

2008 Wills Act Amendments – Where Are We and Where Are We Going?

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Amendments to *Wills Act*

- amendments to *Wills Act* proclaimed August 19, 2008
- new provisions:
 - s. 6(2) – holograph wills
 - s. 8A – substantial compliance
 - s. 19A – effect of divorce on a will

Formalities of Execution

- s. 6(1) sets out formalities of execution
 - in writing
 - signed at the end by the testator
 - in the presence of two or more witnesses
 - who were present at the same time who sign in the presence of the testator

Holograph Wills

- s. 6(2) now permits holograph wills:

Notwithstanding subsection (1), a will is valid if it is wholly in the testator's own handwriting and it is signed by the testator.

"In case I die in this mess, I leave all to the wife. Cecil Geo Harris."

Substantial Compliance – s. 8A

Where a court of competent jurisdiction is satisfied that a writing embodies

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

s. 8A, cont'd

- ... the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.
- A “dramatic change” (Kennedy, C.J.)

Holograph Wills - Process

11A(1) For an application for a grant of probate or administration with the will annexed made respecting a holograph will, the due execution of the holograph will shall be proved by an affidavit in Form 2A.

(2) An affidavit in Form 2A may be taken at or after the time the holograph will is executed and either before or after the death of the testator.

(3) An affidavit in Form 2A is valid if it

- (a) was signed prior to the coming into force of the Act; and
- (b) meets the requirements of the Act.

Holograph Wills – Process (cont'd)

- (4) If a registrar, deputy registrar, notary public or barrister of the Supreme Court is not available to take an affidavit in Form 2A, the person seeking to prove the execution of a holograph will shall obtain written approval from the Registrar for another person to take the affidavit.
- (5) If it appears to the registrar that the execution of a holograph will does not comply with the requirements of the *Wills Act* respecting holograph wills, the registrar shall refuse to approve the application for a grant respecting the will.

Section 11A added: O.I.C. 2008-429, N.S. Reg. 356/2008.



Holograph Wills – Process (cont'd)

I, name of deponent, of street and postal address, place, province/state, country, make oath and say:

1. (a) I was well acquainted with the deceased, name of deceased. I frequently saw the deceased write and sign their name and I am well acquainted with the deceased's handwriting and signature.

OR (b) I am well acquainted with name. I have frequently seen name write and sign their name and I am well acquainted with their handwriting and signature. [Choose (a) or (b) and delete the other.]

2. I have carefully examined the document dated date which is marked as Exhibit A to this Affidavit.

3. I believe the whole of the document including the signature to be in the handwriting of name of signor.

Holograph Wills – Process (cont'd)

- Reg 11A allows proof in common form of a holograph will if Form 2A sworn and Registrar satisfied – if not, then can move to proof in solemn form
- almost always will swear Form 2A after the person has died
- prudent to file it or a form to similar effect when proceeding with proof in solemn form in any event, along with other extrinsic evidence of testamentary intentions etc. (and don't forget to advertise in Royal Gazette!)
- Registrar will often have applications for proof in solemn form heard before a Judge, but can hear them herself (s. 31(1) of the Act)

Holograph Wills – Process (cont'd)

- no known reported case admitting a holographic document to probate
- might be common form grants issued, or unreported solemn form applications granted
- cases are in the pipeline and expect written decisions in the future

Case law to date

- *MacDonald v. MacDonald Estate*, 2009 NSSC 323
- *Robitaille v. Robitaille Estate*, 2011 NSSC 203
- *Komonen v. Fong*, 2011 NSSC 315
- *Thompson v. McKenney Estate*, 2011 NSSC 488
- *Re Das Estate*, 2012 NSSC 441
- *Hayward v. Hayward*, 2011 NSCA 118
- *Sweeney Cunningham Estate v. Sweeney*, 2013 NSSC 299

MacDonald v. MacDonald Estate, 2009 NSSC 323

- handwritten document, “last will of Jean Pringle MacDonald”, dated March 25, 2006
- didn’t comply with formalities of either 6(1) or 6(2) for 2 reasons:
 1. unsigned
 2. two “witnesses” signed, but not in presence of each other, and days after date of will
- brought as application for proof in solemn form under 8A after Registrar refused probate in common form

MacDonald v. MacDonald Estate

- applicant argued s. 6(2) and s. 8A applied retrospectively to allow 2006 document to be admitted to probate in 2009
- Chief Justice Kennedy followed *Re Thibault*, 2009 NSSC 4, which had been decided in connection with s. 19A— no retrospectivity, so document not probated
- respondent described retrospective application as “nightmare for executors [and] for the Court of Probate” – Chief Justice Kennedy said there was “some validity” to that

Robitaille v. Robitaille Estate, 2011 NSSC 203

- deceased, after husband's death, went to solicitor to give instructions for a new will
- solicitor prepared draft and was about to go to deceased's home to have new will executed, when deceased was suddenly hospitalized
- solicitor emailed the new will to be printed off and signed at hospital
- deceased signed the will
- however, no witnesses were present
- two persons later signed the will, not having seen the deceased sign

Robitaille, cont'd

- uncontested application made under s. 8A for a declaration that the will was valid
- brought in Probate Court by way of proof in solemn form
- Justice LeBlanc admitted the writing to proof in common form, concluding that, in all likelihood, if the testator's health had not rapidly deteriorated, the will would have been properly executed

Robitaille, cont'd

- one influential factor was fact that the revised will was substantially similar to pre-existing will
- revisions were rational, and connected to changes in testator's circumstances
- Justice LeBlanc, on his own motion, drew his mind to issue of testamentary capacity
- capacity would normally be assessed by counsel at the time of execution
- Held: rebuttable presumption of testamentary capacity applied, and no evidence of lack of capacity to rebut the presumption

Komonen v. Fong, 2011 NSSC 315

- s. 8A application for a printed will form
- after Mr. Fong's death, will form was found in his home
- form began with the words "This is the Last Will and Testament of me, Dannie Wing Fong"
- words "Dannie Wing Fong" printed in pencil
- other portions of the form had also been completed in pencil
- back page was dated July 2009, it was signed in pencil, and the signature was not witnessed

Komonen v. Fong, cont'd

- Smith A.C.J. dismissed the application, holding that s. 8A enabled a court to grant relief from the formalities of execution, but only when court was satisfied that the document embodied the testamentary intentions of the deceased.
- in this case, Court was not satisfied that the printed will form embodied Mr. Fong's testamentary intentions

Komonen v. Fong, cont'd

- factors:
 - the document had been completed in pencil, which indicated a lack of finality
 - some portions of the document had been left blank
 - document was not witnessed
 - diary entries and text messages indicated that Mr. Fong viewed document as an unfinished draft of will
 - communications that post-dated the will refer to decisions yet unmade, such as appointment of executors and what should be done with home

This is the Last Will and Testament

of me, DANNIE WING FONG of the
CITY of HALIFAX in the Province of
(City, Municipality, Town, District)
NOVA SCOTIA made the 24 day of JUNE 2009
(Date)

1. I REVOKE all former Wills, Codicils, and Testamentary Dispositions previously made by me.

2. I APPOINT SUSAN KOMONEN of the
CITY of MISSISSAUGA in the Province of
(City, Municipality, Town, District)
ONTARIO to be the Execut RIX of this my last Will and Testament.
(or/rix)

BUT IF my said Execut RIX should refuse to act, predecease me, or die within a period
(or/rix)
of 2 days following my death, THEN I APPOINT JENNIFER FONG
TURNER of the CITY of CALGARY
(City, Municipality, Town, District)
in the Province of ALBERTA to be the Execut RIX of this my last Will and Testament.
(or/rix)

3. I DIRECT all my just debts, funeral and testamentary expenses, all succession duties, inheritance and death taxes, and all expenses necessarily incidental thereto, to be paid and satisfied by my Execut RIX as soon as conveniently may be after my death.
(or/rix)

MY BODY WILL BE CREMATED BEFORE BURIAL

4. I GIVE the following legacies: PROVIDED BY KAM CHUNG

1. CASH FROM SCOTIABANK ACCOUNT WITH KAM CHUNG

2. CASH FROM RBC ACCOUNTS WITH JOHN SILLIS

3. CASH FROM PC FINANCIAL MUTUAL FUND

4. CASH FROM US INVEST PORTFOLIO BY MARY ALSUP

5. CASH SALE OF RESIDENCE AT 7121 ELLIOTT ST. HFX

	<u>100%</u>
Tot: JEAN SETO	5%
DOW FONG	15
MON FONG	6
WILLIAM FONG	15
GEORGE FONG	15
KAY ALI	7
ANNE JONES	7
WAYNE FONG	10
HELEN FONG	
SUSAN KOMOWEN	10
JENNIFER FONG TURNER	10%
DALHOUSIE U. ENDOWMENTS	

IN WITNESS whereof I have set my hand the day and year first above written.

Dennis Wing Tsang
(Signature)

This page was signed and the preceding pages were initialed
by the Testat _____ and published and declared as and for
(or, his)

_____ last Will and Testament in the presence of us both
(his/her)

present together at the same time who at _____
(his/her)

request and in _____ presence and in the presence of
(his/her)

each other have hereunto subscribed our names as witnesses:

Name _____
(Signature)

Address _____

Occupation _____

Name _____
(Signature)

Address _____

Occupation _____

DATED JULY

2009

Will

~~OF~~

DANNIE WING FONG.

Thompson v. McKenney Estate, 2011 NSSC 488

- writing prepared by the deceased's daughter
- signed but not witnessed
- evidence revealed not only was document not prepared at deceased's direction, but he probably was not aware of and did not approve of its contents
- medical evidence indicated that deceased lacked testamentary capacity altogether at time
- Justice Coady found that it did not embody the deceased's testamentary intentions

Re Das Estate, 2012 NSSC 441

- deceased had valid will, but also left six typed documents next to his body in his home
- Justice LeBlanc accepted two as s. 8A writings: a letter “To Whom it May Concern” and an untitled numbered list containing directions for gifts of cash and personal effects
- Court found that “To Whom it May Concern” note satisfied requirements of s. 8A, noting testator invited reader to verify his signature against his passport, and acknowledged that the document was of a type that usually required witnessing
- numbered list was “less authoritative” being untitled, unsigned and undated
- neither document contradicted the will, so issue was moot

Unreported Case A

- deceased wished to revise will to make provision for second wife, better tax planning for adult children
- instructions taken from one son, draft prepared and emailed to client's email address, who directed it be printed off and read to him by spouse
- one blank in will for amount of allocation between spouse trust and kids' trusts
- deceased approved the will verbally after parts of it were read to him, but expressed desire to rest before signing
- died without ever waking up to sign

Unreported Case A, cont'd

- brought application for proof in solemn form in Probate Court under s. 8A
- uncontested, filed consents from all persons interested in estate (spouse and children)
- clear benefit to spouse, as previous will and prenuptial agreement made no provision for her
- benefit to children through tax planning (testamentary trusts for them and their families)
- judge granted order on documents alone, no requirement for hearing

Unreported Decision B

- lawyer prepared wills for a couple in 2008
- couple later executed homemade codicils in early 2012 and sent them to trust company executor
- each codicil had only one witness, and the wife's had a problem with construction as well
- lawyer for trust company urged them to see lawyer so homemade documents would not give rise to litigation
- couple did not do so
- wife died, and husband died shortly after

Unreported Decision B, cont'd

- s. 8A application brought by way of proof in solemn form of husband's codicil
- mirror wills had left residue in 2 shares to his family and her family
- his codicil cut out her family
- contested by one of her family members
- Court found that it was an effective codicil
- codicil mimicked language of will, husband took trouble to locate one witness, signed and dated by both

Hayward v. Hayward, 2011 NSCA 118

- in 1995, testator made a will naming wife as executor and beneficiary (son as alternate)
- they divorced in 2004 (Corollary Relief Judgment incorporated separation agreement)
- testator died on October 15, 2008
- son was granted administration of estate
- mother applied to have son removed and herself appointed executor/declared beneficiary
- trial judge found in her favour—amendments operate prospectively (consistent with *Thibault*)

issues on appeal

1. Is s. 19A retrospective?
2. Is the separation agreement an “other writing” under s. 8A ?

Retrospective or Prospective?

“I am of the view that, when construed, in their ordinary literal sense, the words of s. 19A of the *Wills Act* are clear and unambiguous, and demonstrate a legislative intention that the provision operate retrospectively.”

Oland, J.A. at para. 46

The Separation Agreement

RELEASE OF RIGHTS TO ESTATE

17.01 The Husband and Wife each hereby release all rights which he or she might have under the laws of any jurisdiction to any share in the estate of the other or to the administration of the estate of the other, except as otherwise provided in this Agreement.

Separation Agreement, cont'd

RELEASE OF RIGHTS TO MAINTENANCE AND PROPERTY

18.01 Except as provided in this Agreement, the husband and wife release each other from all rights and claims which they may have against each other for maintenance or support, or for property division or ownership under the laws of any jurisdiction and, in particular, under the *Maintenance and Custody Act*, the *Matrimonial Property Act*, the *Intestate Succession Act*, the *Testators' Family Maintenance Act*, the *Pension Benefits Act* and the *Divorce Act, 1985* or any successor legislation.

Is the separation agreement a s. 8A writing?

- Oland, J.A. – trial judge failed to consider whether separation agreement was a s. 8A writing
- Beveridge, J.A. – no reason why documents written before August 19, 2008 are not to be given full force and effect under s. 8A
- Fichaud, J.A. – “In June 2004, George and Nancy Hayward signed a document to eliminate any disposition from Mr. Hayward’s testamentary estate to Ms. Hayward, despite that such a disposition had been directed by Mr. Hayward’s 1995 Will. In my view, this ‘writing’ expressed an intent to alter the effect of Mr. Hayward’s Will under s. 8A(b).”

Implications of *Hayward*

- accelerated effect of amendments
- usual troubles with retrospective legislation – testator who wanted to provide for ex-spouse may have received advice prior to August 19, 2008 that is now no longer valid
- opens up range of pre-August 19, 2008 documents that could qualify as holograph wills, codicils, revocations or other writings that embody testamentary intentions
- greater onus on executors to submit to probate any document that could meet test for holograph document or other writing

Sweeney Cunningham Estate v. Sweeney, 2013 NSSC 299

- deceased executed new will and alter ego trust, which had been prepared by lawyer in Halifax and sent for execution in Yarmouth
- documents were executed, but only one witness
- missing witness noticed by lawyer when he received original back, so he sent a new copy for her to re-execute in front of two witnesses
- deceased never re-executed the will prior to death

Sweeney Cunningham Estate, cont'd

- counsel sought direction from Court on jurisdiction of Supreme and Probate Courts to hear s. 8A application, given lack of direction in legislation
- Justice Wright noted that since s.8A came into effect, applications have been brought and reported as decisions both from the Probate Court and the Supreme Court, without comment as to any divided jurisdiction
- he concluded that two courts have concurrent jurisdiction
- distinction without a difference, since any judicial determination of a s. 8A application will be made by a Supreme Court justice acting in either capacity

Sweeney Cunningham Estate, cont'd

- Justice Wright concluded, “I have no hesitation in finding ... that the application should be granted”
- if not, alter ego trust (which was validly executed at the time) would duplicate specific gifts in previous will
- precisely the situation, like *Robitaille*, that legislative amendments intended to address: soften the harshness of the formalities of execution where deceased clearly was trying to make a will and just didn't get it properly executed

How far will it go? *Re Yu*, [2013] QSC 322

- Supreme Court of Queensland held an electronic document, unsigned and unwitnessed, created on an iPhone was a valid will
- Factors considered:
 - started with the words “*This is the last Will and Testament ...*” and formally identified the deceased and his address
 - created when deceased was contemplating his imminent death (committed suicide immediately after)
 - appointed an executor and authorized executor to deal with the deceased’s affairs in the event of his death;
 - disposed of the whole of the deceased’s property
 - deceased’s name was typed at foot

Re Yu, cont'd

- In Queensland *Succession Act 1981*, “document” includes:
 - any paper or other material on which there is writing;
 - any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and
 - any disc, tape or other article, or any material from which sounds, images, messages or writings are capable of being produced or reproduced, with or without the aid of another article or device
- Not clear what “a writing” is limited to in NS *Wills Act*

Questions?



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