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Wills, Trusts & Estates

New Brunswick appeal probates will without signature: Lessons for Ontario

By **Charles Wagner, Gregory Sidlofsky and David Wagner**

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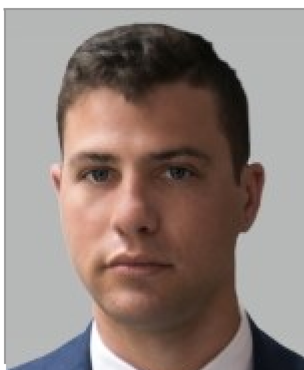

(August 22, 2019, 8:28 AM EDT) -- Justice Stephen McNally of the New Brunswick Court of Queen's Bench was the judge presiding over the litigation involving the estate of Jean Agnes MacDonald Marsden (*Marsden Estate (Re)*, [2017] N.B.J. No. 295). The testator was an older woman with five children. Two of the children had little to do with her for over 20 years. She never bothered dealing with her will until she was admitted to a hospital at the last stages of lung cancer.

Pursuant to her instructions, lawyer Mark Sheehan drafted the will providing that the two children who had ignored their mother for 20 years would receive $100 each. The residue was to be divided equally among the three other children. The elderly woman died before the lawyer brought the will to be executed.

Notwithstanding that the will was unsigned and clearly did not comply with the formalities of execution. the judge ordered that it be probated. The New Brunswick Court of Appeal decision affirmed the judge's decision and dismissed the appeal (*Talbot v. Marsden* 2018 NBCA 82). What, if any, impact does this have on Ontario?

Key to the New Brunswick decision was s. 35.1 of the *Wills Act,* which provides:

"35.1 Where a court of competent jurisdiction is satisfied that a document or any writing on a document embodies:
(a) the testamentary intentions of the deceased, or
(b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will, the court may, notwithstanding that the document or writing was not executed in compliance with the formal requirements imposed by this Act, order that the document or writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act."

The judge hearing the application concluded that "… the unsigned Last Will and Testament drafted by Sheehan upon Marsden's instructions reflects Marsden's deliberate, fixed and final expression as to the disposal of her property upon her death."

The judge exercised the discretion under s. 35.1 of the New Brunswick legislation to grant the application seeking to probate the will. In New Brunswick the legislation provides a judge with discretion to ignore the formalities of execution and that is what happened here. Could that happen in Ontario?

David Wagner

Those trying to probate an unsigned testamentary document will be hard pressed to successfully argue that this case should be considered persuasive authority in Ontario.

In Ontario the rules with respect to wills, known as the formalities of execution, are set out in the *Succession Law Reform Act* (SLRA). The formalities of execution require that a will be in writing (s. 3) and signed by the testator (or by some other person in the testator's presence and by the testator's direction), with the testator acknowledging their signature in the presence of two or more attesting witnesses present at the same time. Further, the will must then be signed by the two or more witnesses in the presence of the testator (s. 4).

Section 4(1)(a) of the SLRA is clear and unambiguous. A will is not valid unless, 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. There is no comparable section in the SLRA that provides the courts any authorization or discretion to order that the testamentary document is valid. Some have argued that even in the absence of the SLRA providing judges with discretion to permit substantial compliance there is an inherent jurisdiction to do so.

It seems that most other cases in Ontario adopt Justice Maurice Cullity's approach. From Justice Cullity's perspective, courts must comply with the directions of the legislature and are not at liberty to change the law introducing uncertainty. As the court stated in *Hindmarsh v. Charlton* (1861), 8 H.L Cas. "… we must obey the directions of the legislature, and are not at liberty to introduce nice distinctions which may bring great uncertainty and confusion".

There are those who disagree and argue that courts have an inherent jurisdiction to permit testamentary documents that substantially comply with the formality of execution.

The legal community in Ontario will be watching cases like *Marsden Estate* very carefully until our own Court of Appeal rules on the issue of substantial compliance in the context of the formalities of execution set out in the SLRA.

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