

Maybe – Maybe Not

Imagine a scenario when two sisters, Jane and Jillian, were living in Ontario. Jillian was going on vacation and wanted to make a Will – just in case, but did not want to bother with a lawyer. She bought a Will kit and filled in the places where indicated and left everything to her boyfriend and charity.

By mistake, she misread the instructions and did not sign the Will at its end. Jillian died and her sister's lawyer challenged the Will asking that it be declared invalid for not complying with the formalities required when executing a Will. Jillian's intention was unambiguous, but was her Will valid? Maybe – Maybe not.

Ontario legislation is clear. A Will is invalid unless it is signed by the testator at its end. This is just but one of a host of formalities set out in the Succession Law Reform Act. What do the courts say? A very similar case to our scenario occurred in the *Re Malichen Estate* case. A husband and wife went to their lawyer's office to sign their Wills. In error, the husband signed the Will drawn for his wife and she signed the Will drawn for him. There was substantial compliance with all the legal formalities. Justice Salhany said, "There does not seem to be anything in the Ontario Succession Law Reform Act or the Estate Act which prohibits the court from following these decisions in correcting the will and admitting it to probate in the form

obviously intended by the testator." Other judges disagree.

In *Sills et al. v. Daley* the Will was only executed by one witness thus disregarding the legislative formality of having two witnesses. The Will was executed by the testator

while she lay in a hospital room in the presence of two individuals yet one of such individuals refused to sign the Will as a witness. Justice O'Flynn distinguished the court's decision in the *Malichen Estate* case by noting that the non compliance with formalities was inadvertent. In this instance, the deceased knew that two witnesses were needed, but failed to have the second witness sign the Will. In conclusion the judge said, "To declare the Will as valid, would be to bypass the clear provision of the Act and to create a discretion in this court which is not found in the Act."



***Charles B. Wagner,
Barrister & Solicitor***

While Substantial Compliance with legislative formalities is good enough in other Canadian jurisdictions, the court cases in Ontario are unclear. The message to those making Wills in Ontario is unmistakable. Those who ignore the formalities set out by the Succession Law Reform Act invite estate litigation after their demise. The best way to avoid beneficiaries fighting over one's estate is to seek counsel from a qualified lawyer who will draft and supervise the proper attestation (witnessing) of the Will.

Charles B. Wagner practices Commercial and Estate Litigation in Toronto. For those researching issues in Estate Litigation, you may access his website at www.cbwagnerlaw.com for both articles of interest and on-line legislation that is relevant to Estate Litigation.