EXECUTION OF WILLS: THE FORMALITIES CONSIDERED

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Section 9 of the Wills Act 1837 stipulates the necessary conditions for the execution of a valid will. By that section it is provided that:

> "No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

The purpose of this article is to examine whether the rationale requiring *some* formalities for the execution of wills is best served by those found in section 9. Or whether a relaxation of the requirements might satisfy the philosophy behind section 9 and yet introduce more flexible modes of executing wills into the law.

Dissatisfaction with the formalities of the Wills Act is apparent in several jurisdictions. The primary source of discontent may be traced to the excess of formalism surrounding the section 9 requirements. For example, the *Manitoba Law Reform Commission* states:[1]

> "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."

Professor Langbein of the University of Chicago describes the problem thus:[2]

> "The law of wills is notorious for its harsh and relentless formalism. The Wills Act prescribes a particular set of formalities for executing one's testament. The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential. Probate courts do not speak of harmless error in the execution of wills. To be sure, there is considerable diversity and contradiction in the cases interpreting what acts constitute compliance with what formalities. But once a formal defect is found, Anglo-American courts have been unanimous in concluding that the attempted will fails."

The case law abounds with examples of testators' intentions which have been frustrated through failure to comply with the formalities.[3] And with

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[1] Manitoba Law Reform Commission *"The Wills Act" And the Doctrine of Substantial Compliance.*

[2] (1975) 88 Harv. L. Rev 489.

[3] E.g. *Re Stalman* (1931) 145 L.T. 339, *Re Beadle* [1974] 1 All E.R. 493 (both cases concerned the position of testatrixes' signatures; and *Re Davies* [1951] 1 All E.R. 920, *Re Colling* [1972] 3 All E.R. 729 (failure to comply with the witness requirements).

examples of judges giving effect to testators' intentions *despite* the formalities.[4] Thus "a body of harsh and often inconsistent case law" has grown up here as in Manitoba. The resultant uncertainty makes advising accurately difficult and litigation more probable. Reform of the law must surely be due to overcome these criticisms and allay fears that complying with the formalities has become a complex art. The rationale which requires some formalities for the execution of wills can be satisfied by less stringent ones than those in section 9. To substantiate this contention a discussion of the rationale will be followed by a consideration of possible reforms.

The Rationale of the Wills Act Formalities

Although formalities for the execution of wills may vary from jurisdiction to jurisdiction, systems with the Wills Act 1837 as the basis of their succession laws share common ground as regards the rationale for the introduction of that Act and its subsequent retention.

The rationale justifying formalities was put forward by De Villiers in 1901 as follows:[5]

> "It is obvious that wills are always more than other legal documents open to the dangers of fraud, perjury and forgery, duress and undue influence, and to doubts as to the mental capacity of the testator, for the reason that the testator is necessarily unable personally to guard against these dangers at the time when the will takes effect. On this account most or all systems of law have required some formality or other to be observed in the execution of wills."

More recently an Australian author framed the rationale for formalities as existing to provide[6]

> "sufficient protection against witnesses who would misrepresent the wishes of those who are dead and unable to give direct evidence of their testamentary wishes and acts."

Professor Langbein of the University of Chicago has classified the purposes of the Wills Act formalities as four-fold.[7] These he itemises as the "evidentiary", "channelling", "cautionary" and "protective" functions of the formalities.

The evidentiary function is served by the requirement that wills be in writing. The paramount purpose of the Wills Act is to provide the court with sufficient reliable evidence of testamentary intent and of the terms of the testators wishes. Legal conditions stipulating the position of the testator's signature, its attestation and subsequent subscription by witnesses are all substantial indications in favour of the document's authenticity. Holo-

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[4] E.g. *Re Roberts* [1934] P.102, In b. *Hornby* [1946] P.171 (position of testators' signatures); and *In the Estate of Long* [1936] P.166, In b. *Smith* [1931] P.225 (where the wills were read in such a way that the testators' signatures appeared at the end although they were *actually written* on the first pages).

[5] De Villiers, J., *Real and Personal Property in England*, p.105.

[6] William F. Ormiston, Q.C. *"Formalities and Wills: A Plea for Caution"* (1980) 54 A.L.J. 451.

[7] (1975) 88 Harv. L. Rev 489 @ pp.491-498.

graphic wills and, to a greater extent, nuncupative wills share deficiencies in this regard.

The channelling function involves a recognition of the undoubted fact that use of uniform criteria to execute wills makes for a more efficient administration system as well as reduced litigation and uncertainty. As an American writer some 40 years ago put it:[8]

> "One who wishes to communicate his thoughts to others must force the raw material of meaning into defined and recognizable channels . . . ."

Such channelling enables the document to move through the judicial system with a minimum of friction. Again, holograph and nuncupative wills serve the channelling function less well as their less stringent formalities make it more difficult to discern whether the communication in question was intended to be of a testamentary nature.

The cautionary function of the formalities is to be found in the procedure and ceremony surrounding the formal execution of a will. The seriousness of his undertaking is thereby thought to be emphasised to the testator. As Professor Langbein states:[9]

> "Writing is somewhat less casual than plain chatter. As we say in a common figure of speech, 'talk is cheap'."

Further, since a will is ambulatory and therefore does not deprive the disponor of any enjoyment of the property during his life, without some formal rigidity a testator might be tempted to make rash or, at least, ill considered dispositions: after all, they will not affect his own material well-being. The requirements of the Wills Act 1837 go some way towards curbing this possibility.

Although holographic wills might be executed after careful, deliberate thought they might just as easily be the result of a casual, off-hand testator. The cautionary function of the formalities *may* then be missing. Nuncupative wills can be criticised on the same basis but their limited use, usually in dangerous situations, is likely to have the same sobering and steadying effect on the mind as complying with formalities is intended to have.

The protective function of the Wills Act formalities can be easily appreciated. The location of the testator's signature is an attempt to make unauthorized additions to the will more difficult. The requirement of independent witnesses seeks to ensure that no fraud or undue influence is practised and that unbiased evidence of the testator's mental capacity can be adduced. Holograph wills make no pretence of serving this function. Nuncupative wills, on the other hand, requiring attestation, clearly do so, albeit in a limited fashion.

Whether the foregoing reasons for the existence of the Wills Act formalities can be achieved in any other way in addition to or instead of meeting the legislative standards themselves is an interesting and controversial question.

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[8] Fuller, *Consideration and Form* (1941) 41 Colum.L.Rev. 799, @ pp.801-803.

[9] J. H. Langbein op. cit. p.495.

In 1971 the English organization "*Justice*" expressed the view that[10]

> ". . . the relative lack of formality required for the making of an English will is in fact a serious disadvantage because it conceals from the ordinary testator the difficulties inherent in disposing of his estate."

The organization contrast buying a house ("the only property transaction of comparable importance"[11]) with executing a will and conclude that the multitudinous formalities and virtually inevitable solicitor involvement in the former are often missing in the latter. They conclude that the resulting problems stemming from home-made wills could be circumvented by the adoption of a notarial system for the attestation of wills whereby an authorized person, such as a Commissioner for Oaths, would be an official witness before whom a will could be formally executed:[12]

> "The principal advantage of the notarial system, in our view, is that the need to have a will formally executed in the presence of a Commissioner for Oaths or probate official would indirectly lead more testators to take proper legal advice before executing their wills. In addition, the problems of formal invalidity would be completely eliminated, and while a notary could not be expected to make any serious investigation of the state of mind or circumstances of the testator we think his presence would still form a more effective barrier against the more blatant forms of undue influence than the present system provides."

They continue:[13]

> "These arguments of course, only apply if notarial execution is made compulsory. On the other hand, the full benefits to be expected from a notarial system will not be achieved if it is introduced only as an alternative to the present system."

To date, no such compulsory notarial system has been introduced in England.

Whilst the proposals of the organization may go some way towards ridding the justice system of wills which do not comply with the strict formalities of section 9, it is submitted that such a move would only be of extremely limited use. It accepts the formalities of section 9 in most respects[14] and is merely an attempt at streamlining the system so that wills are not invalidated on those formal grounds alone. By taking such a stance the organization has ignored, or side stepped, the wider issue already alluded to,[15] namely: Are the *particular* formalities of section 9 the only or the best methods of achieving the reputed reasons for their existence?

The question whether the formalities of section 9 themselves could, or should, be pared down to a minimum threshold level is discussed later in this article. What does merit attention here, however, is whether other types of will might be recognised by our legal system. Such wills, it is submitted, would have to satisfy the generally accepted rationale behind the formali-

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[10] *Home-Made Wills*, A Report by *Justice* p.4.

[11] Ibid. p.5.

[12] Ibid. pp.4-5.

[13] Ibid. p.6.

[14] Despite expressing limited misgivings @ p.7.

[15] Supra p.7.

ties of the Wills Act. But that, it is suggested, need not necessarily prove to be too arduous an obstacle to overcome.

Holograph wills do not *of necessity* fail to embody any of Langbein's four reasons for the existence of formalities, save the protective aspect. That alone, it is submitted, need not operate to preclude their general entry into our legal system.[16] Support for this view can be found in the persuasive critique of the protective policy by Gulliver and Tilson.[17] Their principal arguments are:

(1) That the attestation formalities are inadequate to protect the testator from determined rogues, and

(2) That protective formalities do more harm than good, voiding home-made wills for harmless violations.

It is with their second argument that the authors of that article find themselves in direct confrontation with the authors of the *Justice* document concerning home-made wills. Whilst the former aim for a greater degree of latitude in respect of home-made wills, the latter aim to remove such a recognisable category of wills from the law of succession altogether.

Holograph wills, handwritten and signed by the testator, are valid dispositive testamentary documents in some jurisdictions. For example, in Scotland, Manitoba and America they are permitted.[18] The evidentiary, channelling and cautionary functions *can* be as easily satisfied in a holographic document as in one strictly complying with the Wills Act formalities. The evidentiary function is served by the handwriting; the cautionary through writing and signature and the channelling from the cumulative evidence both in and surrounding the document. It is readily admitted that the channelling function is the least easily satisfied. But simply because a testator is not constrained by the rigours of the Wills Act formalities does not mean that he will necessarily take a casual, careless view of his attempted testamentary dispositions. Such a view is hyperbolic and lacking in evidence. Not every will executed in terms of section 9 is done in a cool, serious, hard-headed fashion—although the formalities, as indicated, go some way to ensuring that that is the case. By the same token, not every holograph will is executed in an offhand, unthinking manner. There is, it is submitted, a mean between these two extremes. And it is the contention of this writer that such a mean should find recognition in the law.

Whilst not necessarily advocating a general freedom to execute legal holograph wills to be of the same effect as wills complying with the requirements of section 9, it is possible that some concession in this sphere would be advantageous rather than detrimental to the law.

The arguments already reviewed[19] as the rationale of the formalities are, it is submitted, persuasive in militating for the retention of at least *some*

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[16] Such wills can be validly executed as privileged wills. See Wills Amendment Act 1955 ss.4-6 (N.Z.)

[17] *Classification of Gratuitous Transfers* (1941) 51 Yale L.J.1 @ pp.9-13.

[18] Law Reform Committee, England, The Making and Revocation of Wills (Consultative Document) 1977 p.4: s.7 The Wills Act (Manitoba) 1871, and Uniform Probate Code 2-503 which requires that "the signature and the material provisions [be] in the handwriting of the testator".

[19] Supra pp.4-6.

formalities to be complied with in the normal course. Formalities do serve to sharpen the mind and awareness, provide strong evidence and go some way to excluding the unwelcome attentions of fraud and undue influence.

As indicated, however, a place can be found for holograph wills. Under our present system a will written and signed on a paper bag by a lone adventurer in the New Zealand high country before his death would have to be pronounced invalid. Likewise a piece of paper containing the last wishes and signature of a marooned seaman on an isolated South Seas Island. But such documents are plainly evidentiary; a more cautionary situation requiring the channelling of one's thoughts on matters of importance could hardly be imagined than when the threat of death looms large and real, and such situations clearly do not require the protective arm of the law; forgeries, undue influence and fraud are not serious propositions.

Ought the law, then, in such cases where compliance with the formalities is an impossibility, to recognise holograph wills as "the next best thing"?

It is submitted that there are strong arguments in favour of such a course. And indeed not just in cases where meeting the formal requirements is an "impossibility".

Whenever a document, appearing to be of a testamentary nature and written and signed in the hand of the would-be testator, is discovered it is submitted that a court ought to have the power to issue a grant of probate in respect of that same document. Such a novel step for the law would be accompanied by conditions tending to prove the authenticity of the document and its equation with the testator's intention. Such conditions could be satisfied by placing the burden of proving the authenticity on the propounder of the document and, in addition, requiring the court to be satisfied as to all the surrounding circumstances of the execution of the document. For example, why it was made without formalities, the presence of other persons at its execution, the lack of legal advice and any misapprehensions the testator was under (for example, that the law of another jurisdiction entitled him to make a valid holograph will). For consistency, it is submitted that the civil standard of proof on a balance of probabilities be retained in such cases.

Should the law opt to encompass such documents the rationale behind the Wills Act will be more comprehensively realised: instead of automatically rejecting as invalid documents which fail to comply with the formalities, effect will still be given to documents which, even without the formalities, evince clear evidence of their own authenticity and the testator's intention. The acceptance of holograph wills is one way this could be accomplished.

Arguments against this view tend to take the line that a relaxation of the formalities in any form is merely the "thin end of the wedge": the floodgates will soon admit any tenuously testamentary document as a valid will. A two-fold rebuttal may suffice: first, the courts will only be able to admit any such document after clear proof that it was intended to be of a testamentary nature; that it was written by the testator and reflects his intention (so far as that can be ascertained) and that it was not made under any form of pressure or duress. Thus the likelihood of any but the most worthy documents being ascribed testamentary status is remote. Secondly, the rigid implementation of the formalities can wreak injustice in the sense

that the rationale of the formalities in such circumstances urges the acceptance of such documents on a valid dispositive footing. To deny the rationale of the requirements for want of a minor formality ought not to be tolerated. To reiterate, the acceptance of holograph wills provides a means by which this could be done.

It is, by no means, however, the only method by which the underlying rationale of the Wills Act formalities could be better given effect to. Other possibilities which have been canvassed over the last decade include: the doctrine of substantial compliance,[20] a general discretion in the hands of the court,[21] a relaxation of the formalities themselves and a relaxation of the rules of evidence to facilitate the admission of all items of relevance.[22] The illuminating possibilities shed by these suggestions will be discussed in the following section.

The other main type of will which might claim a stronger foothold in our system is the nuncupative will. Whilst recognised as a form of privileged will[23] it has failed to be recognised as a major dispositive alternative despite the fact that given certain circumstances such a will may satisfy most of Langbein's four functions for the existence of the formalities. Such functions as it fails to meet need not detract from its authenticity. For example, suppose a fisherman swept overboard called out his last desperate wishes to the rest of the ship's company before being lost in heavy seas. Such an attempted oral disposition, whilst not meeting the evidentiary function of writing, would certainly be the result of a mind cautioned and channelled by the peril of the disponor to an extent which claims the audience of a court and renders discussion of the protective function of the law in such circumstances to be of minimal importance, if not, indeed, irrelevance.

The possibility of according nuncupative wills full legal effect was suggested in America in 1946. By s.49(b) of the draft provision of the Model Probate Code of that year the following circumstances for their inclusion were outlined:[24]

> "(1) A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, shall be valid only if the testator died as a result of the impending peril, and must be
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> (a) Declared to be his will by the testator before two disinterested witnesses;
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> (b) Reduced to writing by or under the direction of one of the witnesses within thirty days after such declaration; and
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> (c) Submitted for probate within six months after the death of the testator.

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[20] Langbein op. cit., Manitoba Law Reform Commission *"The Wills Act" And the Doctrine of Substantial Compliance.*

[21] 28th Report of the Law Reform Committee of South Australia (1974) and its result in s.12 Wills Act 1936-1975.

[22] Law Reform Committee (England) 19th Report (Interpretation of Wills) Cmnd. 5301.

[23] E.g. The Wills Amendment Act 1955 s.6 (N.Z.).

[24] Working Paper No. 28 *The Making and Revocation of Wills, Law Reform Commission of British Columbia* p.180.

> (2) The nuncupative will may dispose of personal property only and to an aggregate value not exceeding one thousand ($1,000) dollars, except that in the case of persons in active military, air or naval service in time of war the aggregate amount may be ten thousand ($10,000) dollars."

Such a suggestion, whilst going some way to recognise the deficiencies in the law wrought by a rigid adherence to formalities, is, it is submitted, still inadequate.

A nuncupative will, to be admitted to probate, requires to be clearly shown to be a true record of the deceased's wishes (the evidentiary function). It must also be proved to have been made *as* a will with due regard to its import (the channelling and cautionary functions). Finally, it must be made free from any external pressures (the protective function).

The evidentiary requirements could be established by an insistence on disinterested witnesses, a subsequent reduction to writing under their auspices, and a limited time for submission to probate. Thus far the former American proposal is satisfactory.

The channelling and cautionary functions can, it is contended, be satisfied by closely defining the circumstances in which such wills may be effected. The Americans suggested their admission to probate if made by a person "in imminent peril of death" and "only if the testator died as a result of the impending peril". In such a situation it would be hard to envisage a testator who was not aware of the gravity of his predicament. (The rationale behind the erstwhile admission of dying declarations into the law of evidence in New Zealand would be applicable here.) The difficulties encountered would lie in setting the parameters of meaning of the phrases "in imminent peril of death" (or "close to death" or "about to die"). Expressions such as these indicate the types of situation which could be legally identified by the law. Problems in discovering a suitable formula to cover oral deathbed wills coupled with the perennial legal difficulty of interpretation should not, it is suggested, result in the sacrifice of such wills in the name of legal simplicity and formalism.

Satisfaction of the protective functions of the formalities would require evidence tending to negate any possibility of duress, coercion, undue influence. Given that the formalities required by the Wills Act are not an effective bar to a determined rogue, it is suggested that as long as such evidence satisfies a court on the balance of probabilities then that, coupled with the evidence of witnesses to the audible remarks of the testator, should operate to ensure the recognition of such wills.

It is notable that, in the opinion of the Law Reform Commission of British Columbia, oral wills would be of small value in attempting to provide the same safeguards as the Wills Act formalities.[25]

> "Any form of oral will which came close to providing the same safeguards would be so technical as to be practically useless."

With respect, it is submitted that it has been demonstrated that this need not be so. A determination to give effect to a testator's wishes coupled with precise drafting watched over by a careful judicial eye could ensure that the number of intestacies decreases. In any event, even if the relevant

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[25] Ibid. @ p.22.

legislation *was* excessively technical to the point of being "practically useless" if *just one* more testator's property devolved according to his desires then, it is submitted, the true rationale of the Wills Act would have been achieved, at least in respect of that testator. A willingness to shape the law around not only the general but also the particular ought not to be abandoned because the suggested improvement is difficult, technical or little-used. On this basis the addition of a well-regulated category of nuncupative wills into the law of New Zealand would fill a void which has long been evident.

On the subject of whether nuncupative wills should be limited to certain types or amounts of property, as in the former American draft, it is contended that the reasons for doing so are outweighed by those militating against the practice.

If the rationale behind the Wills Act formalities can be achieved by the establishment of a set of closely monitored conditions allowing nuncupative wills in "imminent death" situations, then there seems a compelling argument in favour of permitting such wills to be able to perform exactly the same functions as wills executed in accordance with the formalities of s.9 Wills Act 1837. The same rationale has been satisfied: should not the same legal effect be accorded to each?

The view supporting a difference in effect between the types and amounts of dispositions which could be dealt with by these two sorts of will, stems, it is thought, from an innate reluctance in some quarters to allow what is seen as a snag to develop in the law and cause a tear in the sheer fabric sewn by the formalities of section 9. Again, as with holograph wills, the "thin edge of the wedge" argument is employed to emphasise the manifold possibilities of every jocular oral expression of intent being eventually construed as a nuncupative will and that therefore the dispositive powers of such wills, if they must be, must be severely limited. This argument suffers from an excess of hysteria. It must be stressed, first, that the *only* type of nuncupative will foreseen is that arising from "imminent peril" or "deathbed" situations. Secondly, the point must be reiterated that if the rationale for the Wills Act formalities is satisfied then any type of will legally recognised thereafter ought to be able to perform all testamentary functions. Any other conclusion involves the acceptance of a hybrid dispositive power lacking any sensible reason for the distinction.

Proposals For Reform

Mounting dissatisfaction with the strict compliance demanded by the Wills Act is evident from the foregoing discussion. What, then, can be offered as a possible medicament to cure this apparently fatally ill statute? Various suggestions exist.

Professor Langbein favours the introduction of the doctrine of substantial compliance. Thus he calls for:[26]

> "reduced formalism in enforcing whatever formalities the Wills Act requires."

His conception of the doctrine assumes that the testator has made some attempt, at least, at due execution. This view has been termed the "narrow

[26] Op. cit. p.510.

approach" to substantial compliance.[27] The "broad approach",[28] by contrast, extends to the court a discretion to validate a document intended as a will, but in respect of which the testator has made little or no effort to comply with the formalities. Langbein explains the difference thus:[29]

> "The term [i.e. substantial compliance] is presently used to mean that borderline conduct is close enough to the prototype to be deemed in compliance, but not that concededly defective compliance is permissible on purposive grounds."

The narrow approach, therefore, requires both testamentary intent and its evidence in the form of an attempt at due execution. The broad approach, on the other hand, merely requires evidence of testamentary intent *from whatever quarter*.

The narrow approach is less objectionable in the United States, where holograph wills are admitted, than in jurisdictions where they are not. In such jurisdictions the narrow approach would preclude their entry into the law of succession, whereas the broad approach would not (assuming always the requisite standard of evidence having been attained). It has been argued earlier[30] that the exclusion of holograph wills satisfying the rationale of the Wills Act ought to be remedied. As such, it is submitted that on this ground alone the narrow approach ought not to be adopted unless, possibly, a separate category validating the use of holograph wills has been established.

Another suggestion which aims to improve the results of the formalism of the Wills Act is that of the so-called "threshold requirements".

Advocates of this view reject Langbein's narrow concept of attempted compliance. They would replace it with reduced formalities, for example, merely writing and signature.[31] Or perhaps, as Bates proposes, the only formalities which should be required are:[32]

> "that the will should be in writing, signed at some place by the testator, or by someone in his presence and under his direction, and attested by two witnesses on some part of the document."

The "threshold requirements" view, however, suffers from the criticism that if these minimal formalities are to be enforced with the same literalism as the extant ones then it will be questionable whether any progress has been made at all. To circumvent this likely attack, Bates, at least, chooses to support threshold requirements only as an alternative, for he goes on to adopt what appears to be a "broad approach" to the doctrine of substantial compliance as the other alternative.[33]

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[27] See *Palk, S., Informal Wills: From Soldiers to Citizens* (1975) Adel. L.R. 382, 393.

[28] Op. cit. p.394.

[29] *Langbein* op. cit. p.526 @ note 27.

[30] Supra pp.9-12.

[31] See the *Law Reform Commission of British Columbia Working Paper* @ pp.7-8.

[32] G. M. Bates, *A Case for Intention* (1974) 124 N.L.J. 380, 382.

[33] Ibid..

> "If one or more of these formalities is not observed, then the court should nevertheless give effect to the true intentions of the testator as expressed in the document, in the absence of suspicious circumstances . . . . The absence of formalities merely obliges the court to satisfy itself that there are no suspicious circumstances surrounding the making of the will . . . . In any event the formalities must not be allowed to override the deceased's wishes."

Thus far would-be reformers are faced with four possibilities to adopt, namely:

(1) the narrow approach of substantial compliance;
(2) the broad approach of substantial compliance;
(3) minimum threshold provisions; and
(4) minimum threshold provisions coupled with a liberal discretion to give effect to the testator's intentions, notwithstanding a failure to comply with the minimum threshold requirements.

Yet another possibility lies in the question whether the rules of evidence ought to be relaxed in respect of wills. Statements made by a testator to others as to what he intends to constitute his will will usually be hearsay, and, therefore inadmissible unless they fall within the doctrine of *res gestae*. That doctrine requires the statement to be contemporaneous with the events in issue and imposes a limitation on the use of self-serving statements. Once, however, a document has been established as the deceased's, the deceased's intention with regard to it becomes relevant. At this point the deceased's statements before, at or after his making the document may be introduced as original evidence of his state of mind. In *Sugden v Lord St Leonards* Mellish LJ said:[34]

> "Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were."

If a remedial provision were to be adopted which placed reliance on the intentions of the testator then, it is submitted, the rules of evidence should be reconsidered in the light of that remedial provision. No overwhelming reasons would require the relaxation of the rules in such circumstances, however, as the rationale for the existence of the limits on the introduction of evidence would still obtain. There would, for example, still be no prospect of examining the testator; witnesses in such cases would still usually have a financial or emotional interest in the outcome and the problem of hearsay outside of the confines of the *res gestae* doctrine leading to fabrication and a multiplicity of issues would still be very real.

In this light it is suggested that Ormiston's advice not to relax the rules of evidence by statute[35]

> "if the real vice being attacked is the rigour of the existing rules" [relating to execution of wills]

ought to be heeded.

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[34] (1876) 1 P.D. 154 @ p.251

[35] Ormiston op cit. @ p.456.

Having thus canvassed the four main contenders for adoption to remedy some of the defects prevalent in the Wills Act legislation, it is now germane to examine how several jurisdictions have chosen to solve their own peculiar problems.

(i) *The United States.* In some states in America the approach of reducing the Wills Act formalities to a "threshold" level was adopted in the *Uniform Probate Code 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 acknowledgement of the signature.[36]

For holograph wills only the material provisions need be in the handwriting of the testator. Furthermore, the attesting witnesses provision is eliminated.[37]

Whilst this approach would rid the law of some problems (for example the *Re Beadle*,[38] *Re Stalman*[39] line of cases would no longer cause difficulty) circumstances can still be envisaged where strict adherence even to those formalities, should they be adopted here, would still operate to frustrate the testator's intention. For example, if the will was only witnessed by one witness. It is possible then that in the absence of fraud, forgery or coercion, the testator's intention might yet be defeated on a technical basis.

Therefore, whilst "threshold requirements" might rid the law of some of its imperfections, it is submitted that it leaves too many others which remain troublesome, for the same type of amendment to be usefully introduced into the law here.

(ii) *Queensland.* In 1978 in a report of the Law Reform Commission of Queensland *On the Law Relating to Succession* a provision was drafted for possible future inclusion in the Queensland succession laws.[40] The provision adopts Langbein's narrow approach to the doctrine of substantial compliance, and, in fact, was specifically seen and approved of by Langbein himself.[41]

The draft provision reads:[42]

> "*Will to be in writing and signed before two witnesses.* No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned and required (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator but no form of attestation shall be necessary provided that:

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[36] Uniform Probate Code (1974) (official text) sec 2-502.

[37] L. H. Averill, *Uniform Probate Code in a Nut Shell* (1978) @ pp.75 and 77.

[38] [1974] 1 All E.R. 493.

[39] (1931) 145 L.T. 339.

[40] *Report on the Law Relating to Succession*, Queensland Law Reform Commission No. 22 (1978), Appendix 5 (Draft) p.5., s.9.

[41] Ibid., p.7.

[42] Ibid., Appendix 5 (Draft) p.5, s.9.

(a) 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; and

(b) The Court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument."

The Commission considered improving and clarifying the law by reducing the formalities required (as the *Uniform Probate Code* has done) but concluded:[43]

". . . we are satisfied that some formal requirements are necessary; and although sometimes the intention of testators is defeated, nevertheless, the existing law is in a fairly clear condition, having attracted a multitude of decisions."

Two comments require attention: first, that to express any kind of limited satisfaction that because *most* testator's intentions are not defeated by the formalities then the formalities are acceptable as they stand is to shy away from an attempt at a complete attainment of the rationale of the formalities. Such a stance, it is submitted, is neither laudable nor a firm base from which to work. Secondly, issue is taken with the view that the existing law is in "a fairly clear condition". Decisions such as *Re Beadle* and *Re Stalman* reveal that this is plainly not so.[44]

While the Commission rejected arguments in favour of "*threshold formalities*" the members were impressed by arguments which attacked the rigid attitude of the courts respecting compliance with those formalities.[45] To this end the provision requiring only substantial compliance was drafted. The explanation of the provision was couched thus:[46]

"We have . . . decided to recommend that some relaxation in the court's standard should be permitted, and that provided substantial compliance is shown, and the court is satisfied that the instrument presented for probate represents the testamentary intention of the maker of it, the court may admit it to probate. It will be for the court to work out what it understands by substantial compliance, but it is envisaged that the courts will be cautious in their approach to the latitude given, and that only in cases of accident and minor departures will it be possible to give effect to the obvious intention of the testator, as in cases where the court has hitherto wished to admit an instrument to probate but has felt unable to do so because of the shackles of its policy of meticulous compliance."

The major criticism of the Queensland proposal lies, it appears to this author, in the limitation of its approach. It only applies in cases where there has been a failed attempt to execute a will according to the prescribed formalities. But what of cases where the intention of the testator can be clearly ascertained although no "attempt" has been made to execute the will in accordance with the prescribed formalities? For example, what of the will written on a paper bag by a lone adventurer in the high country? No gainful attempt could be made by the testator to find witnesses. And it is doubtful whether their omission would be classified as an "accident"

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[43] Ibid., p.7.

[44] Supra notes 38 and 39.

[45] Op. cit. @ p.7.

[46] Ibid.

or "minor departure" from the prescribed formalities.[47] Likewise, the omission of a testator's signature through his being too sick to sign would, it is submitted, be a circumstance too difficult for the provision, as drafted, to overcome.

Support for this criticism can be found in the *Manitoba Law Reform Commission* which submits (on the subject of the Queensland provision) that:[48]

> ". . . this form of provision unnecessarily limits the potential scope of the remedial doctrine, weakening its usefulness."

(iii) *South Australia.* In South Australia a remedial provision is already in force. In 1975 on a recommendation of the *Law Reform Committee of South Australia*[49] section 12 of the Wills Act 1936-1975 was introduced. It reads:

> "s.12(1). A will is valid if executed in accordance with this Act, notwithstanding that the will is not otherwise published.
>
> s.12(2). 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."

A question discussed by *Palk*[50] is whether subsection 12(2) is to be interpreted broadly or narrowly. In other words, does some attempt at execution have to be made (the narrow approach) or not (the broad approach)?

Palk concedes that the broad approach is most certainly possible on the wording of the subsection.[51] The only criterion specifically required before the Supreme Court can validate the will is that there should be "no reasonable doubt that the deceased intended the document to constitute his will". To interpret those words to mean: "to demonstrate beyond reasonable doubt that the deceased intended the document to constitute his will he must have made an attempt at due execution" appears wholly unwarranted.

The comment is made, however, by the same author, that the narrow approach would seem to be the one envisaged by the *Law Reform Committee of South Australia.*[52] The Committee talks of "technical failure to comply with the Wills Act"[53] and "technical arguments as to the formal validity of will".[54] Such statements would seem to imply, *Palk* argues,[55] something *other than* a total failure to comply with the Wills Act. And, he

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[47] Ibid..

[48] Op. cit. @ p.22

[49] 28th Report of the Law Reform Committee of South Australia *Relating to the Reform of the Law on Intestacy and Wills* (1974) @ pp.10 and 11.

[50] Op. cit. pp.393-396.

[51] Ibid. p.394.

[52] Ibid.

[53] *Law Reform Committee of South Australia Report* @ p.10.

[54] Ibid. @ p.11.

[55] Op. cit. @ p.394.

continues, there is no suggestion in the Report that they were seeking to promote any new modes of will-making.[56]

> "The idea was to stop technical arguments in these cases reaching the court, and the only cases to reach the court are those where there has been a substantial performance of the formalities, so that a grant of probate is possible."

Having thus stated a case for both interpretations *Palk* takes the view that a narrow approach to s.12(2) would be a little hard to justify. He contends:[57]

> "Why should an attempt to comply with the formalities of the Wills Act be the trigger that activates s.12(2) if the document can be defined as an attempted will without these formalities? Why read s.12(2) as saying that there can never be "no reasonable doubt" that the document was intended to be a will if there has not been a determined and substantial attempt to comply with [the formal requirements] of the Act, if s.12(2) simply does not say that?"

It is submitted that these rhetorical questions are extremely persuasive. The broad approach is manifestly possible on the words of the section and none of the arguments advocating the narrow approach are of sufficient weight to displace them. Other jurisdictions,[58] it is to be noted, seem to have assumed that the South Australians intended the statute to take the broad approach.

In the *Working Paper of the Law Reform Commission of British Columbia*, for example, the sole case to date in which a will was admitted to probate under the new law in South Australia is used to demonstrate that the view of the judiciary favours the broad approach to the doctrine of substantial compliance.[59]

The relevant case is *Re Graham*.[60] The facts were these: the testatrix signed her will and then gave it to her nephew with the request that he "get it witnessed". The nephew took the will to two neighbours who signed as witnesses in his presence but not in the testatrix's presence. The will was later returned to the testatrix by the nephew. Soon afterwards the testatrix died leaving approximately $10,000 to her nephew in the impugned will. Clearly, the statutory requirements for the execution of a valid testamentary document had not been fulfilled: the testatrix had not signed the will in the presence of either witness, nor had either witness signed in the testatrix's presence. Could s.12(2) operate to save the will?

The Court held that it could: s.12(2) of the Wills Act 1936-1975 was to be given a broad and remedial interpretation. As Jacobs J said:[61]

> "Upon these facts, I have not the slightest doubt that the deceased intended the document which is before me to constitute her will. Accordingly, if the words of s.12(2) of the Wills Act are to be given their plain and natural meaning, there is no reason at all why the document should not be deemed to be the will of the deceased, and admitted to probate as such, notwithstanding that it has not been executed with the formalities required by the Act."

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[56] Ibid..

[57] Op. cit. @ p.395.

[58] For example, British Columbia and Manitoba.

[59] *Report of the Law Reform Commission of British Columbia* (1978) @ pp.51-52.

[60] (1978) 20 S.A.S.R. 200.

[61] Ibid. @ p.201.

This excerpt from the judgment of Jacobs J finally settles the dispute as to the manner in which the judiciary in South Australia intend to interpret the provision. The words are to be given their "plain and natural meaning". Thus, in order to demonstrate beyond reasonable doubt that the deceased intended the document to constitute his will he need *not* have made an attempt at due execution. Elsewhere in the judgment of Jacobs J further support for his view can be found:[62]

> ". . . if there is one proposition that may be stated with reasonable confidence, it is that s.12(2) is remedial in intent, that is to say, that its purpose is to avoid the hardship and injustice which has so often arisen from the strict application of the formal requirements of a valid will . . . ."

A second jurisdiction which has assumed that the South Australian approach embodies the broad view of the doctrine of substantial compliance is Manitoba.[63]

The *Law Reform Commission of Manitoba* describes the South Australian approach as "the widest in scope of all the remedial provisions in this area". The Commission submits that:[64]

> ". . . 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 South Australian provision is, it is submitted, the boldest step yet taken in any effort to make a testator's intentions effective, given that the *rationale* for the Wills Act formalities has been satisfied, despite the formalities themselves not being met. The introduction of the provision has clearly not resulted in the much-feared multiplicity of litigation. Nor have the formalities themselves lost their usefulness: the section is purely *remedial*—it does not effect a new mode of execution. The fact that a document which falls to be considered under s.12(2) must embody the "testamentary intentions" of the deceased person indicates that the *purposes* of the formalities must be complied with. That is, there must be sufficient evidence to establish authenticity, finality of intention and freedom from fraud or coercion. One method of proving this is by complying with the formalities. The importance of the South Australian provision, however, is that now this is not the *only* way. It is submitted that South Australia has made a considerable improvement in its law of succession: no longer will a Judge be constrained, unwillingly, to conclude that a will cannot be upheld on a technical ground, despite the rationale for the existence of that technicality being clearly satisfied by the purported testamentary document.

A criticism of the South Australian provision lies in the requirement that the Court be

> "satisfied that there can be *no reasonable doubt* that the deceased intended the document to constitute his will."

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[62] Ibid. @ p.202.

[63] See Manitoba Law Reform Commission: *The Wills Act and the Doctrine of Substantial Compliance* pp.25-26.

[64] Ibid. @ p.25.

Proof to such a standard is that usually demanded in the criminal law. It is submitted that the civil standard of proof, that is, proof on a balance of probabilities would have been more appropriate. Two main reasons substantiate this view: first, it would retain a consistency not only with other areas of probate law but also with other areas of civil law. Secondly the imposition of the higher standard in criminal cases is reflective of the serious consequences of a conviction—in many cases a loss of liberty. Such gravity seems in congruous in probate law. Both reasons, it is suggested, lean in favour of the civil standard being adopted by any jurisdiction following South Australia's model. And, indeed, in South Australia giving thought to the possibility of an amendment to its own legislation.

(iv) *Israel.* By section 25 of the Israeli Succession Law 5725-1965 the courts in that country have been able, since 1965, to admit to probate a technically defective will. Section 25 provides that:

> "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."

The leading Israeli case on the application of this provision is *Briel* v *The Attorney-General*[65] decided in 1977. In that case the District Court had refused to grant probate even though it had no doubt as to the "genuineness" of the will. The will was in breach of the succession law in that it did not contain the date on which it was made. The Supreme Court allowed an appeal from the District Court's decision. The Supreme Court's judgment included these comments:[66]

> "The question of all questions regarding the scope and operation of section 25 is always the 'genuineness of the will'. The court has to be first convinced, beyond all doubt, that it is indeed faced with a genuine will. Were it so convinced, the [formal] defects should not prevent it from granting probate of the will. Were it not convinced, even one defect requires it to abstain from granting probate."

And, further:[67]

> "The discretion granted to the Court by section 25 is a very wide one, and if there is no doubt as to the veracity of the will, there are three things only that cannot be remedied by section 25: the testator, two witnesses, and a document in writing."

These comments reveal certain sources of criticism in the Israeli legislation.

First, the standard of proof required is exceedingly onerous. In requiring that the court have "no doubt" as to the genuineness of the will the standard appears to be even higher than the usual standard applicable in criminal proceedings. Proof "beyond reasonable doubt", the usual standard in criminal cases, *may* result in "no doubt" being left in the mind of the court in any particular case—but it will not necessarily do so. To impose a standard which, prima facie at least, appears in excess of the usual

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[65] Israel C.A. 869/75 32 P.D. 98.

[66] Ibid..

[67] Ibid..

criminal requirement will, if it has not already done so, severely limit the potential application of the section.

Secondly, although difficulties of language and law coupled with a scarcity of cases on the provision increase the complexities of determining its scope, it does not yet appear to have been established[68] whether section 25 is to be construed in accordance with the narrow or broad view of substantial compliance. In other words, must there be at least *some attempt* at execution complying with the formalities before the section can be invoked or not? It would appear from the emphasis in the section and in *Briel's Case*[69] on the "genuineness of the will" that the paramountcy of that requirement would tend to favour the adoption of the broad view. And, certainly, as with the South Australian provision, the words of the section themselves can clearly accommodate the broad view. As a matter of interpretation it would, it is thought, be hard to justify a requirement that to bring a court to the state where it has "no doubt as to the genuineness of a will" an attempt at due execution would have to be made.

A third criticism of the section lies in the threshold requirements outlined in *Briel's Case*[70] which must exist before the section can be invoked in aid of a defective will. These threshold requirements comprise: a testator, two witnesses and a document in writing. Whilst most jurisdictions require a testator and a document, the requirement of two witnesses, if rigidly enforced, could be the vehicle which imports, under a remedial section, the potential for undue formalism. Given that any remedial section endeavours to reduce the number of wills struck down on technical grounds, once freedom from fraud, forgery and undue coercion have been proved, then it appears almost paradoxical to provide in the section a requirement which *could* invoke the courts' intervention in such cases again.

Reducing the formalities in this way to a minimum threshold level does not, it is submitted, rid the law of the problem of wills brought down on mere technicalities. Even making so few demands limits the operation of the section for they are required to be satisfied in order to trigger the section into action.

These criticisms, it is submitted, are of sufficient substance to preclude any potential wholesale adoption of the Israeli experience into our legal system.

(v) *British Columbia.* In British Columbia the Law Reform Commission of that province recommended in its 1978 paper that:[71]

> "The Wills Act will 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."

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[68] See *British Columbia Law Commission Working Paper* 1978 p.55.

[69] Supra pp.36-37.

[70] Israel C.A. 869/75 32 P.D. 98 and see supra @ p.36.

[71] Op. cit. pp.67-68.

This proposal clearly rejects the concept of attempted compliance. Instead, threshold requirements of writing and signature are preferred.

The British Columbia approach is wider than that taken in Queensland, and the threshold requirements are lower than those required by both the Uniform Probate Code and the Israeli Succession Law. It is not, however, as broad as the South Australian provision.

The criticisms levelled at the Queensland, Uniform Probate Code and Israeli provisions requiring witnesses can be gladly omitted in a discussion of the British Columbia proposal. The possibilities of execution with, for example, a single witness, which could cause wills to be refused probate in those three jurisdictions, do not present insurmountable obstacles under the suggested provision for British Columbia.

Despite, apparently, paring the threshold requirements to an absolute minimum, even demanding writing and a signature is unnecessary in the view of the *Manitoba Law Reform Commission.* At page 23 of its report the *Manitoba Commission* comments:

> ". . . circumstances can still be envisioned where strict adherence to even these minimal formalities could defeat the testator's intention. As Professor 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'.[72] The likelihood of such an occurrance 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."

This, it is submitted, is a valid criticism. Although the proposal for British Columbia relieves the execution of wills of most of the difficulties currently encountered, it still allows the possibility of a testator's intention failing to be realised for want of a formality.

For example, suppose a testator wrote out his will but then suffered a heart attack and died just as he began to append his signature. Or even before he attempted signing at all. In both sets of circumstances, on the British Columbia provision, the will would not be admitted to probate. But, equally, in both cases the testator's *intention* might be very clear: he meant to sign the document as his will but was prevented by a supervening disability. *If* the rationale of a reduction in the formalities is to effect, as far as possible, the legal embodiment of the testator's intention (in the absence of fraud, forgery and coercion) then, it is submitted, the principle demands freedom from the shackles of all formalities if there is a chance of those formalities operating to defeat the testator's intention in any given case.

An extension of this argument would favour the introduction of oral wills in other than privileged instances. But, to prevent abuse of such nuncupative wills, only, it is submitted, should they be allowed in *in extremis* situations, as previously discussed.[73]

Thus, although the proposal for British Columbia widens the remedial scope of the law by permitting, for example, signed holograph wills to be valid without witnesses, it is thought that the provision does not go far

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[72] J. Langbein *Substantial Compliance with the Wills Act* (1975) 88 Harv. L.Rev. 489 @ 518.

[73] Supra pp.14-19.

enough. A clear manifestation of intention by a testator, unaffected by extraneous factors, ought to be given effect to by the law—irrespective of whether all formalities have been complied with. And some consideration could have been given to the application of this principle in the field of oral wills—although, it is appreciated, several policy factors would serve to limit such a class of wills fairly rigidly.

(vi) *Manitoba.* At page 30 of the *Manitoba Law Reform Commission Report*, the Commission recommends that:[74]

> "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 possibilities, that the document embodies the testamentary intent of the deceased person."

This proposal is the most radical of the six discussed. It contains no threshold requirements, it does not demand any attempt at due execution and the Manitoba Commission envisages the relevant standard of proof being the normal civil standard, that is, proof on a balance of probabilities or on a preponderance of evidence.[75] This is in marked contrast to the South Australian provision which required proof to show that there was:[76]

> "no reasonable doubt that the deceased intended the document to constitute his will."

In other respects, however, the Manitoba Commission regards the South Australian provision as a blueprint for its own. At pages 26 and 27 of the Report 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."

The wording of the proposed Manitoba provision is intended to be similar to that adopted in South Australia but amended to incorporate the altered standard of proof.

It is submitted that the Manitoba proposal is the most exciting and far-reaching of the six. Exciting in its possibilities: far-reaching in its unique scope. It takes the principle of giving effect to the testator's intentions the furthest of all the jurisdictions discussed. It is to be hoped that the provision is accepted and adopted into the law of Manitoba unaltered.

CONCLUSION

The inadequacies of the present requirements for the execution of a valid will have been discussed in this article. It has been seen that the

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[74] *"The Wills Act" and the Doctrine of Substantial Compliance."*

[75] Op. cit. p.27.

[76] s.12(2) Wills Act 1936-1975 (South Australia).

rationale which spawned the formalities is often defeated by them. To reverse this trend various proposals have been put forward in several jurisdictions advocating the introduction of remedial provisions. These provisions have varied from those requiring most of the present formalities coupled with attempted due execution (as in Queensland) to those demanding solely the necessary "testamentary intentions" in a document (as in Manitoba). Which is the most preferable course for New Zealand law to follow?

It is submitted that the testator's testamentary intentions, insofar as they can be ascertained, ought to be given effect to by the law. Therefore, as long as a testator intimates his intentions free from fraud, forgery and undue influence, it should matter not at all whether he has complied with any threshold requirements of, for example, writing, signature and/or witnesses or not. Thus the South Australian statute and the Manitoba proposal are preferred to those of the Uniform Probate Code, Queensland, Israel and British Columbia. Manitoba's insistence on the civil standard of proof is more acceptable than South Australia's requirement "beyond reasonable doubt". Of the six, therefore, it is submitted that Manitoba's proposal makes the clearest and least complicated attempt at giving effect to a testator's testamentary intentions.

The major drawback of the Manitoba approach (indeed of *all* the approaches discussed) is their insistence on the requirement of a *document.* But if true effect is to be given to testamentary intentions evinced by a testator should not oral wills be mentioned in discussion also? Granted, a wide definition of document could serve to validate some such wills. For example, the definition of document in the Evidence Amendment Act (No. 2) 1980 includes[77]

> "(a) Any writing on any material:
>
> (b) Any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored:
>
> (c) Any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means:
>
> (d) Any book, map, plan, graph, or drawing:
>
> (e) Any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced."

Were a proposal similar to Manitoba's to be adopted into New Zealand law, and the aforementioned definition of document utilised, then testamentary intentions spoken into a tape recorder or evinced, for example, in deaf and dumb language on film could be valid. (Freedom from fraud, forgery and coercion would always have to be proved with evidence on the balance of probabilities going to the authenticity of the document and the testator's intention that it actually be testamentary). Such a step would be far removed from our present rigorous insistence on the s.9 formalities. Not only would it validate some types of oral wills but also holograph wills currently not recognised by New Zealand probate law.

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[77] Evidence Amendment Act (No. 2) 1980 s.2(1).

One problem not wholly solved by the adoption of such a solution would be that of oral wills. Oral wills, in certain circumstances, can be proved to contain an authentic expression of a testator's testamentary wishes. The possibility of widespread abuse of oral wills coupled with difficulties of proof have precluded such wills from being adopted as a general mode of will-making in most jurisdictions[78] It is thought that these considerations would still not allow the *general* introduction of oral wills into probate law. However, it is submitted, that the acceptance of oral wills made *in extremis* in a situation of imminent death as a result of which the testator actually died would be a welcome improvement on the present situation.[79] It would not fully embody the principle of giving effect to a testator's intentions but it would, it is thought, go as far as policy factors might allow.

Thus New Zealand succession law can be seen to be deficient in its formalism, and in its failure to recognise holograph wills and nuncupative wills. The introduction of a proposal similar to Manitoba's would remedy the rigid interpretation of s.9 and would allow holograph wills to be proved. The introduction of an *in extremis* provision might operate to save some genuine expressions of testamentary intent made free from fraud, forgery and undue influence and for that reason is advocated. These changes would better reflect in the law the rationale behind the present Wills Act formalities.

In the two jurisdictions which actually have a remedial provision currently in force (namely, Israel and South Australia) it has not been the experience of either that litigation has increased.[80] Nor has it been the experience of either that a multiplicity of forms of wills has resulted. The provisions are *remedial* only. They do not provide a new method of execution: only a remedy for certain types of failures in complying with the formalities.[81] Neither the Courts nor the general system of administration of estates, therefore, appears to have been unduly upset by the introduction of these provisions in Israel and South Australia.

For those reasons, and because a remedial provision allows the Court to give effect to a testator's wishes when it is proved that the document is meant to be the last will of the deceased, it is submitted that New Zealand law ought to adopt a remedial provision. The advantages of adopting a proposal similar to that advanced by the Manitoba Law Reform Commission outweigh, it is thought, those of the other proposals. Its deficiency in not providing for oral wills made *in extremis* ought to be remedied in any proposal advanced or adopted for New Zealand. By opting for this course New Zealand probate law will make some long overdue yet very welcome reforms to the well-nigh invincible Wills Act of 1837.

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[78] Although oral wills are generally recognised as privileged wills—see, e.g. Wills Amendment Act 1955 ss.4-6 (N.Z.).

[79] Supra p.15 for discussion of this type of will.

[80] British Columbia Working Paper pp.57-60.

[81] Ibid.