LAW REFORM COMMISSION

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COMMISSION DE RÉFORME DU DROIT

REPORT

ON

"*THE WILLS ACT*" AND THE DOCTRINE OF SUBSTANTIAL COMPLIANCE

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I. INTRODUCTION

In order for a testamentary transaction to constitute a valid will in Manitoba, it must be executed according to the formalities prescribed by *"The Wills Act"* of Manitoba.[1] Similarly, revocation of and alterations to wills must be performed in a specific manner.[2]

This paper examines these formalities of *"The Wills Act"*, the difficulties in their operation and some possible reforms which could alleviate the problems.

II. HISTORICAL DEVELOPMENT OF THE FORMALITIES

The right to dispose of property at the time of death was recognized in many early civilizations.[3] In the pre-Norman period in England such a process existed but no particular form appeared to be required.[4] The first introduction of formality into the English wills process came with the enactment of the *Wills Act*, 1540. This Act, which allowed for a will of lands, required that such a transaction be "in writing".[5] In the 1600s this very limited provision, which applied only to lands, proved to be insufficient to evidence wills. Additionally,even greater difficulty surrounded wills of personalty which had no requirement as to form.[6] As a result, cases such as *Cole v. Mordaunt* demonstrated the susceptibility of the process to fraudulent practices.[7]

The result of these difficulties was the introduction of the *Statute of Frauds*[8] provisions regarding the execution, revocation and alteration of wills. For wills of personalty the requirements surrounding oral wills were made more stringent. Written wills of personalty required no particular formalities. For wills of land, however, more stringent

requirements were introduced. Such wills were to be:

> . . . in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void. . . .[9]

The Act also introduced formalities for revocation and alteration of wills of land and personalty.[10]

These formalities remained in force, relatively unaltered, for the next 160 years. The only change came with the introduction of the statute 25 Geo. II ch. 6, s. 1. This related to the interpretation of the words "three or four credible witnesses". At that time, the law of evidence provided that beneficiaries who acted as witnesses to the will were incompetent to prove the will by virtue of their interest. Therefore entire wills were being declared void due to one or more of the witnesses being a beneficiary. This was found to be excessively harsh and the above statute was enacted to remedy the defect. It provided that, in such circumstances, the beneficiary's gift would be declared void, but he would be competent to prove the will.[11]

In the years following the introduction of the *Statute of Frauds* substantial difficulty was encountered due to the various formalities being used in wills. Complex rules regarding different procedures for different assets were developed and many estates were thrown into litigation. As a result it was recommended that uniform, simplified formalities be introduced to alleviate the problems being encountered.[12]

In response the English *Wills Act* of 1837 was introduced.[13] Under this statute the distinction between real and personal property was eliminated. The formalities of the *Statute of Frauds*, with some revision, were introduced as the only requirements as to form necessary for proper execution, alteration or revocation of all wills.[14]

It is these 1837 Wills Act provisions which have formed the basis for wills act formalities in most common law jurisdictions, including Manitoba on its entry into federation in 1870. The provisions, with little variation, were later formally adopted in 1882,[15] *and despite some simplification through adoption of the Uniform Law Conference Model Wills Act in 1964,*[16] *the* formalities have remained in substance to this day.

III. CURRENT FORMALITY PROVISIONS

The requirements for execution of a formal will in Manitoba are as follows:

> A will is valid only when it is in writing.[17]
>
> . . . a will is not valid unless,
>
> (a) at its end it is signed by the testator or by some other person in his presence and by his direction;
>
> (b) the testator makes or acknowledges the signature in the presence of two or more witnesses present at the same time; and
>
> (c) two or more of the witnesses attest and subscribe the will in the presence of the testator.[18]

The methods of revocation are set out in section 16:

A will or part of a will is not revoked except by

(a) the marriage of the testator, . . .

(b) a later will valid under this Act; or

(c) a later writing declaring an intention to revoke it and made in accordance with the provisions of this Act governing the making of a will; or

(d) burning, tearing or otherwise destroying it by the testator or by some person in his presence and by his direction with the intention of revoking it.[19]

For alteration section 19(2) applies:

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 6 or section 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.[20]

The competency of witnesses provisions which were incorporated in the 1837 *Wills Act* are included in section 13(1) of the Manitoba statute:

Where a will is attested by a person to whom or to whose then wife or husband, a beneficial devise, bequest, or other disposition or appointment of or affecting real or personal property, except charges and directions for payment of debt, is thereby given or made, the devise, bequest, or other disposition or appointment is void so far only as it concerns the person so attesting, or the wife or the husband

> or a person claiming under any of them; but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.[21]

Additionally section 13(3) extends the competency provision to a person signing for a testator:

> Where a will is signed for the testator by another person to whom or to whose then wife or husband, a beneficial devise, bequest, or other disposition or appointment of or affecting real or personal property, except charges and directions for payment of debt, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns the person so signing, or the wife or the husband or a person claiming under any of them; but the will is not invalid for that reason.[22]

The only other provisions as to form relate to holograph wills. Since the introduction of *"An Act relating to Wills"* in Manitoba in 1871 provision has been made for an informal or holograph will.[23] Such a will is currently permitted by virtue of section 7 of the Manitoba Act:

> A person may make a valid will wholly in his own handwriting and signature without formality and without the presence attestation, or signature, by a witness.[24]

IV. PROBLEMS WITH THE EXISTING PROVISIONS

Generally the formalities of *"The Wills Act"* of Manitoba, as described above, are similar to those in force in most common law jurisdictions.[25] In Manitoba, as in other areas, literal compliance with the formalities is mandatory. That is, the slightest defect as to form invalidates the will. This

formalistic approach has created a body of harsh and often inconsistent case law.[26] An examination of those cases illustrates the problem.

(a) Formal Wills

An area where inequitable decisions are prevalent is that pertaining to the provision that the testator make or acknowledge his signature in the presence of two witnesses who are present at the same time.

In the 1954 Ontario case of *Re Brown*,[27] the testatrix signed her will in an upper room in the presence of a Mrs. Viccars, who then subscribed the will as a witness. The two then went downstairs and joined a Mrs. Moon. The testatrix informed Mrs. Moon that she had made a will and both she and Mrs. Viccars acknowledged their respective signatures. Mrs. Moon then subscribed as a witness. There was no question in this case that the testatrix intended this document to be her will. There was no evidence of fraud or undue influence. Yet on a strict interpretation of the formalities, the will was held invalid. For the will to be valid, Mrs. Viccars should have signed after the acknowledgment by the testatrix to both witnesses. The decision is clearly correct in law. The principle had been well established through a line of cases, namely *Moore v. King*,[28] *Hindmarsh v. Charlton*,[29] *Rose v. Bouck*,[30] *Re Davies*[31] and has been followed in *Re Groffman*[32] and *Re Colling*.[33] However, it is submitted, the result in these cases is inequitable in that the intent of the testator is defeated by a technical defect. This inequity has been perceived and expressed by many of the judges who have decided these cases.

In *Rose v. Bouck* the decision was reached "very

reluctantly".[34] In *Hindmarsh v. Charlton*, Lord Cranworth stated that he had "a sort of personal feeling of regret" that the will could not be sustained.[35] And in *Re Davies*, Morris J. stated "I am compelled to decide the case in accordance with law, even though my decision has the effect of defeating the purpose and intention of the testatrix".[36]

Strict adherence to other provisions as to formality produces equally inequitable results: for example, wills which must be declared invalid because a testator[37] or witness[38] has inadvertently forgotten to sign, or wills which are invalid because the testator is too sick to sign[39] or too sick to turn his head and watch the witnesses sign.[40]

Because of the unfortunate results of technical defects, the courts have employed various confusing distinctions to avoid inequitable decisions. The most glaring illustration of this is in the cases which have attempted to determine if a will has been signed "at its end" as is provided in the statutes. This provision was originally introduced in the 1837 *Wills Act*.[41] However it was so strictly interpreted that an amendment was introduced in England in 1852.[42] This amendment, now adopted in most jurisdictions including Manitoba,[43] allows a more liberal definition of "at its end".

Yet even with relaxation of the provision, the difficulties have persisted. The English reports are replete with cases attempting to explain the provisions, many of which seem contradictory or confusing.[44] For example in the cases of *Re Hornby*[45] and *Re Roberts*[46] signatures in the middle of the page were sufficient to validate the whole will including the portions below. Yet in *Re Stalman*[47] and *Re Bercovitz*[48] signatures at the top were not sufficient to validate the

documents. In Canada, in the case of *Re Walsh*[49] a signature at the beginning was accepted but in *Re Wright*[50] a similar signature at the top was rejected.

In Manitoba in the case of *Re Tachibana*,[51] a holograph will signed at the beginning both in time and placement was held valid based on the premise that the "at end" requirements were inapplicable to holograph wills.

All of the above cases are distinguishable in form but the testator's intention in all the cases was clear. The varied results are not justified. Some are not technically correct in law but appear to be attempts on the part of the judiciary to give effect to the obvious intentions of the testator.

Similar problems are encountered in the cases relating to "envelope" signatures. In the recent case of *Re Beadle*,[52] Mrs. Beadle, after dictating the contents and making the statement "this is just what I wanted", signed the right hand corner of the document and then signed the envelope. Both signatures were insufficient. Following the *Re Bean*[53] case, the envelope signature was of no help since it was meant to identify the envelope and contents as belonging to the testatrix but not to authenticate the will inside the envelope. Yet in the cases of *Re Mann*[54] and *Re Wagner*[55] similar envelope signatures were sufficient as they were intended to authenticate the will.

All of the above described cases illustrate that a wide range of technical distinctions has arisen as a result of the judiciary's attempt to avoid the inequitable results

of a defect as to formalities. These distinctions made the law in this area difficult to interpret.

Even more difficult cases arise where the courts have created exceptions to general probate principles. In the Manitoba case of *Re Thorleifson*,[56] a husband and wife in executing mutual wills signed the wrong documents. The court, in order to remedy the defect, allowed alteration of the will in the form of substitution of the correct words. Although the result is clearly beneficial, it casts uncertainty into probate law. Previous case law had always maintained that the Court of Probate's jurisdiction did not extend to addition or substitution of words.[57] This case suggests that there is an exception to this principle. The uncertainty and difficulties created are not limited to execution of formal wills. A similar problem has arisen regarding holograph wills.

(b) Holograph Wills

As previously described, provision is made in Manitoba as well as Alberta, Saskatchewan, Ontario, Quebec, New Brunswick, Newfoundland and the Territories[58] for an informal or holograph will. The only execution requirement of these special wills is that they be "wholly in the handwriting of the testator and signed by him."[59]

The difficulty with these provisions is due to the introduction of standard wills forms. These printed forms, available in most stationery departments, set out in typing or scroll the basic provisions of a will which can be completed by filling in the blanks. Although there is provision in the form for attestation, cases have arisen where the forms have been completed but not witnessed. In such circumstances

they cannot be admitted as formal wills. Problems have arisen over the interpretation of the words "wholly in the handwriting of the testator" when the courts have attempted to admit them as holograph wills.

In Canada, there are two lines of cases dealing with this question. The strict line is set out in *Re Rigden*[60] and *Re Griffiths*.[61] In these cases the word "wholly" is given its plain and unambiguous meaning and the wills are rejected however unjust, arbitrary or inconvenient the result may be.[62] On the other hand there is a line of cases - *Re Ford*,[63] *Re Laver*,[64] *Re Austin*[65] and the 1979 Manitoba Court of Appeal decision in *Re Philip*[66] wherein such standard form wills have been held valid. These decisions interpret the printed portions of the will to be superfluous, not intended to be adopted by the testator as part of the will. The difficulty with these cases is that the *Re Ford* line of decisions[67] creates doubt once again surrounding some general probate principles.[68]

Furthermore it is very difficult to distinguish between the two lines of cases, and it is difficult to ascertain which line will be followed. This is well illustrated in the recent cases of *Re Shortt*[69] and *Re Forest*.[70] In both cases the testator's intention that the document constitute a will was clear. In both cases the documents were completed in virtually identical fashion. Yet the court in *Re Shortt* allowed the will into probate, while in *Re Forest* the will was held invalid. The law in this area is therefore very uncertain.

(c) Alteration and Revocation

Problems extend also to the requirements for

alteration and revocation. The alteration requirements which provide that changes must be executed in similar fashion to the will have created some difficulty. This is illustrated in cases such as *Re McVay*[71] and *Re Garton*[72] where the intentions of the testator are clear but absence of a witness has made the attempted change ineffective. Furthermore there is difficulty with revocation by physical act in interpreting which acts are sufficient to fall within the terms of the statute.[73]

(d) Attesting Witnesses

A further section, in force in Manitoba and other common law jurisdictions, which has created difficulties is that dealing with attesting witnesses.[74] The difficulty encountered is due to the fact that once a beneficiary acts as a witness, although he is competent to prove the will, his gift is void automatically, regardless of circumstances. This equally applies for a person who signs for the testator. Thus, unfortunate cases such as *Re Brush*,[75] *Re Cumming*,[76] *Whittingham v. Crease & Company*[77] and *Ross v. Caunters*[78] have arisen. In these cases beneficiaries or their spouses have by accident acted as witnesses and despite the fact that there was no evidence of influence or fraud, substantial gifts to the parties became void.

All of the cases examined above illustrate the difficulty that currently surrounds compliance with the formalities of *"The Wills Act"*. The irony of this is that these formalities were introduced to ensure that a document purporting to be a valid will truly embodied the final intentions of the testator. Yet the cases have indicated that strict adherence to these formalities can, in fact, result in defeating the true intentions of the testator.

It has been argued that the above described difficulties are not of sufficient significance to merit any legislative alteration.[79] This argument is particularly applicable to Manitoba. The Manitoba reported cases in this area have been few and in those which have arisen the courts have apparently avoided any harsh results.[80] However, it is submitted, there is still sufficient reason to amend the law in Manitoba.

Here, as in other jurisdictions structured upon private ownership of property, the ability to devise and bequeath is an important right exercised by a broad range of the populace. A legal system which recognizes this power to determine successors in ownership should, as far as possible, ensure that an intentional exercise of the power obtains legal recognition.[81] Although so far the Manitoba courts have generally avoided defeating a testator's intention, circumstances may arise, as the cases have demonstrated, where this will be impossible. There is no need to await such an inequitable situation. Even if the number of cases involved are minimal, any improvement in the law that can be made to avoid such a problem and protect a testator's intention should be instituted. In addition such an improvement would also remove the necessity for technical distinctions and reduce the uncertainty which currently exists.

V. UNIFORM PROBATE CODE APPROACH

In the United States the approach of reducing the *Wills Act* formalities was adopted in the *Uniform Probate Code* (UPC) of 1969. The Code requires only bare essentials for

the proper execution of a formal will. The will must be in writing, signed by the testator or by some other person in the testator's presence and by his direction, and signed by two witnesses who witness either the signing or the acknowledgment of the signature or will.[82]

For holograph wills only the material provisions need be in the handwriting of the testator. Furthermore, the attesting witnesses provision is eliminated.[83]

This approach does eliminate some of the difficulties currently encountered. That is, the *Re Brown* line of cases[84] relating to "in the presence of both witnesses" would be inapplicable. Similarly the *Re Beadle*,[85] *Re Stalman*[86] cases that deal with signatures "at the end" would no longer pose a difficulty. However, it is submitted, the UPC approach is not the optimal solution for two reasons.

First, circumstances can still be envisioned where strict adherence to even these minimal formalities would defeat the testator's intention. For example, if a witness or a testator forgets to sign the will, the new provisions would be of no assistance. Even with the minimum requirements, frustration of a testator's intention on a technical basis is still possible.

There is a second difficulty with this approach. Neither reduction nor elimination of the formalities is an advisable approach because *"The Wills Act"* formalities serve a valid function in probate law and practice.

VI. FUNCTIONS OF THE FORMALITIES

The four basic functions of *"The Wills Act"* formalities were first identified by Prof. John Langbein in his article on the subject. These four he defines as the protective, evidentiary, cautionary and channelling functions.[87]

(a) Protective function

The protective function was of primary importance historically when the formalities were first introduced. The formalities were designed to protect the testator from undue influence or fraudulent activities surrounding the making of his will. Towards this goal, the requirement of a signature "at the end" prevents subsequent interpolations. The provision that a testator sign in the presence of witnesses, present at the same time, prevents a witness or a third party from compelling or influencing the testator's actions. Similarly the maintenance of the competency provisions for a witness surrounds the testator with disinterested parties unmotivated to procure a "spurious will by dishonest methods".[88] Furthermore, requiring attestation and subscription in the "presence" of the testator prevents the witnesses from substituting some other paper for the will.

Holograph wills serve this function to the extent that the requirement as to the testator's handwriting and signature prevent substitution or interpolation. Such wills however are not designed to prevent undue influence or force.

This is because the protective function is no longer seen as a primary purpose behind the formalities. This is attributable to the fact that, despite the theory, the formalities do not, in reality, exercise this function well. As pointed out by Prof. Langbein, the formalities are inadequate to protect a testator from determined crooks. Secondly, the formalities do more harm than good in voiding wills for harmless violations. Thirdly, the formalities are not needed for this purpose since fraud and influence can be proved in other ways notwithstanding valid execution. Thus the protective function was of most importance historically.[89]

(b) Evidentiary function

A much more important function the formalities serve is the evidentiary one. Since courts "are remote from the actual . . . occurrences"[90] which claimants rely on to establish their interests, it is necessary that they be provided with sufficient evidence of the event.

Reliable and permanent evidence of intention, genuineness and clarity of terms is ensured by *"The Wills Act"* formalities. Writing is permanent evidence which can be presented to a court at a later date. Signature at the end assures the court of the authenticity of the whole document. The requirements as to witnesses provide the court with parties who can give evidence to prove the will. By their being disinterested, the evidence of the witnesses is not self-serving. The testator signing or acknowledging in the witnesses' presence provides evidence of intent. And attestation and subscription give verification of their role. With holograph wills, the evidence function is also well served. The requirement of "wholly in the handwriting of the testator" provides evidence of genuineness and intention, with verification of the handwriting substituting for attestation.[91]

The formalities therefore provide the courts with substantial evidence of the validity of a given document. With little or no formality requirements, the task of "proving" a will would be substantially more difficult.

(c) Cautionary function

The third function of the provisions is the "cautionary" one. For a will to be valid it must be established that a testator intended his words to be legally operative. It must be clear that the finality and solemnity of the occasion were impressed upon the testator. This function is served by *"The Wills Act"* formalities. Writing is more final than oral declarations in the sense of the expression that "talk is cheap". Signature in our society is a sign of final authorization. Most people will not lightly sign a document entitled "last will and testament". All the witnessing provisions - presence, attestation and subscription - make the entire process very ceremonial, impressing upon the testator the importance of his actions.

With holograph wills the cautionary function is only served through writing and signature; the rest must be gathered from the terms and wording of the document.[92]

(d) Channelling function

The last function served by the formalities is the channelling one. *"The Wills Act"* formalities make the probate of wills a substantially more uniform and routine procedure. For probate courts, since wills all take basically a similar form, the probate process can be executed with speed and efficiency. For estates of large or small size, the procedure can be completed with little expense or difficulty.

For individuals making their wills the process is beneficial in that they are provided with guidelines. The formalities help a party to channel his thoughts, so that his intention can be communicated to and executed by the courts.[93] This channelling function, like the others, is very important. The above-described functions are performed in similar fashion by the formalities surrounding alteration and revocation.[94]

The Commission, therefore, is of the opinion that *"The Wills Act"* formalities serve valid purposes in probate law and that reduction or elimination of the formalities is not an advisable solution. Furthermore, it is not the formalities which create the current difficulties but rather the approach taken to them.

VII. REMEDIAL PROVISIONS

(a) Need for remedial provisions

As previously described, the current approach to the formalities is that of literal compliance. "The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential."[95] It is submitted that it is this insistent formalism which creates the current difficulties and which should be altered.

If the primary object of the courts is to recognize the testator's intention then the "requirements of execution which concern only the form of the transfer . . . seem justifiable only as implements for its accomplishment . . . ".[96] These requirements should not be seen as goals. To this end the courts should be empowered to "remedy" a defect of form where necessary.

Prof. Langbein recommended such a remedial provision which he called a "substantial compliance" or "harmless error" doctrine.[97] The essential concept is the same. That is, the finding of a formal or execution defect would not lead to automatic invalidation of the will. Rather the proponents of the document would be given the opportunity to establish that the defect is a harmless one.[98] This would entail satisfying the court that, despite the defect, the document represents the intent of the testator and satisfies the purposes of *"The Wills Act"*. For once the intent of the testator is established, and the purposes "are proved to have been served, literal compliance with the formalities is no longer necessary".[99] In effect a functional analysis would be allowed. Therefore the presumption of invalidity surrounding defective execution would be changed from a conclusive to a rebuttable one. It is submitted that introduction of such a remedial provision would alleviate the difficulties that currently exist.

Applying the doctrine to some of the cases previously discussed illustrates its usefulness. In the *Re Brown* line of cases,[100] the error in not acknowledging the signature in the presence of both witnesses automatically made the will invalid. If a remedial provision had been in existence the proponents would have had an opportunity to defeat this presumption of invalidity. It would have been open to them to establish that the document reflected the testator's intent and no undue influence or fraud had been present, despite the defect.

Similarly in the *Re Beadle* case, the judge stated that he was satisfied the document reflected the testator's

intent and no fraudulent interpolation had occurred. A remedial provision would have given him the ability to declare the will valid despite the defect in signature placement.

If applied to the cases dealing with stationery forms of wills, the doctrine would allow the courts to overcome the strict interpretation of the "wholly in the testator's handwriting" provision.

Similarly, if the remedial provision were applied, the beneficiary who inadvertently witnessed a will would no longer automatically lose his gift. Rather it would be open to him to establish that despite his acting as a witness, no undue influence had been employed.

The provision would be equally applicable to defects in the formalities of revocation or alteration.

It is submitted that such a remedial provision would alleviate current difficulties and contain sufficient flexibility to meet future problems in this area.

(b) Objections to remedial provisions

Such a doctrine has been raised in various jurisdictions and has been subject to only minimal objection.[101] These objections, however, should be considered.

It is argued that introduction of such a provision would discourage the use of the proper formalities thereby impairing performance of all the valuable functions. It is submitted that this argument is flawed. The provision

recommended is a remedial provision. It will be used only at final stages to save a will which is defectively executed, revoked or altered. The doctrine is not applicable at initial stages of execution. Reliance on it at that stage would mean subjecting an estate to needless litigation. A remedial provision should not discourage or in any way affect the use of formalities.[102]

A related argument raised against the doctrine is that its introduction would vastly increase the volume of probate litigation.[103] The increase would be attributable to proponents bringing forth various informal documents which currently would not be raised because of defective execution. This argument is not necessarily supportable. For instance a remedial provision would still require that the purposes of the formalities be met. There must be reliable evidence that the document is genuine and constitutes the final intent of the testator, free from imposition, undue influence or fraud. Cases will not likely reach the courts unless there is some possibility of establishing these factors. If such a possibility exists then in the interests of fulfilling the testator's intention the extra litigation or delays incurred would be justifiable.

Secondly, any potential increase would most likely be offset by a decrease in other forms of probate litigation. It will no longer be beneficial for parties to challenge a will strictly on the basis of a technical objection. Thus it is possible a reduction not an increase of litigation would occur.[104] Finally, experience in jurisdictions which have implemented such a provision does not support the validity of the objection. In Israel, where such a provision has been in force for 15 years, no increase in litigation has been

observed.[105] In South Australia, where a remedial amendment was introduced in 1975, there has been no marked increase in litigation. In fact in the five years of the doctrine's statutory existence only one case has been reported.[106]

In total, it is submitted, the objections to the provision are not of sufficient weight to merit rejection of the doctrine. The Commission has concluded that introduction of such a provision into Manitoba constitutes the optimal solution to the formality problems.

(c) Scope of remedial provisions

The more difficult question than the advisability of the doctrine in general is the problem of defining the scope of the provision.

Two jurisdictions have introduced a general remedial doctrine in their *Wills Act*. Two other jurisdictions have recommended introduction of such a provision. In all four areas the form of the provision has varied in terms of the limitations placed on the particular sections. The three main forms of limitation appear to be a higher standard of proof, threshold requirements or attempted execution.

i) Queensland

Of the four provisions, the one which can best be called a "substantial compliance" doctrine is the provision drafted for institution in the Queensland jurisdiction of Australia. This provision reads as follows:

> The Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities

> prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator; . . . .[107]

The wording of this section indicates the limitation in the approach of the Queensland provision. That is, the section is only applicable where there has been an attempt to execute according to prescribed formalities which has failed. This is a strict embodiment of the doctrine proposed by Prof. Langbein.[108] Such an enactment is beneficial in that it covers most of the problems currently found. However, it is submitted, the limitations of this approach make the provision excessively narrow.

The requirement of attempted execution tends to imply that an attempt would have to be made to meet all the formalities. That is, the absence of a formality, such as using only one witness or being too sick to sign, might not be able to be corrected through this provision.

Additionally, the word "substantial" is an ambiguous term to employ. Prof. Langbein in his article uses the word in the sense of complying in substance as opposed to form.[109] However, such wording could be interpreted to mean a substantial or large amount. Therefore the doctrine might be inapplicable to a document which had a major defect such as a forgotten signature or use of only one witness.[110]

It is submitted that this form of provision unnecessarily limits the potential scope of the remedial doctrine, weakening its usefulness.

ii) British Columbia

A similar problem is encountered with the approach

recently recommended by the Law Reform Commission of British Columbia. Their proposal reads as follows:

> The *Wills Act* be amended to permit the Supreme Court to admit to probate a document capable of having testamentary effect notwithstanding that it has not been executed in compliance with the required formalities if:
>
> (a) the instrument is in writing and signed by or on behalf of the deceased, and
>
> (b) the court is satisfied that the deceased intended the document to have testamentary effect.[111]

The approach taken by this proposal is to reject the concept of attempted compliance but replace it with "threshold requirements" of writing and signature.

The British Columbia approach is beneficial in that it is broader than the Queensland approach and it does cover most of the difficulties currently encountered. Yet, circumstances can still be envisioned where strict adherence to even these minimal formalities could defeat the testator's intention. As Prof. Langbein points out what of the testator who is about to sign his will in front of witnesses, when an "interloper's bullet or a coronary seizure fells him".[112] The likelihood of such an occurrence is small but the fact remains there is no necessity for such limitations to the proposed section. In effect such requirements do not conform with the functional analysis on which the remedial provision is based. For this reason such a limitation is not recommendable.

iii) Israel

Two jurisdictions have actually enacted remedial

provisions. In Israel such a section was instituted in 1965. Section 25 of the Israeli *Succession Act* reads in English translation as follows:

> Where the court has no doubt as to the genuineness of a will, it may grant probate thereof notwithstanding any defect with regard to the signature of the testator or of the witnesses, the date of the will, the procedure set out in sections 20 to 23 or the capacity of the witnesses.[113]

From the wording of the section the extent of the limitations imposed is unclear. The scarcity of cases dealing with the provisions, in addition to language and law differences, make the section's scope even more difficult to interpret.[114] However, two main restrictions have been discovered. The section is clearly limited through the requirement of a high standard of proof. Application of the provision requires that the court have "no doubt" as to the veracity of the will. Additionally, recent case law sets out threshold requirements of a "testator, two witnesses and a document in writing," the absence of which cannot be remedied.[115]

Once again, it is submitted, for the reasons previously stated, such an approach unnecessarily limits the scope of the remedial provision.

iv) South Australia

South Australia is the other jurisdiction which has enacted a remedial provision. In 1975 on a recommendation of the South Australian Law Reform Committee[116] section 12 of the *Wills Act* was introduced. It reads as follows:

> A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.[117]

As the wording of the section illustrates the South Australian approach is the widest in scope of all the remedial provisions in this area. The section does not provide for any threshold requirements or any need to establish attempted compliance. The only limitation is a higher standard of proof - proof beyond a reasonable doubt.

It is submitted that this wide approach adopted in South Australia is the one which best achieves the goal of the remedial provision. By placing no limitation on the doctrine's application, it empowers a court to overcome any technical defect or absence of formality in giving effect to the testator's intention.

The advisability of this approach can be detailed as follows. It is futile to try to foresee every type of mistake and every type of formality that testators might employ in the making of a will. The variety of human beings and their transactions is too great. The provision instituted should be broad enough to encompass all such possibilities. Limitations only weaken the provision's ability to do so. The only control necessary on such a remedial provision is already provided for in the wisdom of the courts.[118] The judiciary has had no difficulty in discerning a testator's intention in the past despite defects of form. And once the

court is satisfied of that intent there is no reason to place any technical limitation on the court's ability to admit that document to probate.

The criticisms addressed to such a wide provision are simply re-statements of the objections to a remedial provision in general. That is, the wider the provision, the greater the opportunity for undermining the formalities and their purposes and increased litigation. The same arguments raised before must be repeated. The provision is remedial; it will not affect initial execution. Requiring that the document embody the "testamentary intentions" of the testator implies that the purposes of the formalities must be met. There must be sufficient evidence to establish genuineness, finality of intent, absence of fraud and undue influence. Furthermore, regarding the question of increased litigation, as previously described, there has been only one case in South Australia on this section since its enactment.

In that case, *Re Graham*,[119] the testatrix executed her will and gave it to her nephew instructing him to have it "witnessed". The nephew took the will to two neighbours who signed the document as witnesses. Jacobs J., in hearing the case had not the "slightest doubt that the deceased intended the document . . . to constitute her will".[120] Therefore, by applying section 12 he was able to admit the will to probate despite the defect. This case illustrates the effective application of the South Australian provision and its uniqueness indicates the fears of excessive litigation are not supportable.

VIII.PROPOSAL FOR MANITOBA

In total, it is submitted that the wide approach

to the remedial provision taken in South Australia is the optimal approach for such a section. The introduction of limitations defeats the purpose of the provision without serving any necessary function. Therefore, the majority of the Commission recommends that the remedial provision introduced in Manitoba should take this wide approach so as best to encompass all present and potential difficulties. However, if such a provision is instituted in Manitoba, some qualifications to the section would be necessary.

The first qualification relates to the question of the standard of proof to be employed. The standard of proof used generally in probate matters is the normal civil standard of "balance of probabilities" or "preponderance of evidence". This standard requires that one must adduce evidence which is capable of showing a greater probability of validity than the contrary.[121]

However, in the South Australian remedial section, the court must be satisfied beyond a reasonable doubt about the testator's intention. This is the standard of proof employed in criminal actions. It requires adducing evidence which is capable of compelling practical certainty of a state of facts.[122] It is submitted that, unlike the South Australian section, the Manitoba provision should employ the normal civil standard of proof on the balance of probabilities. This conclusion is based on the following factors.

First, in line with the preceding arguments, limitations on the doctrine's application are unnecessary. Secondly, as previously described, the civil standard of proof is employed in other areas of probate law. Introduction of a different standard only creates inconsistency in the probate process. Thirdly, the civil standard serves

its function well. The proof required is an establishment of a preponderance of evidence to show that a conclusion sought is the most probable view of the facts.[123] This does not entail just a mechanical weighing of probabilities. Rather it necessarily involves a careful consideration of the possibilities in the context of the factors of the case.[124] Additionally, in the area of execution of wills, any curious circumstances will give rise to the "doctrine of suspicion". This doctrine casts an additional burden on the propounders of the will to remove the suspicion by affirmative evidence.[125]

Given this protection and all of the above factors, the Commission recommends that the normal civil standard of proof be employed in the remedial section.

With removal of the reasonable doubt standard a second qualification to the section is necessary. It is submitted that the wording ". . . if the Supreme Court . . . is satisfied. . ." would no longer be appropriate. The difficulty with such wording is that it connotes subjective analysis by the judiciary and it does not emphasize an objective examination of the sufficiency of the evidence. The exact level of proof required to "satisfy" a judge would be unclear and perhaps subject to variation. This would create uncertainty surrounding the remedial provision. Additionally, the subjective element of such terminology would create difficulty in appealing these decisions.

The Commission therefore recommends that the wording of the proposed Manitoba provision be similar to that adopted in South Australia but be amended to read ". . . be deemed to be a will of the deceased person if *it is proved* upon

application for admission of the document to probate as the last will of the deceased, that the deceased intended the document to constitute his will". We believe that this wording creates a much more objective standard for both certainty and appeal purposes.

The third qualification to the remedial provision recommended for Manitoba is that it should be very clearly worded to encompass revocation and alteration defects as well as those of execution.

With regard to the provision relating to attesting witnesses, the Commission recommends that a separate section be introduced to extend the doctrine to this area. In this regard, Ontario has recently introduced a provision which accomplishes this goal. Section 12(3) of *"The Succession Law Reform Act"* reads as follows:

> Notwithstanding anything in this section, where a surrogate court is satisfied that neither the person so attesting or signing for the testator nor the spouse exercised any improper or undue influence upon the testator, the devise, bequest or other disposition or appointment is not void.[120]

It is submitted that this section successfully embodies the necessary approach to these provisions. The only necessary qualification to this section is in relation to the wording "a surrogate court is satisfied". Once again, substitution of the phrase "it is proved" would make the section more satisfactory. Other than this alteration, the Commission recommends that the Manitoba section be similar to the Ontario provision.

IX. CONCLUSION

For ease of reference, the Commission's recommendations can be summarized as follows:

1. A remedial provision should be introduced in *"The Wills Act"* allowing the probate courts in Manitoba to admit a document to probate despite a defect in form, if it is proved on the balance of probabilities, that the document embodies the testamentary intent of the deceased person.

2. The provision should be worded so as to apply to defects in execution, alteration and revocation.

3. A further section should be enacted to allow the probate court to save a gift to a beneficiary who has signed for the testator or as a witness to a will, where the court is satisfied that no improper or undue influence was employed.

This is a report pursuant to section 5(2) of *"The Law Reform Commission Act"*, signed this 8th day of September 1980.

Clifford H.C. Edwards, Chairman

Patricia G. Ritchie, Commissioner

David G. Newman, Commissioner

A. Burton Bass, Commissioner

Beverly-Ann Scott, Commissioner

Knox B. Foster, Commissioner

FOOTNOTES

1. *"The Wills Act"*, C.C.S.M. c. W150, sections 4, 5, 7, 8 and 13.

2. *"The Wills Act"*, C.C.S.M. c. W150, sections 16, 17 and 19.

3. A. Reppy and L.J. Tompkins, *Historical and Statutory Background of the Law of Wills*, (1928) 3.

4. *Id.*, at 12.

5. *Statute of Wills*, 32 Hen. VIII c. 1, sec. 1 (U.K.).

6. *Supra note 3 at 32.*

7. *Id.*, at 9.

8. *Statute of Frauds*, 29 Car. II c. 3.

9. *Statute of Frauds*, 29 Car. II c. 3, sec. V (translated form found in A. Reppy and L.J. Tompkins, *Historical and Statutory Background of the Law of Wills*, (1928) 195).

10. *Statute of Frauds*, 29 Car. II c. 3, sections VI, XIX, XX, XXII.

11. *An act for avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils concerning real estates in that part of Great Britain called England and in His Majesty's colonies* and plantations in America, 25 Geo. II c. 6, sec. I.

12. Working Paper #28 on *The Making and Revocation of Wills*, Law Reform Commission of British Columbia.

13. *Wills Act*, 7 Wm. IV & 1 Vict., c. 26 (U.K.).

14. *Wills Act, 7 Wm. IV & 1 Vict., c. 26 (U.K.).*

15. *"The Wills Act of Manitoba"*, S.M. 1882, 45 V. c. 2.

16. *"The Wills Act"*, S.M. 1964, c. 57.

17. *"The Wills Act"*, C.C.S.M. c. W150, section 4.

18. *"The Wills Act"*, C.C.S.M. c. W150, section 5.

19. *"The Wills Act"*, C.C.S.M. c. W150, section 16.

20. *"The Wills Act"*, C.C.S.M. c. W150, section 19(2)

21. *"The Wills Act"*, C.C.S.M. c. W150, section 13(1).

22. *"The Wills Act"*, C.C.S.M. c. W150, section 13(3).

23. *An Act relating to Wills*, S.M. 1871, 34 V. c. 4, section 15.

24. *"The Wills Act"*, C.C.S.M. c. W150, section 7.

25. J. Langbein, "Substantial Compliance with the Wills Act" (1975), 88 *Harvard L. Rev.* 489 at 490.

26. *Id.*, at 489.

27. [1954] O.W.N. 301 (Sur. Ct.).

28. (1842), 163 E.R. 716.

29. (1861), 11 E.R. 388 (H.L.).

30. (1908), 2 Alta. L.R. 263.

31. [1951] 1 All E.R. 920.

32. [1969] 2 All E.R. 108(P.D.).

33. [1972] 1 W.L.R. 1440 (CH.D.).

34. *Supra* note 30, at 264.

35. *Supra* note 29, at 168.

36. *Supra* note 31, at 922.

37. *Re Bean*, [1944] 2 All E.R. 348 (P.D.).

38. *Solicitor, Ex Parte Fitzpatrick*, [1924] 1 D.L.R. 981; 54 O.L.R. 3 (Ont. C.A.).

39. *Peden v. Abraham*, [1912] 3 W.W.R. 265; 8 D.L.R. 403 (B.C.S.C.).

40. *Re Wozciechowiecz*, [1931] 3 W.W.R. 283 (Alta. C.A.).

41. *Wills Act*, 7 Wm. IV & 1 Vict. c. 26, section IX (U.K.).

42. *Wills Act Amendment Act*, 15 & 16 V. c. 24 (U.K.).

43. *"The Wills Act"*, C.C.S.M. c. W150, section 8.

44. T.G. Feeney, *The Canadian Law of Wills: Probate* (1976) 54.

45. [1946] 2 All E.R. 150 (P.D.).

46. [1934] P. 102.

47. (1931) 145 L.T. 339 (C.A.).

48. [1962] 1 All E.R. 352 (C.A.).

49. (1893), 7 Nfld L.R. 738.

50. [1937] 3 W.W.R. 452 (Sask. K.B.).

51. (1968), 66 D.L.R. (2d) 567 (Man. C.A.).

52. [1974] 1 All E.R. 493 (Ch.D.)

53. *Supra* note 37.

54. [1942] 2 All E.R. 193 (P.D.).

55. (1959), 29 W.W.R. 34; 20 D.L.R. (2d) 1770 (Sask. Sur.Ct.).

56. (1954), 13 W.W.R. 515 (Man. Sur. Ct.)

57. *Supra* note 44, at 42.

58. Alberta: R.S.A. 1970, c. 393, s. 7; Saskatchewan: R.S.S. 1965, c. 127, s. 7(2); Manitoba: C.C.S.M. c. W150, s. 7; Ontario: S.O. 1977, c. 40, s. 6; Quebec: C.C. Art. 842, 850; New Brunswick: R.S.N.B. 1973, c. W-9, s. 6; Newfoundland: R.S.N. 1970, c. 401, s. 2; Northwest Territories: R.O.N.T. 1974, c. W-3, s. 6(2); Yukon: R.O.Y.T. 1971, c. W-3, s. 6(2).

59. *Supra* note 44, at 49.

60. [1941] 1 W.W.R. 566 (Sask. Sur. Ct.).

61. [1945] 3 W.W.R. 46 (Sask. Sur. Ct.).

62. *Supra* notes 60 and 61.

63. (1954) 1e W.W.R. (N.S.) 604 (Alta. D.C.).

64. (1957), 21 W.W.R. 209; 10 D.L.R. (2d) 279 (Sask. Q.B.).

65. (1967), 59 W.W.R. 321; 61 D.L.R. (2d) 582 (Alta. C.A.).

66. [1979], 3 W.W.R. 554 (Man. C.A.).

67. *Supra* notes 63-66.

68. See *Re Philip* [1978] 4 W.W.R. 148 (Man. Co. Ct.) at p.158 wherein Philp, Sur. Ct. J. discusses the ability of a court of probate to omit words from a will.

69. (1977), 4 Alta. L.R. (2d) 152 (Alta. Sur. Ct.).

70. [1980] 1 W.W.R. 470 (Sask. Sur. Ct.).

71. (1955) 16 W.W.R. 200 (Alta. S.C.).

72. [1924] 1 W.W.R. 1023 (Sask. Sur. Ct.).

73. See *Cheese v. Lovejoy* [1877] 2 P.D. 251.

74. *"The Wills Act"*, C.C.S.M. c. W150, section 13(1)(3).

75. [1942] O.R. 647.

76. (1963), 38 D.L.R. (2d) 243 (Ont. H.C.).

77. [1978] 5 W.W.R. 45 (B.C.S.C.).

78. [1979] 3 W.L.R. 605 (Ch. D.).

79. S.N.L. Palk, "Informal Wills: From Soldiers to Citizens" (1973-76), 5 *Adel. L.R.* 382.

80. See *Re Tachibana, supra* note 51; *Re Philip, supra* note 66; *Re Harvie* (1907) 7 W.L.R. 103 (Man. C.A.).

81. A.G. Gulliver and C.J. Gilson, "Classification of Gratuitous Transfers" (1941) 51 *Yale L.J.* 1, at 2.

82. *Uniform Probate Code* (1974) (official text) sec. 2-502.

83. L.H. Averill, *Uniform Probate Code in a Nut Shell* (1978) 75, 77.

84. *Supra* notes 27-33.

85. *Supra* note 52.

86. *Supra* note 47.

87. *Supra* note 25, at 492-297.

88. *Supra* note 81, at 11.

89. *Supra* note 25, at 496.

90. *Supra* note 81, at 3.

91. See *supra* note 81, at 943; *supra* note 25, at 496, 497.

92. See *Supra* note 25, at 495, 496.

93. *Id.*, at 494.

94. *Id.*, at 517-518.

95. *Id.*, at 489.

96. *Supra* note 81, at 3.

97. *Supra* note 25.

98. *Id.*, at 515, 516.

99. *Id.*, at 499.

100. *Supra* notes 27-33.

101. See *supra* note 79; *supra* note 25, at 524-526; C.K. Nelson and J.M. Starck, "Formalities and Formalism: A Critical Look at the Execution of Wills" (1978) 6 *Pepperdine L.R.* 331, at 355-56.

102. *Supra* note 25, at 524.

103. *Id.*, at 525-526.

104. *Ibid.*

105. *Supra*note 12, at 56.

106. J.H. Langbein, "Crumbling of the Wills Act: Australians Point the Way" (1979), 65 *A.B.J.* 1192, at 1195; subsequent updating through S.A.S.R. to end of 1979.

107. *Report on the Law Relating to Succession*, Queensland Law Reform Commission #22 (1978), Appendix 5 (Draft) p. 5.

108. *Supra* note 25.

109. *Ibid.*

110. *Supra* note 79, at 394.

111. *Supra* note 12, at 67,68.

112. *Supra* note 25, at 518.

113. *Supra* note 12, at 52,53.

114. *Id.*, at 53-56.

115. *Briel v. The Attorney-General*, Israel C.A. 869/75 32 P.D. 98.

116. Twenty-Eighth Report of the Law Reform Committee of South Australia, *Relating to the Reform of the Law on Intestacy and Wills* (1974) 10, 11.

117. *Wills Act*, 1936-1975 (No. 2302 of 1936 - No. 86 of 1975) sec. 12(2).

118. See S.M. Waddams, "Legislation and Contract Law" (1979) 17 *U.W.O.L.R.* 185.

119. (1978) 20 S.A.S.R. 198.

120. *Id.*, at 201.

121. *R. v. Findlay*, [1944] 1 W.W.R. 609; 2 D.L.R. 773 (B.C.C.A.).

122. *Ibid.*

123. *Clark v. R.*, [1921] 2 W.W.R. 446, 61 S.C.R. 608, 59 D.L.R. 121.

124. *Supra* note 12, at 66.

125. *Supra* note 44, at 34-37.

126. *The Succession Law Reform Act*, S.O. 1977, c. 40, sec. 12(3).