The Crumbling of the Wills Act: The Australians Point the Way
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On November 29th of 1978, a probate court sitting in the Australian city of Adelaide issued a judgment that is likely in time to stand as a great milestone in the progress of probate law in the United States and the rest of the common law world.

The Australian court admitted to probate and thereby enforced a will that was conceded to have been executed in partial violation of the formal requirements of the local Wills Act. For the first time in the common law world, a court excused a testator's failure to comply strictly with the Wills Act formalities. A "substantial compliance" or "harmless error" doctrine had finally been recognized and applied.

The present article outlines the background of this development and points to its large implications for American probate practice.

The Wills Act

Every Anglo-American jurisdiction has a so-called Wills Act that prescribes the formalities for making a valid will. These statutes have a common core that traces back to English models—the wills provisions of the Statute of Frauds of 1677 and the Wills Act of 1837. This received English tradition recognizes only one mode of testation, the attested (sometimes called the formal or witnessed) will. Its essentials are writing, signature and attestation. The terms of the will must be in writing, the testator must sign the will, and two (sometimes three) witnesses must attest to the testator's signature. A variety of other formal requirements can be found in the Wills Acts of the various jurisdictions: rules governing the acknowledgment of a signature already in place, rules calling for the testator and the witnesses to sign in each other's presence, requirements about the positioning of signature, and many more. (For a fairly recent compilation of the details, see Rees, "American Wills Statutes," 46 Virginia Law Review 613, 856 (1960).)

An alternative formal system for holographic wills is permitted to testators in twenty-odd American jurisdictions, mostly those in the Western states where Spanish law has been influential, but including Pennsylvania, Virginia and now (through the medium of the newly enacted Uniform Probate Code) Michigan as well. Holograph statutes allow the testator in effect to substitute handwriting for attestation. He may execute his will without witnesses, but it must be "entirely" (or in some states "materially") in his handwriting.

Strict Compliance

These formal requirements are not difficult to comply with, and one of the basic responsibilities of conscientious lawyer-draftsmen is to supervise execution ceremonies in order to ensure compliance. In general, the bar discharges this responsibility well, so that execution blunders occur relatively rarely in the lawyer-served end of the estate planning spectrum. Not so for homedrawn wills, however. Laymen ignorant of the existence or true import of the formal requirements of the Wills Act have left behind them a staggering legacy of noncomplying instruments, frustrated estate plans, aggravated probate expenses, and commensurate human misery.

In dealing with these botched wills, Anglo-American courts have produced one of the cruelest chapters that survives in the common law. Purely technical violations that could in no way cast doubt

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upon the authenticity or finality of wills are held to invalidate the offending instrument.

A typical illustration, currently reproduced in one of the leading American law school casebooks, is the decision of Sir Jocelyn Simon in the English case of Re Groffman, (1969) 1 W.L.R. 733 (Ct. Ap. 1968). Each of the two witnesses, who were attending a social gathering at the testator's home, affixed his signature while the other was in the next room. The will was held invalid for violation of the requirement that the witnesses sign in the presence of each other, although the judge forthrightly declared: "I am perfectly satisfied that the document was intended by the deceased to be executed as his will and that its contents represent his testamentary intentions."

Because this rule of strict compliance with the Wills Act formalities produces results so harsh, sympathetic courts have been inclined to squirm. The law reports bulge with a vast, hopelessly contradictory case law on questions such as whether a gesture or a grunt constituted a testator's acknowledgment of signature. (See Annotation, 7 A.L.R. 3d 317 (1966).) Courts have thus enabled themselves to find literal compliance in cases that in fact instance defective compliance. In the leading case of Re Hornby, (1946) P. 171, interpreting the requirement of the English statute that the testator's signature be "at the end" of the will, the court concluded that a signature in the middle of the instrument was actually at the end because the testator "thought it would be more convenient to have his signature" in the middle.

It is very hard to predict when the equities of particular cases will inspire particular courts to indulge in these evasions. Hence, the strict compliance rule—although meant to promote certainty in testamentation—breeds litigation on account of the unpredictability about when and how the courts will apply it. The rule has achieved what is in many respects the worst of both worlds. It produces results of unexampled harshness when it is enforced, and it frequently leads the courts to dishonesty and caprice when it is not.

Reform Efforts Commence

Not surprisingly, this state of affairs has provoked discontent. Recent law school casebooks in the field have prodded students to ask whether the purposes of the Wills Act really compel the results inflicted under the rule of literal compliance. The Uniform Probate Code of 1969 has made a contribution towards reducing the dimensions of the problem (in those states that have enacted the Code) by reducing the number and complexity of Wills Act formalities, so that laymen have less to get wrong. Signature and attestation are still required, but the rules about placement of signature and presence of witnesses have been abolished.

Finally, the rule of literal compliance came under direct attack. Within a period of a few months in 1974–1975, literature appeared in England, Australia and the United States calling for the development of a purposive standard for evaluating defectively executed wills.

The first article was provoked by Re Beadle, (1974) All E.R. 493, another of the endless series of irreconcilable cases applying the requirement that the signature be "at the end." The testatrix had signed her will at the top and again on the envelope into which she sealed it. The court "regretfully" declared the will invalid. The judge candidly observed that there was no possibility of anything having been altered after the envelope had been sealed and put away, and that there was "no doubt at all that the paper contains what she wanted. . . ."

Commenting on Re Beadle in a leading practitioners' journal, G.M. Bates of Birmingham University juxtaposed the case with Re Hornby and wondered why, if a signature placed halfway down a will could satisfy the statutory requirement, a signature at the top could not. That sort of critique was hardly novel, sound though it was. But Bates went further, arguing that the strict compliance rule itself was misguided. He suggested that "if one or more of the [Wills Act] 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" (Bates, "A Case for Intention," 124 New Law Journal 380, 382 (1974)).

Five months after Bates' article appeared, the official Law Reform Committee of the state of South Australia took up the theme (without knowledge of the Bates' article) as an incidental topic in a report to the Attorney General dealing mainly with the projected overhaul of the state's intestacy laws. The Committee remarked that the number of intestate estates could be reduced if the courts were empowered to validate wills despite mechanical execution defects. "It would seem to us that in all cases where there is a technical failure to comply with the Wills Act, there should be a power given to the Court or a Judge to declare that the will in question is a good and valid testamentary document if he is satisfied that the document does in fact represent the last will and testament of the testator . . . " (Twenty-eighth
The Substantial Compliance Doctrine

These English and Australian developments occurred while an article of mine setting forth a doctrinal basis for more discerning enforcement of the Wills Act in press. My position was summed up in the title: there should be a rule of “Substantial Compliance with the Wills Act” (88 Harvard Law Review 489 (1975)) that would permit the proponents of a defectively executed will to prove that the particular defect was harmless to the purposes of the Wills Act. Drawing on a rich literature devoted to identifying the functions of the Wills Act formalities, I made the following points:

(1) The Wills Act is meant to assure the implementation of the decedent’s testamentary intention at a time, when by definition, he can no longer be on hand to express himself. The requirement of written terms forces the testator to leave permanent evidence of the substance of his wishes. Signature and attestation provide evidence of the genuineness of the instrument, and they caution the testator about the seriousness and finality of his act. The attestation ceremony also has a protective function: disinterested observers are supposed to prevent crooks from deceiving or coercing the testator into making a disposition that does not represent his true intentions. Taken together, these evidentiary, cautionary and protective functions serve another end, the channeling function: when the formalities are complied with, they routinize testament, eliminate contest, reduce probate costs and court time, and facilitate good estate planning.

(2) When, however, there has been a mechanical blunder, it does not follow that the purposes of the Wills Act have been diserved. Thus, for example, if the statute calls for signature “at the end” in order to prevent subsequent interpolation, it does not follow that in every case of misplaced signature such an event has occurred.

(3) Accordingly, we could obtain all of the benefits of the Wills Act formal system and yet avoid so much of the hardship if the presumption of invalidity applied to defectively executed wills were reduced from a conclusive to a rebuttable one. The proponents of a defectively executed will should be allowed to prove what they are now entitled to presume in cases of due execution— that the will in question expresses the decedent’s true testamentary intent. They should be allowed to prove that the defect is harmless to the purpose of the formality. In the example just given of misplaced signature, the proponents would bear the burden of proving (on an ordinary preponderance-of-proof standard) that subsequent interpolation had not occurred.

(4) Although the substantial compliance rule is a litigation doctrine, it should not be feared as a potential litigation-breeder. Precisely because it is a litigation rule, it would have no place in professional estate planning. Nor would the substantial compliance doctrine attract the reliance of amateurs. Every incentive for due execution would remain, for no testator sets out to throw his estate into litigation.

Other factors would operate to diminish the incidence and the difficulty of the litigation that would arise under the substantial compliance rule. By no means would every defectively executed instrument result in a contest. On many issues, the proponents’ burden of proof would be so onerous that they would forego the trouble and expense of hopeless litigation; and on certain other issues, the proponents’ burden would be so easy to discharge that potential contestants would not bother to litigate. Evidentiary and cautionary formalities like signature and writing are all but indispensable, whereas omitted protective formalities like the simultaneous presence of attesting witnesses are easily shown to have been needless in the particular case.

Indeed, it seems plausible that the substantial compliance doctrine might actually decrease the levels of probate litigation. In numerous situations such as the “at-the-end” cases we have discussed above, the literal compliance rule has produced a large and contradictory case law. The courts now purport to ask in these cases: did the particular conduct constitute literal compliance with the formality? The substantial compliance doctrine would replace that awkward, formalistic question with a more manageable question: did the conduct serve the purpose of the formality? By substituting a purposive analysis for a formal one, the substantial compliance doctrine would make the standard more predictable, and contestants would lose their present incentive to prove up harmless defects.

(5) An equivalent substantial compliance doctrine has been working smoothly for decades in the functionally identical sphere of the major will substitute, life insurance, in those situations where there are technical violations of the testament like formalities for change-of-beneficiary designations. (See Annotation, 19 A.L.R. 2d 5 (1951).)

Breakthrough in South Australia

In November, 1975, the state of South Australia
enacted a substantial compliance doctrine patterned on the recommendation of the state Law Reform Committee discussed above. Section 9 of the Wills Act Amendment Act (No. 2), which came into effect in January, 1976, amends the South Australian Wills Act to provide:

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 (which is the first instance 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.

By enacting this extremely liberal provision, the South Australian parliament determined to put to the test of actual experience all the hoary justifications for the rule of strict compliance. Experience rather than conjecture would now decide whether the strict compliance rule had been an essential bulwark against legions of schemers ready to coerce and defraud enfeebled testators; experience would now disclose whether decedents' estates would be engulfed in floodtides of litigation.

The Graham Case

Now that the proverbial floodgates have been left open for three years, only a single case has thus far arisen under the new law, Re Graham, decided on November 29, 1978, and not yet published in the reports (Action No. T.C.J. 38/78, Judgment No. 4090 of the Supreme Court of South Australia, per Jacobs, J.). Accordingly, the first important lesson of the South Australian experiment appears to be—as proponents of the substantial compliance doctrine predicted—that the probate process functions quite well without the strict compliance rule. Conceivably, future caseloads might mount as potential schemers and contestants explore their new license, but the experience to date certainly is to the contrary.

The opinion in the Graham case gives further cause for confidence that the courts will not find it difficult to strike the right balance between flexible treatment of formal defects on the one hand and the need for strong evidence of testamentary intent on the other. The facts of the case may be easily stated. An elderly testatrix handed her will to her nephew with her signature already in place and asked him "to get it witnessed." He took it to two neighboring housewives, who signed as "witnesses," although neither had actually seen the testatrix sign as the Wills Act requires. The nephew then returned the will to the testatrix. (In the subsequent probate proceedings upon the defectively executed instrument, the testatrix' signature was independently verified.)

The judge concluded that "upon these facts, I have not the slightest doubt that the deceased intended the document which is before me to constitute her will." Although not wishing to lay down broad dictum about the new statutory substantial compliance doctrine, the court emphasized the statute's "requirement that the Court should be satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will" (emphasis original). The court then remarked "that in most cases, the greater the departure from the requirements of formal validity dictated by the Wills Act, "the harder will it be for the Court to reach the desired state of satisfaction." This reading of the statutory language is very close to the burden-shifting rule that was envisaged in the scholarly literature preceding the South Australian statute, where it has been urged that the proponents of the will should bear the burden of proving that the particular execution defect is harmless to the purposes of the Wills Act.

Is Statute Needed?

The South Australian experience is likely to put to rest any remaining doubts about the wisdom of the substantial compliance approach. The large issue that is still unresolved in current discussions is whether, in states whose legislatures have not taken up the question, the courts should be free to adopt the substantial compliance solution without statute.

It is conceded on all sides that a legislature could forbid substantial compliance and insist on a literal compliance rule if it wished. I have taken the position that the existing literal compliance rule is a judicial creation and that the courts can abandon it when experience and reflection reveal that its harsh results are not essential to the good order of the probate system (88 Harvard Law Review at 530-31). The substantial compliance doctrine would do little more than bring the Wills Act into parity with the Statute of Frauds, where the judicially-developed part performance and main purpose rules apply a functional standard to the formalities for contract and conveyance.

Particularly in those American jurisdictions where the legislatures have authorized holographic wills, it seems appropriate to ask courts to take a fresh look at the substantial compliance question. The legislatures in these states have authorized in the holograph
a type of testation that completely dispenses with the protective policy that is the dominant concern of so many of the formalities for attested wills. When, therefore, a testator attempts to make an attested will but blunders, he will still have achieved a level of formality that compares favorably with that permitted for a holographic will in the same state.

In an age when the expansive requirements of public law tend ever more to crowd private law matters from the legislative agenda, it is unrealistic to pretend that the legislatures should correct the courts' mistake in the interpretation of the Wills Act. Substantial compliance is the proper work of the courts, and it is also the new responsibility and opportunity of the probate bar to raise the issue on behalf of the intended beneficiaries of blemished wills.