that the presumption against intestacy is rebutted in the circumstances of this case. The 1995 will (holograph will) demonstrated a clear intention of disposing of virtually all of John's property, taking this case out of the normal situation in which a second, partially inconsistent will revokes a prior will only to the extent of the inconsistency, and impliedly revoking the 1983 will".[30]

A formal will may be revoked by a holograph writing that is signed by the testatrix and that declares an intention to revoke.[31]

"It is not necessary that an instrument revoking a will be susceptible to probate. Section 15 of the *Succession Law Reform Act*[32] provides that a will may be revoked not only by a

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30 *Supra* note 26 at para 45
31 *Re Kinahan* (1981), 9 E.T.R. 53 (Ont. Surr. Ct.)
32 R.S.O. 1990 c. S. 26

subsequent testamentary instrument but also, "by a writing ...declaring an intention to revoke, and ...made in accordance with the provisions of the Part governing the making of a will...the intention to revoke must be expressly declared."[33]

In *Bishop Estate v. Eisor*[34], a will which had the words "cancelled 13 May 1988" across each page of the original will in the handwriting of the testator followed by her signature constituted a an intention to revoke the original will and was held to be a valid holograph will.

Similarly, in *Canada Trust v. Foster*[35], after the death of the deceased, her copy of the will dated August 3, 1983, was found in her room or apartment with the words, "Cancelled/Lily Downey", on it in her handwriting. In addition, a letter dated August 29, 1986, to her from the trust company suggesting review of her will had the words "Cancelled Will Sept. 19/86 — Downey" written on it in the deceased's handwriting. The Will was found to have been revoked.

Instructions to Solicitor

There is authority for the proposition that instructions for a Will, assuming they comply with the statutory requirements, can take effect as a Will. The key is whether they are intended to have a disposing effect, pending the making of a formal Will or whether they were simply intended as a guide or statement of information for a future will.

In *MacLennan Estate*[36], the testator met with his lawyer and gave her instructions for a new will. After several months passed, he left a handwritten and signed note for her at her office containing information about the residue of his estate and the executors he wished to name. The Court found that the note was a valid holograph codicil to the testator's prior will. The Court relied on both evidence within the note itself and extrinsic evidence. The fact that the name of

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33 at p. 101
34 (1990) 39 E.T.R. 36 (Ont. H.C.),
35 (1991) CarswellOnt 528, 40 E.T.R. 221
36 (1986)22 E.T.R. 22

the testator was set out at the top of the page and his signature was at the bottom was considered as evidence that the note was not intended as simply instructions to his lawyer. The Court also held that the words, "nominate' and "bequeath", used in the note were more indicative of a fixed and final intention than words like, "I must change this will".[37]

In *Caule v. Brophy*[38], a testator's letter to his solicitor was held to be a valid holograph will that revoked the testator's prior will. The Court indentified several features of the document and the circumstances that grounded its finding: the testator had appointed his executor, dealt with the residue of the Estate and requested the preparation of a formal will in the terms set out in the his letter. There had been no changes made to the instructions as a result of his discussion with his lawyer and there were no future consultations dealing with the substance of the will. [39] The Court also noted that, some time after writing the letter, the testator mentioned to his lawyer that one of the "beneficiaries" had died. The person who had died was one of the people named in the letter as a beneficiary. Barry J. wrote:

> If there was any doubt about the matter, I believe it is removed totally by Brophy's post-testamentary statement to Caule, Q.C., that "one of the beneficiaries is dead". Brophy had to be referring to the death of Harris Noseworthy, who was mentioned on the page attached to the 1987 letter. I find that Brophy's reference to "one of the beneficiaries" is evidence that he considered the 1987 letter to be his new will. He did not refer to "one of the proposed beneficiaries". He was treating his new will as being operative when he met Caule, Q.C., in January of 1991. I believe that this is indirect evidence of his testamentary intention in executing the l987 letter.
>
> I conclude that I am entitled to consider such a post-testamentary statement, not for the purpose of construing the meaning of the words used by Brophy in the 1987 letter for the purpose of determining their dispositive effect but to determine whether Brophy intended the 1987 document to be an effective will or not. See, Feeney, at p. 9, footnote 35. The post-testamentary statement is corroboration of the evidence of Caule, Q.C., that Brophy, at the meeting in October, 1987 when he brought in the letter, was "clear and firm" concerning the disposition of his property.[40]

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37 *Re Kinahan* (1981) 9 E.T.R. 53

38 50, E.T.R. 122; 1993 CarswellNfld 39

39 At para 42

40 At para 47 and 48

This case is also authority for the principle that a prior will can be impliedly or expressly revoked by a valid holograph will. The Court held that it was not necessary for the testator to instruct his lawyer to destroy his prior will. The Court reasoned that if the testator believed the letter to be an effective new will, then, "there was no reason for him to have the 1976 Will destroyed. It would be both impliedly and expressly revoked by the terms of the 1987 letter"[41].

Where the court found that the instructions to the solicitor were intended to operate provisionally as a will until the final will had been prepared and executed, the instructions were found to be a holograph will.[42]

In *Bennett*, the court found that the letter from the deceased to her solicitor discussing instructions for her will was not a holograph will because she was committed in the letter to future consultation with her lawyer. The letter to the solicitor was found not to express a fixed and final intention to dispose of her property on her death in a certain manner. One of the important pieces of evidence was that the testator failed to pursue what she indicated in her letter she as planning to do even though there was ample opportunity to do so. The Court interpreted that as evidence that the testator abandoned her intentions set out in her instructions to her solicitor.

Similarly, the Manitoba Court of Appeal[43] refused to find that instructions given to an accountant and passed on to a lawyer, "was never touched by the *animus testandi*". See also, *Hamill v. St. Luke's Church*[44] and *Morrison v. Owen*[45].

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41 At para 45
42 *Caule v. Brophy et al.* (1993), 108 Nfld. & P.E.I.R. 27.
43 *George v. Daily* (1997), 143 D.L.R. (4th) 273, 15 E.T.R. (2d) 1, [1997] 3 W.W.R. 379, 115 Man. R. (2d) 27, 139 W.A.C. 27, 1997 CarswellMan 57 (C.A.).
44 15 E.T.R. (2d) 184
45 (1991) 44 E.T.R. 290

Lists

In *Canada Permanent Trust Co. et al. v. Bowman et al.*, [1962] S.C.R 711, the Supreme Court of Canada held that a signed document, wholly in the handwriting of the deceased, containing a list of gifts, was a holograph will. Martland J. explained that the document was a statement of wishes of the deceased respecting the disposal of her property and found that it was implicit in the document itself that she wanted the disposition of her property to occur on her death. He mentioned that she had used language that was characteristic of wills.

A document simply containing names of relatives followed by percentages can also be held to be a holograph Will.[46] This was the case where the document did not even dispose of the entire estate.

Suicide Notes

A suicide note can be a valid testamentary instrument if it meets the technical requirements of validity as set out in the *Succession Law Reform Act*.

As noted above, precatory instruments and letters considered to not express a deliberate and final intention will not be admitted as testamentary documents.

In *Quirk v. Wernicke Estate*[47], the deceased left a handwritten will signed August 25, 1981, about eight months before he took his life on April 18, 1982. This will was signed by two witnesses, and left the deceased's estate to his wife of over twenty years. However, the deceased contemplated suicide, and on September 24, 1981, the deceased left a signed note that read: "Mary, good 'by my love I leave everything to you & the boys". The issue was whether this later note was testamentary, thus changing his earlier intention to leave everything to his wife. The court found that the note was not testamentary. The first "will" was witnessed by two witnesses,

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46 *Lindblom Estate v. Worthington*, 1999 CarswellAlta 976, [2000] 3 W.W.R. 85
47 1983] S.J. No. 586 (Sask. Surr. Ct.)

whereas the later note was not: the court held that if there was testamentary intent, the deceased would have had the note witnessed, as he had earlier. The court also noted that the note was taken by the police following a suicide attempt, and the deceased did not make any effort to retrieve it. The court reasoned that if the note was intended to be a will, the deceased would have made an effort to get the note back. In addition, the earlier will was kept by the deceased along with his other important papers. Finally, the deceased referred to the earlier will in the weeks before his death, and made no reference to the note. The court concluded that the propounders had not discharged the burden of proving that the later note was intended to be a testamentary instrument.

In *Re Holyk Estate*[48], the deceased left a note that appears to set out various names, and descriptions of various pieces of property. There was also a name with the notation "ex" beside it (presumably "executor"). At first instance, the court rejected the submission that the note was a valid testamentary instrument. The court referred to the requirement that it contain a fixed, final and deliberate expression of the intention as to the disposal of property on death" At first instance, that was not found. The document was merely a list of names and property, which seemed to indicate some desire to make a gift. Upon appeal, the court heard further evidence from a neighbour. The neighbour indicated that the deceased was suicidal. The deceased gave a key to his house to the neighbour, and told him what documents he would find there. Upon searching the house, the neighbour found the note, and memoranda on preparing a will. The court accepted this evidence, and admitted the will to probate. This evidence was said to be "convincing evidence that the writing in question expresses the last testamentary intent of the deceased person."

Summary

Despite common perceptions that a Will is a very formal document, any signed handwritings of the deceased must be examined very carefully to determine whether they are, in fact, a Will.

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[48] [1992] S. J. No. 400 (Surr. Ct.)