Sills v. Daley and the Doctrine of Substantial Compliance: Is "Close" Good Enough?

1. Introduction

A "last will and testament" is not a mere tautology. It not only expresses the will of the testator regarding the disposition of his or her estate, but also serves as a testament to those wishes by providing a written record. A will encompasses both elements, representing one's fixed and final testamentary intentions with some measure of permanence and formality. The exact nature of the requisite formalities, however, has engendered much debate. In most jurisdictions, the matter is governed by legislation. What is not always clear, however, is whether — and, if so, to what extent — the court has discretion to relax the prescribed formalities and accept substantial compliance as being sufficient. This article examines these questions from a Canadian perspective, with particular emphasis on Ontario law, including the most recent decision of the Ontario Superior Court of Justice in *Sills v. Daley*.[1]

2. The Statutory Formalities

In Ontario, the *Succession Law Reform Act*[2] (the "*SLRA*") sets out the formal requirements for the execution of a valid will:

> 4(1) Subject to sections 5 and 6,[3] a Will is not valid unless,
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> (a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;
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> (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and
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> (c) two or more of the attesting witnesses subscribe the will in the presence of the testator.
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> (2) Where witnesses are required by this section, no form of attestation is necessary.

While the steps are clear, what happens when they are not followed precisely? Suppose, for example, that the testator signed in the presence of two witnesses, both present at the same time, but left the room to answer the telephone before both witnesses had finished signing. Or imagine a situation in which both witnesses were present

1. (2002), 64 O.R. (3d) 19, 3 E.T.R. (3d) 297 (S.C.J.).
2. R.S.O. 1990, c. S.26.
3. Section 5 refers to wills of testators in active military service. Section 6 recognizes the validity of holograph wills.

to see the testator sign but, through inadvertence, only one of them subscribed her name to the will? Such scenarios occur with unfortunate frequency, and the conflicting results highlight the tension that exists in this context between formality and formalism.

3. Substantial Compliance: The Debate

Both the case law and scholarly writing support divergent approaches, sometimes favouring a strict interpretation of the applicable statutory provisions, and other times advocating a more relaxed approach, where the harm the provisions seek to prevent poses no real risk. The more permissive approach was adopted by the Ontario Court (General Division) (as it then was known) in *Sikora v. Olejniczak*,[4] in which reference was made to certain general principles enunciated in the case of *Re Peverett*:[5]

> Two things may be laid down as general principles. The first is, that the Court is always extremely anxious to give effect to the wishes of persons if satisfied that they really are their testamentary wishes; and, secondly, the Court will not allow a matter of form to stand in the way if the essential elements of execution have been fulfilled.

A similar argument was propounded by John H. Langbein in his seminal article supporting the doctrine of substantial compliance:[6]

> The rule of literal compliance with the *Wills Act* is a snare for the ignorant and the ill-advised, a needless hangover from a time when the law of proof was in its infancy. In the three centuries since the first *Wills Act*, we have developed the means to adjudicate whether formal defects are harmless to the statutory purpose. We are reminded "that legal technicality is a disease, not of the old age, but of the infancy of societies." The rule of literal compliance has outlived whatever utility it may have had. The time for the substantial compliance doctrine has come.

The contrary viewpoint was succinctly expressed in the following passage from the decision in *Hindmarsh v. Charlton*:[7]

> [T]hese are very distressing cases for Judges to determine. I may honestly say that we have a strong inclination in our minds to support the validity

4. (1998), 24 E.T.R. (2d) 150 (Ont. Ct. (Gen. Div.)).
5. [1902] P. 205 (Eng. P.D.A.), at pp. 206-207.
6. J.H. Langbein, "Substantial Compliance with the Wills Act" (1975), 88 Harv. L. Rev. 489, at p. 531.
7. (1861), 8 H.L. Cas. 160 at pp. 166-7, 11 E.R. 388.

> of the will in dispute, which the parties *bona fide* made, as they believed, according to law, and where there is not the smallest suspicion in the circumstances of the case. But we must obey the directions of the Legislature, and we are not at liberty to introduce nice distinctions which may bring about great uncertainty and confusion.

Ironically, it is precisely because of these conflicting positions that a state of uncertainty and confusion has developed and now persists — as the Ontario decision in *Sills v. Daley* clearly illustrates.

4. Sills v. Daley

The case arose in the context of an application for a certificate of appointment of estate trustee (known in other jurisdictions as "letters probate") relating to a will executed on June 1, 1994 (the "1994 will"). The respondent filed an objection alleging that the testatrix, Daley, made a later will dated August 15, 2000 (the "2000 will") that revoked the earlier one. The issue before the court was whether the 2000 will could be admitted to probate, given that only one witness had signed the document, and did so before Daley herself signed. The respondent argued that it was not a valid will, since it failed to comply with the statutory requirements under the *SLRA*.

Daley was in hospital, awaiting surgery, when she signed the 2000 will. Her friend, Ryan, and her sister, Ebbers, were also present. Ryan had prepared the 2000 will (which significantly altered the 1994 will), signed the document herself, then presented it to Daley for her signature. Ebbers was then asked to sign as a second witness, but declined. According to her cross-examination, she preferred that an impartial person do so, as she considered herself to be "too close".

The court held that the 2000 will was not a valid testamentary document and could therefore not be admitted to probate. In arriving at this decision, O'Flynn J. reviewed various authorities both in Ontario and in British Columbia, and either distinguished or declined to follow those decisions in which the court had overlooked formal defects in similar circumstances. In particular, he refused to follow an earlier decision of the Ontario Court (General Division) in *Sisson v. Park Street Baptist Church*.[8] In *Sisson*, Murphy J. admitted to probate a will that had been signed by the testator in the presence of a lawyer and his secretary. The secretary then signed the document in the testator's presence but, through inadvertence, the lawyer failed to do so. Notwithstanding the absence of substantial compliance legislation in

8. (1998), 24 E.T.R. (2d) 18 (Ont. Ct. (Gen. Div.)).

Ontario, Murphy J. found that the court was entitled to develop the common law in this area. Taking a practical approach, he stated:

> I am satisfied that the will actually reflects the intention of the testatrix. The intention of the testatrix is readily ascertained by the reference to the four page letter of instructions. Mr. Lech and Ms. Walton were both present when Mrs. Taylor signed the will. Mrs. Taylor signed in the presence of Mr. Lech and Ms. Walton. Ms. Walton signed as witness in the presence of Mrs. Taylor and Mr. Lech. Mr. Lech placed the date on the will. Mr. Lech witnessed the signature of Mrs. Taylor and Ms. Walton.
>
> There are significant safeguards that have been established here to prevent the mischief that the *Wills Act* was established to prevent.
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> I find that the logic in *Riva, Re* and *Malichen Estate, Re* and of John Langhein [sic] is compelling that the absence of legislation on point should not stop the court from developing the common law where, in circumstances like this, there has been substantial compliance, given that the dangers which two witnesses are to guard against does not exist here.[9]

In *Sills v. Daley*, however, O'Flynn J. distinguished *Sisson* on the basis that the error in that case had been made entirely through inadvertence. Moreover, the applicants in *Sisson* were not opposed to the granting of probate. He also distinguished the cases referred to in *Sisson*, being *Riva (Re)*[10] and *Malichen Estate (Re)*,[11] in that neither used language of "substantial compliance". The former involved the position of the testator's signature and considered the presumption of due execution where the witnesses could not be located. The latter dealt with the interpretation of a will which was prepared for a wife, but mistakenly signed by her husband.

It is difficult to understand why O'Flynn J. saw the element of inadvertence in the case before him as being relevant in distinguishing *Sisson*, since he clearly concluded that a court has no discretion to relieve parties from strict compliance with testamentary formalities. He was unequivocal on this point, holding that the 2000 will was invalid because there was only one subscribing witness — rendering it unnecessary to consider the issue of that witness having signed before the testatrix did.

O'Flynn J. also relied on the decision of the British Columbia Court of Appeal in *Ellis v. Turner*.[12] The testatrix in that case had signed the will at the top of the document and had failed to sign in the presence

9. *Supra*, at paras. 38-40.
10. (1978), 3 E.T.R. 307 (Ont. Co. Ct.).
11. (1994), 6 E.T.R. (2d) 217 (Ont. Ct. (Gen. Div.)).
12. (1997), 20 E.T.R. (2d) 306, 163 W.A.C. 244, 43 B.C.L.R. (3d) 283 (C.A.).

of witnesses. In a unanimous decision, the appellate court staunchly defended the need for strict compliance:

> The *Wills Act* creates a scheme designed to ensure that a document purporting to be a testamentary disposition is in fact the will of the testator. A strong indicia of authenticity is proof that the will was signed at its end in the presence of witnesses. This Court must interpret, apply and respect the law as passed by the legislature. To declare the will in this case to be valid would be to by-pass the clear provisions of the *Wills Act* and to create a discretion in this Court which is not found in the Act. This is something which we cannot do.[13]

As noted, these are not easy circumstances, and they are all the more challenging given the evolutionary nature of the law. In examining the resulting uncertainty in this area, it is instructive to consider the matter from a historical perspective to understand why formal requirements were originally introduced.

5. Historical Perspective

Testamentary formalities have been imposed for centuries. In the Middle Ages, the ecclesiastical courts recognized oral wills of personal property. Wills of land were not recognized by the law courts until authorized by the *Statute of Wills* of 1540.[14] Such wills were required to be in writing. The *Statute of Frauds* of 1677[15] introduced certain formalities, requiring that devises of land be signed by the testator and subscribed by witnesses. By contrast, unsigned and unwitnessed wills of personal property could be valid, until the passage of the English *Wills Act* of 1837.[16] Section 9 of that statute required such wills to meet the same formalities as wills of land. In addition, the testator's signature was to be placed at the "end" of the document, and the two witnesses were required to be present at the same time.[17]

Many Commonwealth and American jurisdictions, Ontario among them, modelled their legislation on s. 9 of the *Wills Act* of 1837. As such, Ontario law also requires strict compliance with its statutory formalities. If these requirements are not met precisely, and in the proper sequence, the will is *prima facie* invalid.

13. *Supra*, at para. 9.
14. 32 Hen. VIII, c. 1.
15. 29 Charles II, c. 3.
16. 7 Will. 4 & 1 Vict., c. 26.
17. See W.M. McGovern, Jr. and S.F. Kurtz, *Wills, Trusts and Estates: Including Taxation and Future Interests*, 2nd ed. (St. Paul: West Group, 2001), at p. 169, and C.H. Sherrin, *Williams on Wills*, 8th ed. (London: Butterworths, 2002), Vol. 1, at pp. 115-16.

6. Purpose of Formalities

Historically, the formalities of execution were intended to serve various functions, including the following outlined here.[18]

(1) Evidentiary Function

It was felt that a written document that was acknowledged in the presence of others would provide a more reliable record of the testator's intentions. The testator's signature then offered further evidence of the document's reliability.

(2) Cautionary Function

Because a will does not effect an immediate disposition of the testator's property, it was considered necessary to impress upon the testator the solemnity of the testamentary act. Thus, not only must the words of a will evidence a deliberate and disposing intention, but the formalities must be respected in order to reinforce the dispositive effect on the testator's death. Arguably, signing one's name before witnesses demonstrates a stronger commitment than does a verbal promise.

(3) Protective Function

The formalities of execution were also intended as a safeguard against substitution — and hence fraud. Similarly, the presence of witnesses, particularly disinterested ones, provided further such protection, and an opportunity to assess both capacity and the possibility of undue influence.[19]

(4) Organizational Function

The requirement for a written will, coupled with the requisite execution formalities, forces the testator to organize his or her dispositions in a coherent and logical fashion. This also serves to strengthen the cautionary function since the testator must necessarily consider the disposition of all assets after death.

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18. See Langbein, *op. cit.*, footnote 6.
19. This protective function has in fact evolved with modern technology. In most formal executions that take place in Ontario, the testator will not only sign at the end of the will, but he or she will initial the bottom right corner of each preceding page, as will both witnesses. Although initialing is not a statutory requirement, it serves both an evidentiary and a protective function, by guarding against the possibility of substitution, an otherwise genuine risk considering that most attested wills are created by computer-based word processors.

7. Examination of Formalities in a Modern Context

While, historically, the existing statutory formalities may have served these and other functions to some degree, the question for this day and age is how well they continue to do so. Proponents of the substantial compliance doctrine would argue that the formalities do not now — and perhaps never did — adequately serve any of these purposes. They do not, for instance, offer any reliable guarantee against fraud, undue influence or lack of capacity. Rather, they were developed primarily with a view to ensuring that the document did in fact embody the fixed and final testamentary intentions of its maker. But there are other means of gauging this, and the courts are comfortable in pursuing a factual inquiry to this end. Furthermore, unlike in the past, people nowadays commonly make wills at an earlier stage of life, and often do so with the assistance of solicitors. It is therefore questionable whether the same safeguards should be imposed in all circumstances — or indeed, whether the centuries-old formalities should be imposed at all.

(1) Authentication

If the underlying purpose of the formal execution requirements is to authenticate the document as representing the final and independent intentions of the testator, it does not necessarily follow that anything short of strict compliance with such formalities must automatically invalidate the document as a will. On the contrary, it is arguable that if evidence can substantiate the document as reliably representing the testator's intentions, substantial compliance should be sufficient.

The formalities were not designed to accommodate modern technological advances, which might now offer other options for reliable testaments, including videotaped or tape-recorded wills. While such options might necessitate different probative safeguards, the possibility of other reliable forms of testamentary instruments suggests that the inflexible application of the execution rules is an outdated and ineffective approach to satisfying all — or even any — of the functions noted previously.

(2) Inconsistent Procedures

Support for the development of the substantial compliance doctrine can also be found in the inconsistent formal requirements that apply to other testamentary or quasi-testamentary acts. Holograph wills, for example, are now recognized as valid in many jurisdictions, including Ontario. Section 6 of the *SLRA* provides:

> 6. A testator may make a valid will wholly by his or her own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

As do similar statutory provisions in other jurisdictions, this section still requires that the will be in writing, so as to provide evidence of the testator's intentions. Despite the written format, however, a holograph will does not serve the evidentiary function particularly well. Even a casual writing could be interpreted as a will — and thus be admitted to probate — without its creators having intended it as such. The law reports are also full of cases involving the interpretation of holograph wills where the testator's intention was not clearly expressed. Nor does a holograph will adequately serve the cautionary, organizational or protective functions. Nevertheless, the legislature has chosen to endorse this as a valid form of testamentary document, while paradoxically still insisting on stringent formalities in the case of a professionally prepared and attested will.

Other forms of quasi-testamentary acts are also subject to relaxed execution procedures, calling into question the need for strict compliance with the statutory requirements for wills. Some examples:

1. In each of the common law provinces, a beneficiary designation in respect of the benefits payable under many types of "plans" can be made by will, or by an instrument signed by the plan participant — or by someone else on his or her behalf, in his or her presence and by his or her direction — without attestation.[20]
2. The insurance statute of each common law province permits similar informality with respect to the designation of a beneficiary under a life insurance contract. A beneficiary designation is made by means of a "declaration", which the statute defines as an "instrument signed by the insured". The term "instrument" includes, but is not limited to, a will.[21] Accordingly, an insurance beneficiary designation can also be made by the insured without witnesses, notwithstanding that as in the case of a will, the beneficiary's entitlement to the insurance proceeds would not come into effect until after the death of the life insured.

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20. The term "plan" is expansively defined by statute and includes retirement savings plans and retirement income funds, as those terms are respectively defined in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). See, for example, s. 50 of the *SLRA*, s. 2 of the *Beneficiaries Designation Act*, R.S.N.S. 1989, c. 36, and s. 1 of the *Retirement Plan Beneficiaries Act*, S.M. 1992, c. 31 (C.C.S.M., c. R138).
21. For example, in Ontario see the *Insurance Act*, R.S.O. 1990, c. I.8, s. 171.

3. Creation of an *inter vivos* trust requires no statutory formalities, even where the trust provides for the distribution of assets after the death of the settlor.

(3) Development of Substantial Compliance Doctrine

A final indication of the weakening support for strict and absolute compliance with statutory formalities is the development of the substantial compliance doctrine. This is evident in both a statutory and common law context.

(a) Statutory Developments

Many jurisdictions have enacted substantial compliance legislation which permits the court, in certain circumstances, to declare as valid a will which fails to comply with all formalities.[22] In Canada, four common law provinces have introduced such remedial legislation: Manitoba; Saskatchewan; New Brunswick; and Prince Edward Island. Manitoba's legislation was first introduced in 1983 and, after subsequent amendments, s. 23 of its *Wills Act*[23] now provides:

> 23. Where upon application, if the court is satisfied that a document or any writing on a document embodies
>
> (a) the testamentary intentions of a deceased; or
>
> (b) the intention of a 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;
>
> the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

The legislative scheme is designed to ensure that the document represents the last wishes of the testator. If the court is satisfied on this point, it may disregard formal deficiencies and declare the will to be valid.

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22. These jurisdictions include Australia, Canada, United States, Israel and Germany. Recommendations for adoption of the doctrine have been made by a number of Law Reform Commissions, including those of Scotland and South Africa.
23. R.S.M. 1988, c. W150.

While legislation in the other provinces mentioned is similar, slight differences in wording are notable. In Saskatchewan[24] and Prince Edward Island,[25] for instance, reference is made to compliance with "all the formal requirements imposed". This same wording was originally contained in the Manitoba legislation before its amendment. The change therefore suggests that a more relaxed standard may apply in Manitoba, where it is arguably not necessary that any of the formalities be respected in order for the will to be declared valid, so long as the testator's intentions are clear.[26]

Section 714 of the *Civil Code of Quebec*[27] also permits probate of either a holograph or a formal will, in the absence of strict compliance with formalities. Quebec courts, however, have taken a restrictive approach to the interpretation of s. 714 (although it has been applied to permit probate of a will on a computer diskette).[28]

(b) Common Law Developments

By contrast, no such alleviating legislation exists at present in any of Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia and Ontario.[29] Despite the lack of legislative relief in these jurisdictions, in some of them the courts have seen fit to probate certain wills which deviate from the statutory formalities. The conflicting Ontario decisions in *Sisson* and *Sills v. Daley* clearly demonstrate this

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24. *Wills Act, 1996*, S.S. 1996, c. W-14.1, s. 37. Shortly after the "dispensing power" was incorporated into this statute, it was the subject of commentary in an earlier article in this journal: see B.R. Hildebrandt, "Amendments to the Saskatchewan Wills Act: Will They Open the Floodgates?" (1990-91), 10 E. & T.J. 69, at pp. 73-4.
25. *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 70.
26. Query also whether New Brunswick's legislation would be similarly interpreted, since the relevant provision in that province makes reference to a will "not executed in compliance with *the* formal requirements imposed by this Act" (emphasis added): see *Wills Act*, R.S.N.B. 1973, c. W-9, s. 35.1. Evidently, the "dispensing power" in neither Manitoba's nor New Brunswick's *Wills Act* would go so far as to permit a court to recognize an oral will as valid. In each case, the authority granted to the court to dispense with formalities deals only with a "document" or "writing on a document"
27. S.Q. 1991, c. 64.
28. *Rioux v. Coulombre* (1996), 19 E.T.R. (2d) 201 (Que. S.C.).
29. Nor has England embraced the doctrine of substantial compliance. Law Reform Commissions in each of Alberta, British Columbia and Nova Scotia have recommended adoption of the doctrine: see, respectively, Report No. 52 of the British Columbia Law Reform Commission, "Report on the Making and Revokation of Wills" (1981); Report No. 84 of the Alberta Law Reform Institute, "Wills: Noncompliance with Formalities" (2000); and the Law Reform Commission of Nova Scotia's "Reform of the Nova Scotia Wills Act" (2003). (The Alberta Law Reform Institute report was reproduced in 20 E.T.P.J. 132.)

dichotomy. A similar lack of consistency is evident in British Columbia as well. Although *Ellis v. Turner*[30] remains the highest level decision in that province, there are nevertheless later decisions in which it was not followed. In the case of *Krause v. Toni*,[31] for example, the court applied the doctrine of substantial compliance to admit to probate a will which one of the witnesses had failed to sign.

However, *Krause v. Toni* was not followed in the most recent decision on point, *Toomey v. Davis*.[32] In that case, the issue centred on the validity of a codicil where one of the witnesses had not signed in the presence of the testator. Although the court was completely "satisfied" on the evidence that the codicil expressed the true intentions of the testator, and that non-compliance with the formalities was inadvertent, the absence of substantial compliance legislation in British Columbia decided the issue. Relying primarily upon *Ellis v. Turner*, the court saw no option but to dismiss the application.

Before the Court of Appeal's decision in *Ellis v. Turner*, British Columbia courts were perhaps less reluctant to apply the doctrine of substantial compliance, as is evident in the case of *Simkins Estate v. Simkins*.[33] In that instance, only one witness signed in the presence of the testator. The testator then separately acknowledged his signature to the second witness, who also signed. Accordingly, the formalities were not followed, the testator having failed to either sign or acknowledge his signature in the presence of both witnesses, present at the same time. However, the court had no doubt as to the authenticity of the will and admitted it to probate. In deciding the issue, Hogarth J. held:

> To rule such a will invalid is an absurdity and, what is worse, a total defeat of the acknowledged intent of the testator by means of a document that complied with all the formalities, save and except the exact sequence, that have been held to be necessary. I do not choose to follow such decisions when a rational alternative more compatible with justice, the will of the testator and the substance of the statute, is open to me.[34]

8. Conclusion

In light of developments since *Simkins*, it is questionable whether this "rational alternative" is in fact open to the court. In British

30. *Supra*, footnote 12.
31. (1999), 28 E.T.R. (2d) 225, [1999] B.C.J. No. 2075 (QL) (S.C.).
32. (2003), 2 E.T.R. (3d) 246, [2003] B.C.J. No. 1847 (QL) (S.C.).
33. (1992), 45 E.T.R. 287, [1992] 5 W.W.R. 418, 67 B.C.L.R. (2d) 289 (S.C.).
34. *Supra*, at para. 25.

Columbia, *Ellis v. Turner* would seem to be the definitive statement on the issue. In Ontario, however, there remains a great deal of uncertainty, fuelled by the contradictory decisions in *Sills v. Daley* and *Sisson*. While some judges have displayed a practical willingness, absent legislative authority, to recognize wills that substantially comply, others have not. It is therefore inevitable that the current state of confusion will continue, at least until a higher level of court — or the legislature itself — has dealt with the issue. In the meantime, the counsel of perfection for solicitors is to ensure that executions are conducted in strict compliance with the statutory formalities. For this reason, wills should generally not be sent out for execution, but where this is necessary, one should ensure that the document is carefully reviewed, once returned, to determine whether the formal requirements have been met. Failing to take these steps risks exposure to disappointed beneficiaries whose interests may be compromised by an invalidly executed will.[35]

Of course, this advice will be of little assistance where no solicitor is involved. Unless and until the doctrine of substantial compliance is formally endorsed, the validity of formally deficient wills will continue to be put in issue before the courts. How ironic that the safeguards designed to obviate such intervention may now be promoting it.

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35. See, for instance, *Ross v. Caunters*, [1980] Ch. 297, [1979] 3 All E.R. 580; *White v. Jones*, [1995] 2 A.C. 207, [1995] 1 All E.R. 691 (H.L.). Also on the duty of a solicitor to review a will previously sent out to the client for execution, see the recent decision of Mann J. in the Chancery Division of the High Court of Justice in *Humblestone v. Martin Tolhurst Partnership (A Firm)*, 2004 EWHC 151, [2004] W.T.L.R. 343 (Ch.), which was the subject of a case comment in 23 E.T.P.J. 202.

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