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# Documenting Intentions: Honouring Intentions or Paving the Road to Hell?

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Clients are increasingly seeking bespoke estate-planning documents that reflect their unique wishes, voice, and vision. As estate practitioners, our job is, first, to find out what those wishes are and, second, to document those wishes. Spelling out a client's wishes can be challenging if the client does not really know, or does not express, those wishes, or if the client's true wishes run counter to public policy and would not withstand court scrutiny because they do not meet the client's moral and legal obligations to family.

Practitioners must walk a fine line between giving enough clarity to a fiduciary to carry out a client's wishes, and allowing the fiduciary enough flexibility and discretion to respond to a myriad of unpredictable future events.

In recent years, the law has adapted to reconcile two competing principles: the importance of formality, certainty, and solemnity on the one hand, and the need to be accessible and adaptable to changing ways of documenting a client's wishes on the other. Across Canada we have seen changes in legislation that allow the court either to cure formally deficient wills or to partially or wholly dispense with the need for formalities.

Practitioners have increasingly adopted tools such as "letters of wishes" or "memorandums to trustees" to supplement formal documents, to more fully capture the client's wishes, and to give the client a stronger voice. These supplemental documents also serve a practical purpose: they appease and reassure clients that their voice will be heard.

But by documenting these intentions more fully, are we, as the expression goes, paving the road to hell? What are the risks of reducing the need for formalities? What are the disadvantages of providing direction to the fiduciary as to how to exercise their discretion?

To answer these questions, we review the history and reasoning behind this pendulum swing, from a preference for formalities to an honouring of intentions, by looking at how British Columbia and Quebec have adapted. Then we discuss some of the pros and cons of this new intention-driven landscape.

## British Columbia's Approach

Until March 31, 2014, when B.C. significantly updated its wills legislation, British Columbia required strict compliance with the formalities of will execution in order for a will to be valid. Specifically, at the end of the will-drafting process, the will-maker[1] had to sign the will in the presence of two witnesses, each of whom then had to subscribe the will in the presence of the will-maker. The courts in British Columbia and other strict-compliance jurisdictions had no ability to waive compliance, which led to arguably absurd results that defeated the deceased's intentions.[2] In 1997, the Manitoba Court of Appeal said that "[r]elief from literal compliance with" the formal execution requirements was "an idea whose time has come."[3]

That time arrived in British Columbia with the enactment of the *Wills, Estates and Succession Act* (WESA) on March 31, 2014. Section 58 of WESA is a dispensing provision, also called a curative provision or saving provision.

1 Until the *Wills, Estates and Succession Act*, SBC 2009, c. 13 (WESA) came into effect on March 31, 2014, British Columbia used the term "testator" or (less commonly in later years) "testatrix" to describe the person whose will was in question. WESA uses the gender-neutral term "will-maker," which will be used in the discussion of BC law.

2 See, for example, *Toomey v. Davis*, [2003] BCJ No. 1847 (SC), where the deceased signed a codicil in the presence of two witnesses, but one of those witnesses signed the codicil later, not in the presence of the deceased. The codicil was deemed to be invalid. Similarly, in *Re Wozciechoweicz*, [1931] 4 DLR 585 (Alta. CA), the Alberta Court of Appeal held that the two witnesses did not sign "in the presence" of the will-maker, who was lying ill in his bed facing the wall while the two witnesses signed the will in his hospital room, since he could not physically see them subscribe the will. In *Re Brown Estate*, [1954] OWN 301 (Surr. Ct.), the Ontario Surrogate Court held that a will was invalid where the will-maker signed her name in the presence of one witness, who then signed her name, before the two of them walked to another room in the house to meet the second witness. The will-maker and the first witness each acknowledged her respective signature, and the second witness signed. However, because the first witness did not again subscribe the will after the deceased acknowledged her signature before both of them, the formal requirements were not met.

3 *George v. Daily*, [1997] MJ No. 51 (CA), at paragraph 1.

It allows the court to recognize a document or writing as a valid testamentary document even where none of the formal execution requirements have been met.

The introduction of a dispensing provision moved British Columbia away from a strict-compliance regime by specifically empowering the court to review the circumstances of the execution, writing, or alteration of the document and to determine whether to recognize the document as a will. While this is a very broad power, there are still reasonable parameters within which the court will exercise its power. Specifically, the evidence must satisfy the court that

- the document or writing is authentic; and
- the document or writing represents the testamentary intentions of the deceased—that is, that it "records a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death."[4]

To date, the BC courts have used the dispensing provision to recognize effective testamentary documents ranging from a will that was drafted by a solicitor but not executed,[5] to a single line in a computer document labelled "Budget" stating "Get a will made out at some point. A 5-way assets split for remaining brother and sisters. Greg, Annette or Trevor as executor."[6]

These decisions turn on a consideration of the evidence surrounding the creation of the document, statements made by the deceased regarding estate planning, where and how the document was kept, whether the deceased had disclosed the document to others, the nature of the deceased's relationships with friends and family, and, of course, a close consideration of the document or writing itself. The BC Court of Appeal confirmed the broad scope of evidence to be considered on section 58 applications, saying that "the court will benefit from learning as much as possible about all that could illuminate the deceased's state of mind, understanding and intention regarding the document."[7]

Yet, the BC Court of Appeal has held that the dispensing provision does not provide carte blanche to carry out all types of post mortem planning. In *Quinn Estate v. Rydland*,[8] the will itself had been properly executed, in compliance with the formal requirements. However, it contained a "pour-over clause" whereby the residue of the estate would pour over into an inter vivos trust. The trust was in existence when the will was made and was properly referenced by name. However, the trust permitted amendments and revocation, and in fact Mr. Quinn did amend the trust after executing his will. The amendments were not executed before two witnesses.

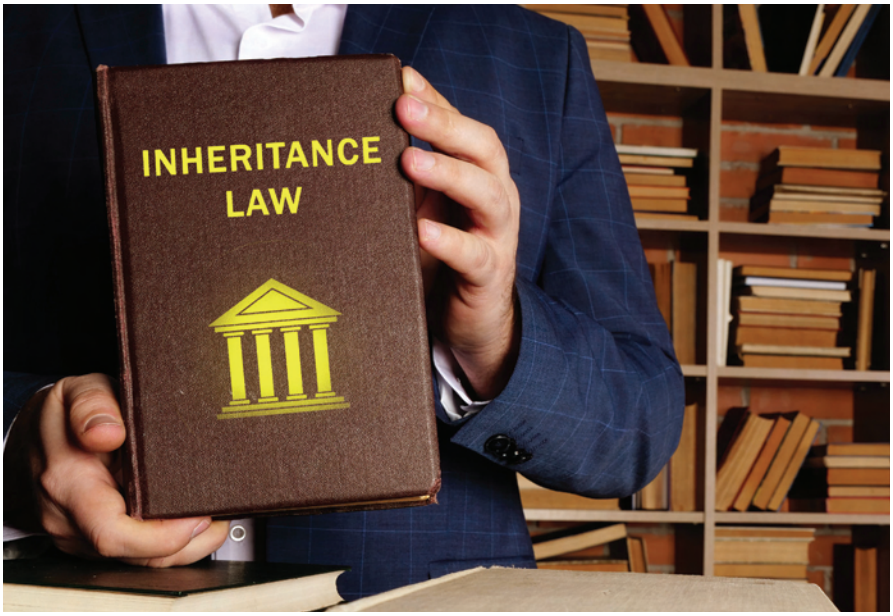
The court considered the nature of the application. It was not asked to find that the trust was valid as a testamentary disposition, but rather to find that clause 6 of the will was effective despite referencing a trust that had been subsequently amended not in compliance with the formal requirements. The court recognized that using the curative provision to permit the pour-over clause to be effective would "allow the will-maker to circumvent the formalities altogether,"[9] and held that section 58 did not apply on these facts.[10]

The introduction of a dispensing provision in British Columbia has not created significant uncertainty or a litigation tsunami. Rather, it has provided the court with the power to give effect to the deceased's testamentary wishes where the formal execution requirements have not been met. The courts have recognized and applied a clear test and have considered a broad range of evidence to discern the deceased's intention. Thus, rather than paving the road to hell, the provision permits the court to honour the deceased's intentions.

## Quebec's Approach

The role of testamentary intention in Quebec took a decidedly more liberal turn after the conquest of New France by England. Up to that point, New France was governed by the *Coutume de la prévoté et vicomté de Paris*, which was the system of law that governed Quebec for over 300 years and was the foundation for the *Civil Code of Lower Canada* (CCLC), enacted in 1866. The *Coutume de Paris* both limited a person's right to dispose freely of most of his or her property and prescribed

4 *Estate of Young*, 2015 BCSC 182, at paragraph 35.
5 *Gibb Estate (Re)*, 2021 BCSC 2461.
6 *Hubschi Estate (Re)*, 2019 BCSC 2040, at paragraph 1.
7 *Hadley Estate (Re)*, 2017 BCCA 311, at paragraph 40.
8 *Quinn Estate v. Rydland*, 2019 BCCA 91. Note that the section 58 argument was made in the alternative, but was addressed by the court.
9 Ibid., at paragraph 37.
10 The following year, a similar case with a pour-over clause came before the BC Supreme Court, *Waslenchuk Estate*, 2020 BCSC 1929. Here, there was no evidence that the inter vivos trust had been amended subsequent to the execution of the will. The court held (at paragraph 78) that regardless of whether the trust is in fact amended, the reasoning in *Quinn* applied.




strict formalities for wills that made testamentary depositions virtually non-existent in New France. The *Quebec Act, 1774* ushered in changes to testamentary freedom while restoring civil law in Lower Canada. It simplified the will-making process and rejected the application of the hereditary reserve that limited a person's ability to dispose of his or her property.

The respect for testamentary freedom and for testamentary intention was expressly integrated in the CCLC. Not only was a person free to dispose of his or her property by more simplified forms of wills, the courts were empowered to reduce the strict harness of the legal formalities of one form of will if the legal formalities of another form were met.[11]

When the *Civil Code of Québec* (CCQ) entered into force in 1994, the legislator retained this principle[12] and introduced CCQ article 714, which provides that a holographic will or a will made in the presence of witnesses may be saved if the essential requirements as to its form are present and if it contains the unquestionable and unequivocal last wishes of the deceased.

The key question is the degree to which CCQ article 714 permits a court to save a defective will. For example, can a court ignore all formalities if testamentary intention is unequivocally present? Which formalities are essential and which are not? Can the existence of certain formalities vary depending on the strength of evidence of testamentary intention?

Over the past 28 years, a significant number of decisions have applied CCQ article 714. As with all paradigm shifts, there were bound to be some difficulties in determining the limits of the provision. Fortunately, CCQ article 714 has received the attention from the Quebec Court of Appeal on a number of occasions.

The Quebec courts have generally accepted that CCQ article 714 involves the meeting of a two-step test, namely:

1. the defective will must meet the "essential requirements" of its form, and
2. the defective will must unequivocally contain the last wishes of the deceased.

The first step of the test is a reiteration of the rule that, in the law of wills, certain formal requirements must be met, which are necessary to ensure the subjective understanding that the person intended to make a will. The writer of the will is thus transformed into a testator by completing certain formalities that can objectively be understood as a reflection of subjective intent. The difficult part of this test, however, is determining which requirements are essential.

The second step of the test focuses on the subjective intention of the writer. Simply put, the defective will must express the unquestionable and unequivocal *animus testandi* of the testator.

The discretionary power of the verifying judge is not absolute. This power is limited by the very wording of CCQ article 714, in that the judge cannot set aside the failure to meet certain formal conditions, which are essential, by relying solely on the clear and unequivocal will of the deceased. Fortunately, the Quebec Court of Appeal has adopted a structured approach to CCQ article 714, which can be of useful precedential value to other jurisdictions new to substantial compliance.[13]

The role of intention also plays a critical role in Quebec trusts. A Quebec trust can be fully discretionary,

11 CCLC article 855.
12 CQLR c. CCQ-1991 (CCQ), article 713.
13 We explore the structured approach to CCQ article 714 in more detail in Amy Mortimore, Troy McEachren, and Rhonda Johnson, "Documenting Intentions: Honouring Intentions or Paving the Road to Hell?" presentation at the STEP Canada 24th National Conference, June 16, 2022.

whereby the trustee is given broad discretionary powers. Absent limitations imposed by a settlor, a trustee's discretion is limited only where it is exercised in an unreasonable, arbitrary, or malicious manner, or if the exercise of that discretion is contrary to the objectives of the trust.[14] Thus, the settlor's intention is the driving force behind the creation and the future administration of a trust and the property that it contains. It is arguable that a settlor can express his or her intention both at the time of the creation of the trust in the trust document and in an external letter of wishes that postdates the trust's creation. This was the conclusion of the High Court of New Zealand in Kain v. Public Trust. While Kain is a common-law decision, the legal reasoning in it is compelling.

## Pros and Cons of Documenting Intentions

If, as the trend seems to be, clients are seeking more input into documenting their wishes, what are some of the risks to avoid?

The two extremes of this trend are under- and over-documenting intentions. If the will-maker's or settlor's intentions are under-documented, the fiduciaries and the courts are left to surmise what they may have been. The most common example of this can be seen with a spousal trust that provides little direction regarding how much or how little of the capital should be used to benefit the spouse. What is "proper" is in the eye of the beholder, and a lack of direction invites tensions between disparate classes of beneficiaries, such as the second spouse and the children. With an interest in dynastic trusts on the rise, where the settlor's legacy is meant to last for generations, some direction by the settlor is legally and practically very useful to set the guiding principles and purposes of the trust.

On the other hand, over-documenting the will-maker's or settlor's intentions may hinder the fiduciary's ability to respond to unforeseen circumstances. For example, a settlor might prefer that the trustees put funds solely into a conservative investment vehicle. That restriction might prevent the trustees from maximizing the benefit to the beneficiaries. Often, the will-maker's or settlor's wishes are contained in a separate document, outside the will or the trust deed, that includes standard phrasing such as, "This is my letter of wishes. It is my hope that it provides guidance to my trustees but it does not form part of my will and it is not a legally enforceable document." If this is the case, then the usual standard applies in how the trustees should exercise their discretion. They must consider all relevant factors, and disregard irrelevant factors. So they might prepare their trustees' resolutions, acknowledge that they have reviewed and considered the letter of wishes regarding investments, and then outline their reasons for taking a different approach. If these wishes are mandated in the will or trust deed, the trustees' discretion is prescribed by the terms of the deed and they will not be able to do anything beyond the scope of the deed without court approval.

Over-documenting might also invite scrutiny of the capacity of the will-maker or settlor, particularly where the wishes are inconsistent, factually wrong, or delusional. It might also be tempting to sanitize the settlor's letter of wishes. Modifying or excluding various portions may be well-intended, but the drafter should ensure that the document still reflects the will-maker's or settlor's authentic voice. Otherwise, its moral persuasiveness with the family may be lost.

Ultimately, practitioners must reconcile a client's desire to "control from the grave" with the fact that it is the will-maker's or settlor's intentions that are paramount. Setting the general course and direction, and then allowing the fiduciary to choose the specifics of how to proceed on that course, may be the best way of avoiding the road to hell.

14 John B. Claxton, *Studies on the Quebec Law of Trust* (Toronto: Thomson Carswell, 2005) at para. 8.22.