Project No 76 – Part I

Wills:
Substantial Compliance

DISCUSSION PAPER

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# CONTENTS

## CHAPTER 1 - INTRODUCTION

1. TERMS OF REFERENCE 1.1  
2. THE WILLS ACT 1.3  
3. EXTENT OF FORMAL INVALIDITY 1.7  
4. CONSEQUENCES OF FORMAL INVALIDITY 1.9  

## CHAPTER 2 - THE PRESENT LAW

1. INTRODUCTION 2.1  
2. THE FORMALITIES REQUIRED FOR NON-PRIVILEGED WILLS 2.2  
   (a) Writing 2.4  
   (b) Signature by the testator  
      (i) Nature of the signature 2.5  
      (ii) Position of the signature 2.6  
   (c) Signature or acknowledgement by the testator in the  
      presence of two witnesses 2.7  
   (d) Attestation of witnesses  
      (i) Order and place of signing 2.8  
      (ii) Attestation clause not necessary for validity 2.9  
3. EXAMPLES OF CASES WHERE WILLS HAVE  
   BEEN HELD TO BE INVALID 2.10  
   (a) The testator's signature 2.11  
   (b) The presence of witnesses 2.12  

## CHAPTER 3 - THE LAW ELSEWHERE AND PROPOSALS  
FOR CHANGE ELSEWHERE

1. INTRODUCTION 3.1  
2. SOUTH AUSTRALIA  
   (a) 1975 amendment 3.2  
   (b) Cases on the amendment 3.3  
   (c) Other matters 3.4  
3. QUEENSLAND 3.6  
4. PROPOSALS FOR CHANGE ELSEWHERE IN AUSTRALIA  
   (a) Northern Territory 3.9  
   (b) Tasmania 3.10  
5. CANADA 3.11  
   (a) Manitoba 3.13  
   (b) British Columbia 3.14  
CHAPTER 4 - DISCUSSION

1. INTRODUCTION 4.1
2. THE PURPOSES OF THE WILLS ACT FORMALITIES 4.3
3. SHOULD A "SUBSTANTIAL COMPLIANCE" RULE BE ENACTED?
   (a) General 4.5
   (b) Ancillary matters
      (i) Alterations to wills 4.8
      (ii) Revocation 4.9
      (iii) Retrospectivity 4.10
4. VIEWS WELCOMED 4.11

CHAPTER 5 - QUESTIONS AT ISSUE 5.1
PREFACE

The Commission has been asked to consider and report on the question whether or not it would be desirable to adopt a modification of the requirement of strict compliance with the formalities of the Wills Act 1970-1971.

The Commission has not formed a final view on the issues raised in this paper and welcomes the views of those interested in the topic. It would help the Commission if views were supported by reasons.

The Commission requests that comments be sent to the Commission by 1 February 1985.

Unless advised to the contrary, the Commission will assume that comments received on the paper are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to their comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

The paper is based on material available to the Commission on 1 November 1984 and can be studied at the Commission's office by anyone wishing to do so.
CHAPTER 1
INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission has been asked:

"To examine and report on the following matters with respect to the law of wills -

(a) whether or not it would be desirable to adopt some modification of the requirement of strict compliance with the formalities of the Wills Act 1970-1971 by the adoption of the doctrine of substantial compliance or otherwise;

(b) the effect of marriage or divorce on an existing will including, in particular, the wills of persons who subsequently lose the mental capacity to make a new will."

1.2 This paper deals only with part (a) of the reference. Part (b), which raises different issues, will be dealt with at a later date.

2. THE WILLS ACT

1.3 In Western Australia, the formalities of making a will are set out in the Wills Act 1970-1971 and must be strictly observed if the will is to be valid. An infringement of any of the requirements invalidates a will even though there may be no doubt that the document represents the testamentary wishes of the deceased. A typical example of invalidity is where one of the two witnesses required by the Wills Act is out of the testator's presence at a critical stage of the process. Such errors usually arise when the testator prepares his or her own will, either with or without a printed form, and without fully appreciating the procedures which must be complied with.

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1 Hereinafter cited as the "Wills Act". Similar provisions are to be found in the legislation of most other common law jurisdictions.
2 There is one exception permitted by the Wills Act and that is in relation to "privileged wills". Service personnel on active duty, and seamen "being at sea", may make a privileged will: Wills Act, ss 17 and 18. Such a person may make a valid will "without any formality, by any form of words, whether written or spoken, if it is clear that he thereby intended to dispose of his property after his death": id, s 18. This discussion paper is not concerned with privileged wills.
3 Re Beadle [1974] 1 All ER 493.
4 See paras 2.13 to 2.14 below.
5 However, it is not unknown for a professionally drawn will to be invalid. For example "mirror" wills may be prepared for a husband and wife and, through inadvertence at the solicitor's office, the husband signs the will prepared for the wife and vice versa: see paras 2.11 and 3.3(iii) below.
1.4 In England, prior to 1837, there was considerable confusion surrounding the requirements for making a valid will. The *Statute of Frauds 1677* provided that a valid will disposing of land must be in writing, signed by the testator or by someone at his direction, and attested and subscribed by "three or four credible witnesses". However, wills bequeathing personalty were subject to different rules developed by the Ecclesiastical Courts, which had jurisdiction over such wills.

1.5 In order to reduce the confusion, the Real Property Commissioners in England recommended that all wills should be required to be executed in one single form which could be easily understood and applied. This recommendation was implemented by the English *Wills Act 1837*. This legislation was adopted or copied in most other common law jurisdictions, including Western Australia. The English legislation was amended in 1852 to modify the requirement that the will be signed by the testator "at the foot or end thereof". A similar amendment was made in Western Australia in 1855.

1.6 The formalities required in Western Australia are now contained in the *Wills Act*. They remain substantially unchanged, except that the requirement as to the position of the testator’s signature on the will has been further modified.

3. **EXTENT OF FORMAL INVALIDITY**

1.7 Statistics are not kept by the Supreme Court of Western Australia of the number of wills not admitted to probate because of failure to comply with the formalities. However, the Commission has been informed by the Acting Principal Registrar of the Court that it is only occasionally that a will is rejected for this reason. This may not disclose the full extent of
the problem. Under Rule 13 of the *Non-Contentious Probate Rules 1967-1981* all documents purportedly of a testamentary character are required to be brought into the Probate Registry if alleged to be invalid for any reason other than revocation. The rule operates in the context of an application for administration of an intestate estate or for probate of an earlier valid will and its purpose seems to be to enable the Registrar to confirm that such documents are in fact invalid as wills. The Probate Registry estimates that there are perhaps four or five such documents filed annually.\(^{12}\)

1.8 Nevertheless, the low incidence of formal invalidity is not necessarily decisive in deciding whether a change in the law is justified. The frustration of a testator’s clear intention should not be countenanced if a way can be found to give effect to it, consistently with the general purposes of the law in the area.

4. **CONSEQUENCES OF FORMAL INVALIDITY**

1.9 In most cases the consequence of a will being held invalid is that the deceased dies intestate and his property is distributed in accordance with section 14 of the *Administration Act 1903-1984*.\(^{13}\) However, sometimes this will not be so. There may be an earlier valid will which the deceased intended to revoke by the later will. If the later will is invalid the purported revocation of the earlier will is invalid also. The earlier will accordingly stands, unless it has been independently revoked by some other action of the testator.\(^{14}\) In many cases the resulting distribution will be different from that desired by the testator.\(^{15}\) However this may not always be so. The distribution under intestacy, or an earlier will, could in fact coincide with that provided for in the invalid will.

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\(^{12}\) It is of interest that in England also very few wills are rejected for formal invalidity: para 3.18 below. However, because the existence of this rule may not be known to all professional advisers, the number of obviously invalid wills could be higher.

\(^{13}\) Of course, a will may be admitted to probate which is in fact invalid because of a formal defect not apparent on its face. If the attestation clause is sufficient, and if the Registrar has no reason to doubt the due execution of the will, it will probably be admitted to probate in the ordinary way: see generally the *Non-Contentious Probate Rules 1967-1981*. Such a document can be set aside if the true position is later discovered.

\(^{14}\) This section provides for the distribution of the estate among the surviving spouse and issue of the deceased. If there are no such persons the estate is distributed to other specified relatives. If there are no such relatives the estate is escheated to the Crown.

\(^{15}\) The *Inheritance (Family and Dependents Provision) Act 1972* empowers the court to order that further provision be made out of the estate of a deceased in favour of a specified member of the deceased's family in certain circumstances. This Act expressly provides that the court shall not be bound to assume that the law as to distribution on intestacy makes adequate provision in all cases: *Inheritance (Family and Dependents Provision) Act 1972*, s 6(2). The Act applies also to cases where the deceased left a valid will: Id, s 6(1).
1.10 The consequences of an invalid will are not confined to those of a legal nature. A testator’s family may find it distressing for his wishes to be ignored because of what they perceive is a mere technicality. Moreover, besides financial loss to potential beneficiaries additional legal expense may be incurred, brought about, for example, because the invalidity was disputed in legal proceedings or because the administration of the estate involved more work than if the will had been valid. It is probable that cases of formal invalidity would most often occur where it could least be afforded, that is in the home-made wills of small estates.
CHAPTER 2
THE PRESENT LAW

1. INTRODUCTION

2.1 In this chapter the Commission briefly outlines the formalities of the Wills Act and the various problems which have arisen in Western Australia and elsewhere.

2. THE FORMALITIES REQUIRED FOR NON-PRIVILEGED WILLS

2.2 Section 8 of the Wills Act provides that a non-privileged will is not valid unless:

"(a) It is in writing;

(b) it is signed by the testator or signed in his name by some other person in his presence and by his direction, in such place on the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will;

(c) the testator makes or acknowledges the signature in the presence of at least two witnesses present at the same time; and

(d) the witnesses attest and subscribe the will in the presence of the testator but no publication or form of attestation is necessary."

2.3 These requirements are elaborated briefly in the following paragraphs.

(a) Writing

2.4 Writing includes not only writing by hand, but also "printing, photography, photocopying, lithography, typewriting and any other modes of representing or reproducing words in visible form".

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1 For an explanation of a "privileged" will see para 1.3 footnote 2 above. Wills other than these are referred to as "non-privileged" wills.

2 For a fuller exposition see, for example, I J Hardingham, M A Neave and H A J Ford, Wills and Intestacy in Australia and New Zealand, (1983) ch 2 (hereinafter cited as "Hardingham, Neave and Ford").

3 Interpretation Act 1984, s 5.
(b) Signature by the testator

(i) Nature of the signature

2.5 For the purposes of the Wills Act a signature includes not only the written name of the testator but also his initials\(^4\) or mark.\(^5\) The testator's signature will still be his even if he has had his hand guided by another.\(^6\) Of course, the testator must be aware of what is being done at the time and assent to it.\(^7\) Further, a person may sign for the testator in his presence and at his direction and may affix his own\(^8\) or the testator's name\(^9\) to the will.

(ii) Position of the signature

2.6 Formerly, the legislation provided that the testator must sign at the "foot or end" of the will. This requirement frequently caused difficulty and elaborate case law developed in respect of testators who signed in unusual places. In Western Australia the law as to the position of the testator's signature has been substantially liberalised by the provisions of section 8(b) of the Wills Act which, as indicated above, only requires that the testator sign in such place on the will that it is apparent on its face that he intended to give effect by the signature to the writing signed as his will.

(c) Signature or acknowledgement the testator in the presence of two witnesses

2.7 The testator need not sign in the presence of witnesses present at the same time providing he acknowledges his signature before both of them together. No particular form of acknowledgement is required; a gesture may in itself be adequate. However, it is essential that the witnesses be afforded an opportunity by the testator of seeing his signature.\(^10\)

\(^4\) In the Estate of Theakston (1956) 74 WN (NSW) 113.
\(^5\) Re Hammon (1874) 5 AJR 19. This rule not only covers the case of an illiterate testator, but one too ill or weak to sign his full name. See, however, the facts of Re Colling (deceased); Lawson and another v Von Winckler and another [1972] 3 All ER 729 set out in para 2.13 below. Part of a signature is insufficient where the testator intended to complete it.
\(^6\) Re White [1948] 1 DLR 572.
\(^7\) Copeman v Staples and Smith (1911) 13 GLR 467.
\(^8\) In Goods of Clark (1839) 2 Curt 329, 163 ER 428.
\(^9\) In Goods of Bailey (1838) 1 Curt 914, 163 ER 316.
\(^10\) In the Will of Morgan [1950] VLR 335.
(d)  Attestation of witnesses

(i)  Order and place of signing

2.8 The witnesses must attest and subscribe the will by means of signature in the presence of the testator but not necessarily in each other's presence. The signing or acknowledgement of his signature by the testator must take place before either witness signs. There are no particular requirements as to the position of the witnesses' signatures but the court must be satisfied that they intended to attest the operative signature of the testator and not, for example, to testify to the words of a clause in the will.

(ii) Attestation clause not necessary for validity

2.9 The Wills Act provides in section 8(c) that "...no publication or form of attestation is necessary". It is, however, normal for a proper attestation clause to be included in a professionally drawn will, and will forms contain such a clause. Such a clause will reinforce the presumption of due execution.

3. EXAMPLES OF CASES WHERE WILLS HAVE BEEN HELD TO BE INVALID

2.10 In order to place the question in a practical context, it may be helpful to give examples of cases where, through inadvertence or perhaps lack of knowledge, a testator has not complied with one or more of the formal requirements, with the consequence that the will has been held to be invalid.

11 "...to 'attest and subscribe' a will means to put one's signature or other identifying mark representing one's name on the will with the intention thereby of attesting that the testator's signature has been made or acknowledged in one's presence": Re Lucas [1966] VR 267, 269.

12 "Thus, the testator may not, conformably with the Wills Act, sign or acknowledge his signature in the presence of A, procure A's signature, then acknowledge in the presence of A and B before procuring B's signature. In such a case A must re-sign. He cannot simply acknowledge his signature to B": Hardingham, Neave and Ford, 39. In the Estate of Davies, Russell v Delaney [1951] 1 All ER 920 was a case where a will was held to be invalid on these grounds: para 2.14 below. See also Re Colling [1972] 3 All ER 729 the facts of which are outlined in para 2.13 below.

13 That is, the testator need not state to the witnesses that the document is his will.

14 That is, the will need not contain an attestation clause.

15 Rule 15(1) of the Non-Contentious Probate Rules 1967 provides that where a will contains no attestation clause or where the attestation clause is insufficient the Registrar shall require an affidavit of due execution from one or more of the attesting witnesses or, if no attesting witness is conveniently available, from any other person who was present at the time the will was executed. Where such an affidavit cannot be obtained, the Registrar may under rule 15(3) accept evidence on affidavit from such persons as he thinks fit to show that the signature on the will is in the handwriting of the deceased.
(a) The testator's signature

2.11 In Western Australia the testator is now simply required to sign "...in such place on the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will", so that earlier rulings as to whether a will was signed at "the foot or end thereof" are no longer relevant. Nevertheless even this wider provision would not save a will similar to that in the Western Australian case of In re Petchell, Deceased. In this case Petchell gave instructions for the preparation of his will which would have left the whole of his estate to his wife with gifts over to his children. At the same time his wife gave instructions for a mirror will to be prepared. When the documents were prepared each party read and approved the contents but due to an error signed each other's will instead of their own.

On the death of Mr Petchell an application was made for probate of his will but the application was refused as he had not signed it as the legislation required.

(b) The presence of witnesses

2.12 As indicated above, failure to comply with the requirement as to the presence of witnesses is a common cause of invalidity. The Commission was informed by the Acting Principal Registrar of the Western Australian Supreme Court that recently a will was refused probate because the testatrix, having signed her will, separately asked acquaintances to witness her signature. Because the acquaintances were not present at the same time when the testatrix signed or acknowledged her signature the will was invalid. This case is interesting in that the attestation clause was in the usual form indicating that the witnesses were present at the same time. However, the Acting Principal Registrar required an affidavit as to due execution from the witnesses because there were minor alterations in the document which had not been attested. The affidavits brought to light the truth as to the attestation.

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16 Wills Act, s 8(b).
17 (1945) 46 WALR 62.
18 In the similar South Australian case In the Estate of Blakely, Deceased (1983) 32 SASR 473 the South Australian Supreme Court validated the will under s 12(2) of the Wills Act 1936-1975 (SA).
19 The Acting Principal Registrar also drew to the Commission's attention a similar case which had occurred a few years earlier.
2.13 Often a small deviation invalidates a will. For example, in the English case of *Re Collings*\(^{20}\) a testator who was a patient in a hospital asked a nurse and another patient to witness his signature but while he was signing, and before he had completed his signature, the nurse was called away to attend to another patient. The testator nevertheless continued signing and the other witness then signed. When the nurse returned, the testator and the other witness both acknowledged their signatures and the nurse added her signature. It was common ground that the acknowledgement by the testator of his signature after the nurse had returned to the bedside was insufficient to validate the will, since the other witness had already signed.\(^{21}\) Accordingly, the applicant for probate of the will argued, as the only way remaining to validate the will, that the half completed signature\(^{22}\) was sufficient for the purposes of the *Wills Act*. The court rejected the argument. In declaring the will invalid, Mr Justice Ungoed-Thomas said that he came to the conclusion "with the greatest regret", and only because he felt "...compelled to do so despite its so clearly defeating the intention of the testator".

2.14 In an earlier English case\(^{23}\) involving the absence of one of the witnesses in the room at the crucial time, Morris J observed:

"...I am compelled to decide the case in accordance with law, even though my decision has the effect of defeating the purpose and intention of the testatrix."

2.15 Paragraph 3.3 below contains an account of a number of South Australian cases in which the will would have been held to be invalid prior to the South Australian *Wills Act Amendment Act (No 2) 1975* and which would still be invalid were they to occur in Western Australia.

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\(^{20}\) [1972] 3 All ER 729.

\(^{21}\) Para 2.8 above.

\(^{22}\) That is, that portion of the signature which had been written before the nurse was called away.

\(^{23}\) *In the Estate of Davies, Russell v Delaney* [1951] 1 All ER 920.
CHAPTER 3
THE LAW ELSEWHERE AND PROPOSALS
FOR CHANGE ELSEWHERE

1. INTRODUCTION

3.1 The law in England, New Zealand and most Australian jurisdictions in relation to the formalities to be observed in making a will, and the need for strict compliance with those formalities, is similar to Western Australia. However, South Australia and Queensland have recently introduced a "substantial compliance" provision, though in different terms. In this chapter the Commission outlines the changes to the law in South Australia and Queensland and the proposals for change recently made elsewhere both in Australia and in certain other jurisdictions.

2. SOUTH AUSTRALIA

(a) 1975 amendment

3.2 South Australia in 1975 amended its wills legislation by adding the following provision:

"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, 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."

Two points require emphasis. First, although the subsection has been referred to as a "substantial compliance" provision, it is in fact much wider. With the exception that the will must be in documentary form, it appears to enable the court to validate a testamentary

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1 Wills Act Amendment Act (No 2) 1975 (SA), inserting a new s 12(2) in the Wills Act 1936-1975 (SA). The amendment was based on a recommendation of the Law Reform Committee of South Australia in its report, Relating to the Reform of the Law on Intestacy and Wills, (Twenty-Eighth Report, 1974) 10-11. The recommendation of the Committee was designed to avoid invalidity where there was a "technical failure" to comply with the Wills Act or where the testator could not reasonably obtain witnesses for his will: ibid.

2 For example, by J H Langbein in “Crumbling of the Wills Act: Australians Point the Way” (1979) 65 American Bar Association Journal 1192, 1194.
statement where the deceased observed none of the formalities, and indeed made no attempt to comply with them. Secondly, a document cannot be "deemed to be a will of the deceased person" unless the Supreme Court is satisfied that "there can be no reasonable doubt that the deceased intended the document to constitute his will". In other words the Court must apply the criminal standard of proof (beyond a reasonable doubt), not the civil standard (on the balance of probabilities).

(b) Cases on the amendment

3.3 There are a number of cases on the provision. The first three mentioned below concern one of the most common causes of formal invalidity, namely where the testator did not sign or acknowledge his signature in the presence of "two or more witnesses present at the same time". The next two deal with the situation where the deceased’s signature was not witnessed. The last two cases are ones where it has been held that section 12(2) applies even where the document was not signed by the deceased.

(i) Presence of witnesses

* In the Estate of Graham, Deceased -

The will was signed by the testatrix, and by two witnesses. However, the testatrix did not sign or acknowledge the will in the presence of the witnesses as section 8 of the South Australian Wills Act 1936-1975 requires. What happened was that, having signed the will, the testatrix handed it to a relative and asked him "to get it witnessed". He took the will to two neighbours who knew the testatrix, and they both signed as "witnesses". The court held on the evidence that there was "not the slightest doubt that the deceased intended the document to constitute her will" and accordingly ordered that the will be admitted to probate.

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3 This includes the absence of the testator's signature: In the Estate of Williams, Deceased (unreported) Full Court of South Australia: 6 July 1984, No 258 of 1983: para 3.3(iii) below.

* In the Estate of Kolodnicky, Deceased\(^5\)

The testator, having signed the will, took it to two persons located in different parts of the town, who each signed their names as attesting witnesses. The court held that the will did not comply with section 8 of the South Australian Wills Act 1936-1975 but that there was no doubt that the deceased intended the document to be his will. Accordingly it ordered that it be admitted to probate.

* In the Estate of Dale, Deceased, Dale v Wills\(^6\)

The facts were similar to Kolodnicky’s case, except that the deceased signed the will in the presence of one witness who then signed as witness. The deceased then took the will to another witness who insisted that the deceased sign again, which he did. The second witness then signed the document. The court held that although the will did not comply with section 8 there was no doubt that the deceased intended the document to constitute his will. Accordingly it ordered that it be admitted to probate.

(ii) Testator’s signature unwitnessed

* In the Estate of Crocker, Deceased\(^7\)

This case is unusual in that it concerns what was intended to be a privileged will. The testator in 1941, while a member of the RAAF, made and signed a will on a form supplied by the Air Force. The will was not witnessed. The testator died in 1981. The court held that he had not in fact been entitled to make a privileged will under the legislation then in force in South Australia. It nevertheless held that it could validate the will under section 12(2) as, on the proven facts, there was no doubt that the testator intended the document to constitute his will.

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\(^{5}\) (1981) 27 SASR 374.


This case illustrates the fact that section 12(2) is not confined to cases where the testator has through inadvertence or lack of knowledge failed to comply with one of the required formalities. The provision also has application where there are a number of conflicting "testamentary documents" none of which were duly executed, and where the court has the difficult task of deciding which of them, if any, should be admitted to probate.

A medical practitioner (who was also a legal practitioner) in 1977 signed a will which also bore the signature of two witnesses. However, it subsequently appeared that the will had not been duly executed as the testator had not signed or acknowledged his signature in the presence of the witnesses "present at the same time". Between the date of that will and the practitioner's death in 1981 he prepared several testamentary documents none of which were duly executed. Shortly before his death he handed to a woman employed by him on office work a note book, telling her to use the book for notes. The note book remained in her possession until after his death when it was found to contain two sheets in the practitioner's handwriting, beginning "My last will and testament", and signed and dated by the practitioner with the words added: "Written as I have considerable cardiac pain and irregularity at time [sic]". This document provided for the appointment of two executors and contained a number of bequests. The signature was not witnessed. The court held that, on the evidence presented, there was no reasonable doubt that the testator intended the two sheets of paper in the notebook to constitute his will and accordingly ordered that the sheets be admitted to probate.

The case was taken on appeal by the person who was appointed executrix under the will signed in 1977. The Full Court unanimously upheld the order of the judge of first instance.¹⁰

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⁸ (1983) 32 SASR 413.
⁹ In the Estate of Kelly, Deceased; Duggan v Hallion (1983) 34 SASR 370. In doing so the Full Court emphasised that as a court of appeal it could not upset a judgment of the trial court unless the judge misapprehended the evidence or misdirected himself and that he had not been shown to have done so: per Zelling J at 384.
(iii) Will not signed by testator

* In the Estate of Blakely, Deceased\(^{10}\)

The deceased and his wife had instructed a solicitor to prepare mirror wills for both of them. These were drafted, read and approved by the parties but due to a mistake in the solicitor's office the husband signed the wife's will and the wife the husband's. The husband died before the error was discovered and probate was sought for his will notwithstanding that it had been signed by his wife. The court ordered that the will be admitted to probate. It regarded earlier statements on the need for a testator to execute the document for section 12(2) to operate as obiter\(^ {11}\) and indicated that in an appropriate case no signature was necessary. The court said\(^ {12}\) "The brake against a flood of fraudulent or unmeritorious applications is the very high standard of proof required by section 12(2)".

* In the Estate of Williams, Deceased\(^ {13}\)

In this case the Full Court of South Australia upheld the view of the court in Blakely's case that section 12(2) had application even where the deceased had not signed the document. The facts were as follows -

The testatrix and her husband were about to depart on a lengthy trip. At that time they already had professionally prepared wills but they considered them to be out of date. Because there was no time to have other wills professionally prepared they each wrote out a further will in their own handwriting and invited neighbours in as witnesses. Although the husband signed his will and

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10 (1983) 32 SASR 473.
12 In the Estate of Blakely, Deceased (1983) 32 SASR 473, 479.
13 In the Estate of Williams, Deceased (unreported) Full Court of South Australia, 6 July 1984, No 258 of 1983. The case came before the Full Court on a reference by the judge of first instance.
the witnesses signed both wills, it was only after the death of the wife that it was realised that she had not signed her will.

The Full Court held that a testator’s signature was merely one of the formalities required by section 8 of the South Australian Wills Act 1936-1975 for valid execution and that consequently section 12(2) of that Act was applicable to cases where this formality was not complied with. Accordingly, since on the proven facts there was no reasonable doubt that the wife had intended the document to be her will, the court ordered that it be admitted to probate.

(c) Other matters

* Alterations to a will

3.4 Section 12(2) can also be applied to part of a document so that alterations made to a will subsequent to its execution may be included as part of the document admitted to probate. Whether the provision could be applied to a document intended to operate solely as an instrument of revocation has not yet been decided.

* Solicitor's duty

3.5 A collateral difficulty which the South Australian provision raises is the duty of a solicitor to attempt to gain probate of a document which might possibly be validated under section 12(2). This duty was adverted to In the Estate of Kolodnicky, Deceased where Legoe J declined to give any general advice on the matter. He did, however, point out that the question must in each case be resolved by a consideration of a solicitor's duty to his client and as the law now stands to third parties under the principles enunciated in Ross v Caunters and Watts v Public Trustee for Western Australia.

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14 In the Estate of Standley, Deceased (1982) 29 SASR 490.
16 Id, 385.
3. QUEENSLAND

3.6 Section 9 of the Queensland Succession Act 1981-1983 lays down similar requirements for the formal validity of a will to Western Australia but adds two provisos, one of which is relevant in this context. That proviso states:

"the Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator; ...

3.7 There are certain terms used in the proviso which may cause difficulty for the court and for professional advisers.

* "substantial compliance": It is not clear whether the court’s power is confined to cases of minor deviations from the prescribed formalities or whether emphasis is to be placed on the purposes served by those formalities, so that even major deviations may be sanctioned, provided those purposes are served in the particular case.

* "testamentary instrument": There may be doubt whether this would include any writing, no matter how casually expressed, or would only cover documents drafted with some degree of formality.

* "satisfied": Presumably proof that the instrument expresses the "testamentary intention of the testator" is to be in accordance with the civil standard, but this may depend on the meaning to be given to "substantial compliance".

3.8 There are no reported or unreported cases on the Queensland provision.

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19 The provisos were based on recommendations of the Queensland Law Reform Commission, On the Law Relating to Succession, (Report No 22, 1978) 7. The Commission argued that some relaxation of the rigid standard applied by the courts was warranted: ibid.

20 For example, as in Re Colling [1972] 3 All ER 729, para 2.13 above. The Queensland Law Reform Commission in its report (at 7) said:

"It will be for the court to work out what it understands by substantial compliance, but it is envisaged that the courts will be cautious in their approach to the latitude given, and that only in cases of accident and minor departures will it be possible to give effect to the obvious intention of the testator, as in cases where the court has hitherto wished to admit an instrument to probate but has felt unable to do so because of the shackles of its policy of meticulous compliance."

21 For example, as seems to have been the situation in In the Estate of Graham, Deceased (1978) 20 SASR 198: see para 3.3(i) above.
4. PROPOSALS FOR CHANGE ELSEWHERE IN AUSTRALIA

(a) Northern Territory

3.9 The Northern Territory Law Reform Committee in 1979\textsuperscript{22} recommended that a provision similar to section 12(2) of the South Australian Wills Act 1936-1975 should be introduced into the Northern Territory. The Committee gave no reason for its recommendation, except to indicate that there may be cases, which it said were probably rare, in which it might be reasonable to depart from the formalities. This recommendation has been adopted in principle by the Government in the Territory but not yet implemented.

(b) Tasmania

3.10 The Law Reform Commission of Tasmania in 1983\textsuperscript{23} also recommended the enactment of a provision to empower the Supreme Court to declare a defectively executed will to be valid. The Commission said: \textsuperscript{24}

"Two solutions were canvassed:

* A general dispensing power in the Court to pronounce a will valid if the court was satisfied that it represented a genuine attempt to express the testator’s wishes, notwithstanding the absence of some formality required under Section 9: and irrespective of whether the deceased had attempted to comply with the formalities or not; and

* A general dispensing power in the Court to pronounce a will valid only where the deceased has at least attempted to comply with Section 9 requirements; but where the defect is so inconsequential and harmless to the purpose of the formalities that the Court is satisfied that it can give effect to the true intentions of the testator without defeating the purpose of Section 9 (a doctrine of 'substantial compliance')."

The Tasmanian Commission recommended against adoption of the first solution which it said had given rise to uncertain litigation in South Australia. It favoured the second solution which it said would be more acceptable to the courts, since it preserved "the spirit of the formalities,

\textsuperscript{22} Northern Territory Law Reform Committee, \textit{Relating to the Attestation of Wills by Interested Witnesses and Due Execution of Wills}, (Report No 2, 1979) 10-11.
\textsuperscript{24} Ibid.
if not the letter. Dealing with uncertain evidence of intention would in its view be less of a problem under it. The Commission accordingly recommended that:

"...the Court should be granted a general power to declare an otherwise defectively executed will to be valid, if it can be shown that the defects are inconsequential and do not detract from the overall purpose of the Wills Act; and that the testator had at least attempted to comply with those formalities."

The Commission suggested that the phrase 'by mistake, accident or other reasonable cause' should "appropriately convey the circumstances in which the testator's defectively executed intentions might be upheld in what is otherwise a purportedly formal will."

5. CANADA

3.11 The position in the Canadian Provinces as to the formalities for making a valid will is broadly similar to Western Australia. However, some Canadian jurisdictions also allow a testator to make a "holograph " will, that is, one which is written by the testator in his own handwriting and signed by him. No other formalities are required.

3.12 Two Canadian Law Reform Commissions (Manitoba and, British Columbia) have recently recommended in favour of a substantial compliance provision.27 The Manitoba report has been implemented.28 In the following paragraphs the Commission outlines the recommendations of each of these bodies.

(a) Manitoba

3.13 The Manitoba Law Reform Commission recommended the enactment of a provision along the lines of the South Australian legislation29 but with the following modifications -

25 Ibid.
26 Ibid.
28 Wills Act (Manitoba), SM 1982-83-84, Cap 31.
29 Para 3.2 above.
* **First**, the standard of proof should be the normal civil standard of "balance of probabilities" which is that employed in other areas of probate law, rather than the criminal law standard.

* **Secondly**, and as a corollary to the first modification, it recommended that the South Australian wording "...if the Supreme Court...is satisfied" should be replaced by the wording "...be deemed to be a will of the deceased person if it is proved upon application for admission of the document to probate as the last will of the deceased, that the deceased intended the document to constitute his will". In the Manitoba Commission’s view this change would create a much more objective standard for both certainty and appeal purposes”.

* **Thirdly**, the provision should be "...very clearly worded to encompass revocation and alteration defects as well as those of execution”.

(b) **British Columbia**

3.14 The Law Reform Commission of British Columbia recommended that a provision be added to the *Wills Act* of that Province to the effect that, notwithstanding that a document did not comply with these formalities, it should be valid as a will if -

(a) it is in writing;

(b) it is signed by the testator; and

(c) the court is satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect.

3.15 It also recommended that the provision apply only to cases where the testator died after the provision comes into effect.

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31 Ibid.
3.16 These recommendations differ from those of the Manitoba Commission in two main respects -

(a) The document must be signed by the testator in order to qualify. The British Columbia Commission concluded that the increased litigation that would result if there were no such threshold requirement would outweigh any benefit that would result from dropping it.

(b) Although it agreed with the Manitoba Commission that the civil standard of proof should apply, it considered that this standard is better expressed by requiring the court to be "satisfied" of the relevant matters.\(^{32}\)

6. AGAINST THE TIDE? - THE ENGLISH LAW REFORM COMMITTEE

3.17 The English Law Reform Committee in its Twenty Second Report in 1980\(^{33}\) dealt with the question whether the courts should have a dispensing power as to the formalities required of a valid will, and recommended against it.

3.18 In order to gain an idea of the dimensions of the problem the Committee had commissioned a survey of all wills submitted to probate in England and Wales over a three month period in 1978. The survey showed that during that period 40,664 wills were admitted to probate and 97 rejected (about 0.24%). Of those rejected, 93 were rejected because they failed to comply in one way or another with the formalities required by section 9 of the English Wills Act 1837.

3.19 The Committee sought public comment on the suggestion that the courts should have a general dispensing power conferred on them to admit a will to probate if satisfied that it was genuine, notwithstanding its failure to comply with the requirements of section 9. The response was about evenly divided.

3.20 In justifying its rejection of the proposal for a dispensing power, the Committee said:\(^{34}\)

\(^{32}\) The Manitoba Commission did not favour the use of this word as it considered that it added a subjective element which would create difficulty on appeal: Manitoba Law Reform Commission, “The Wills Act and the Doctrine of Substantial Compliance” (Report No 43, 1980) 28.


\(^{34}\) Id, 4.
"While the idea of a dispensing power has attractions, most of us were more impressed by the argument against it, namely that by making it less certain whether or not an informally executed will is capable of being admitted to probate, it could lead to litigation, expense and delay, often in cases where it could least be afforded, for it is the home-made wills which most often go wrong. Recent legislation in South Australia allows the courts just such a discretion and we have read with interest the first case in which that legislation was successfully invoked. [35] The judgment contains an interesting discussion of the relationship between the formalities and the new discretion which in our view indicates that the courts will not find the application of their dispensing power an easy matter. We think that to attempt to cure the tiny minority of cases where things go wrong in this way might create more problems than it would solve and we have therefore concluded that a general dispensing power should not be introduced into our law of succession."

3.21 The Committee, however, went on to recommend the following reductions in the formalities required under section 9 of the Wills Act 1837 to overcome some common causes of formal invalidity. 36

(a) The requirement that the testator’s signature be at the "foot or end" of the will should be replaced by a provision that it is sufficient if, wherever the signature is placed, it is apparent on the face of the will that the testator intended by his signature to validate the will.37

(b) An acknowledgement by a witness of his signature should have the same effect as his signature "...just as under the present law a testator’s acknowledgement of his signature is as operative as his actual signature".38

3.22 Similar reservations about a substantial compliance doctrine have been expressed in Australia.39

35 The Committee were referring to Re Graham, Deceased (1978) 20 SASR 198: see para 3. 3(i) above.
36 These recommendations were given effect to by s 17 of the Administration of Justice Act 1982 (UK), which replaced s 9 of the Wills Act 1837 by a new section.
37 This is similar to the requirement in s 8(b) of the Wills Act (WA): para 2.2(b) above.
38 This recommendation was designed to validate wills such as that in Re Colling [ 1972] 3 All ER 729: para 2.13 above. The will in that case would have been valid if the first witness's acknowledgement of his signature to the second witness (the nurse) had had the same legal effect as if he had instead signed again.
CHAPTER 4
DISCUSSION

1. INTRODUCTION

4.1 The requirements as to the manner of execution aside, a will can be a most informal document. There is no legal regulation of its contents, or manner of expression. In particular, there is no requirement that it be drafted by, or witnessed by, an official. There is no requirement that a testator record or deposit his will in any official record office. He may leave it wherever he wishes, whether at a solicitor's office, in a bank safe deposit box or among his private papers at home. The view has been expressed by the English organisation "Justice" that the present rules are not formal enough because they conceal from an ordinary testator the difficulties inherent in disposing of his estate. "Justice" recommended the adoption of a notarial system for the attestation of wills, such as exists in some European countries, whereby a will would be required to be executed before an authorised person, such as a Commissioner for Oaths. It said that this would have the indirect effect of leading more testators to take proper legal advice before executing their wills.

4.2 It is not within the Commission's terms of reference to consider whether the rules for making a will should be either more or less formal or that the document should conform in some other way to officially prescribed rules. However, the fact that a well known English organisation has called for reform in this direction is sufficient to indicate caution in deciding whether the existing formalities should be relaxed or made subject to a judicial dispensing power.

2. THE PURPOSES OF THE WILLS ACT FORMALITIES

4.3 The reasons for enacting formal requirements have been succinctly expressed by Hardingham, Neave and Ford as follows:

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1 A will can be written in any language, or even in code: Kell v Charmer (1856) 23 Beav 195; 53 ER 76. Of course the meaning of any expression in a will may require determination by the court if it is obscure.
2 Justice, Home-Made Wills (1971) 4. "Justice" is the name of the British Section of the International Commission of Jurists.
3 Id, 4-6.
4 Hardingham, Neave and Ford, 23. See also J H Langbein, “Substantial Compliance with the Wills Act” (1975) 88 Harvard L Rev 489 and the address by the same author, Defects of Form in the Execution of
"First, they are imposed in an endeavour to provide reliable evidence of the testamentary intent of a deceased person whose expression of intent may have been made many years before his death. \(^5\)

Secondly, because a testamentary disposition does not deprive the disponor of any enjoyment of the property during his life there is a greater possibility of his making casual, ill-considered expressions of donative intent than in the case of dispositions during lifetime. The formal requirements provide some opportunity for deliberation.

Thirdly, the efficient operation of a legal system which has to authorise the distribution of thousands of deceased estates on the basis that it is satisfied that each testator expressed testamentary intentions, is assisted. The establishment of uniform criteria by which those who wish to make wills can do so in a form readily recognisable as a will not only reduces uncertainty and the risk of litigation but eases the burden of the state officials whose task it is to consider whether the executor’s power to deal with the testator’s estate should be authenticated by a grant of probate."

The Commission considers that these functions are important and that nothing should be done which would unduly weaken them. The issue in this paper is simply whether, without making too great an inroad into the purposes served by the formalities, the court should be empowered to validate a testamentary statement which falls short of the formal requirements and if so, where, if anywhere, should the line be drawn. Should only minor deviations from the prescribed formalities be permitted (for example, as in \textit{Re Colling}\(^6\)) or should the law go further by enabling testamentary statements to be validated where only one person signed as a witness? Or where there are no witnesses at all? Or where the testator himself has not signed the document? Or further still by enabling validation of an oral testamentary statement (as is possible in the case of a "privileged" will\(^7\))? Indeed, should the only test be that of genuine "testamentary intent"?

4.4 If a judicial dispensing power is to be permitted there is the further question of the standard of proof to be required of the genuineness of a purported testamentary intention. This question is elaborated in paragraph 4.6 below.

\(^5\) For example, the requirement of the testator’s signature and its attestation by witnesses is designed to help prevent forgery or coercion.

\(^6\) [1972] 3 All ER 729: para 2.13 above.

\(^7\) Footnote 2 to para 1.3 above. The South Australian amendment (para 3.2 above) requires as a minimum that the statement be in a document.
3. SHOULD A "SUBSTANTIAL COMPLIANCE" RULE BE ENACTED?

(a) General

4.5 In some of the cases outlined in the previous two chapters a minor slip was the cause of the invalidity. The testator had intended to comply with the formal requirements, but in the event failed in some seemingly unimportant way in doing so. No doubt it is this sort of case which is the source of the advocacy of a substantial compliance rule. However, while such a concept is easy to describe in a general way it is difficult to articulate it in legislative terms which would both give clear guidance to the courts and confine the dispensing power within reasonable bounds. This difficulty is illustrated by the variety of formulations referred to in Chapter 3 above which either have been enacted, or are proposed to be enacted, in the jurisdictions concerned. For example, the narrow approach of the Law Reform Commission of Tasmania\(^8\) may require the court to hold as invalid a will where the testator had not attempted to sign or acknowledge his signature in the joint presence of witnesses,\(^9\) no doubt because he had not appreciated that this was a requirement. On the other hand the wide terms of the South Australian provision would seem to enable the court to validate a document in which none of the formalities had been complied with (or even that any attempt was made to comply with them) provided that the necessary degree of proof of testamentary intent is established. This could place the court in difficulty where, for example, there were a number of defective and inconsistent "testamentary documents" which had allegedly been drawn up by or on behalf of the deceased over the years.

4.6 The question of the appropriate standard of proof as to testamentary intent would need to be decided upon, should a dispensing power be considered desirable. The answer to this seems to depend on the width of the proposed dispensing power. If only minor deviations are to be permitted, it would seem that the civil standard might apply. However, if the court's dispensing power is to be very wide (as in South Australia) it might seem appropriate to require that the testamentary intent of the deceased in relation to the document should be proved beyond a reasonable doubt. This is not only because of the increased possibility of

\(^8\) Para 3.10 above.

\(^9\) For example, as in *In the Estate of Graham, Deceased* (1978) 20 SASR 198: para 3. 3(i) above.

It is not clear what the Tasmanian Commission had in mind in proposing that the testator should have "attempted to comply with [the] formalities". It could have meant either that the testator knew what the formalities were but failed through mistake or inadvertence to comply with them, or on the other hand that although he had intended to make a valid will he was under a misapprehension as to what the law required and so complied only with what he thought were the requirements.
fraud but also because of the need to be certain that the deceased was indeed genuine in his action.

4.7 Apart from questions as to the precise formulation of a substantial compliance rule, the Commission considers that regard should be had to the possible indirect consequences of enacting such a rule. These include the following -

* Before the dispensing power can be exercised an application must be made to the court to determine whether the document concerned comes within the rule. However, this increase in the number of court cases may be offset by a diminution in the number of, or at least the complexity of, proceedings brought by persons who would benefit if a will, apparently valid on its face, could be shown to have been invalidly executed.\(^{10}\) Such persons may not oppose such an application if the defectively executed will seemed to be well within the new provision.

* Some members of the public may, as a consequence of enacting the rule, adopt the attitude of "near enough is good enough" when it comes to executing their wills (this is more likely in the case of home drawn wills). This could result in an increase in the number of wills requiring judicial determination as to their validity and may even result in an increase in the number of invalid wills (that is, those held to be beyond the scope of the dispensing power). As against this, it is probable that most testators would continue to ensure that their wills were properly executed, so as to avoid any possibility of litigation. The likely effect upon people’s attitude of the enactment of a judicial dispensing power cannot be estimated at this stage.

\(^{10}\) *Re Colling* [1972] 3 All ER 729 (para 2.13 above) and *In the Estate of Davies, Russell v Delaney* [1951] 1 All ER 920 (para 2.14 above) were instances of such cases. It is also possible that a substantial compliance provision, by implementing the last wishes of the testator, may reduce the number of claims under the *Inheritance (Family and Dependents Provision) Act* 1972. This is on the not improbable assumption that these last wishes disposed of the testator’s property among his dependants in the most appropriate fashion. In the absence of such a provision the distribution would be in accordance with the provisions on intestacy or under an earlier valid will (if any), and may not be appropriate. If so, this may impel a defendant to bring an action under the *Inheritance (Family and Dependents Provision) Act* for greater provision out of the estate.
Of the jurisdictions referred to in the previous chapter only South Australia has had its provision in place for any length of time (about 8 years) which is probably insufficient to assess whether any shift in attitude has occurred.

(b) Ancillary matters

(i) Alterations to wills

4.8 Under the present law, an alteration to a testamentary document already executed must also be made in compliance with section 8 of the Wills Act.\(^{11}\) If a dispensing power is considered desirable in relation to a testamentary document it would also seem desirable to extend it to any alteration to the document.

(ii) Revocation

4.9 At present if a will is to be validly revoked by writing, that writing must also be executed in conformity with section 8 of the Wills Act.\(^ {12}\) Any new dispensing power would presumably apply to a revocation contained in a later will, but the Commission welcomes views on whether it should also apply to the case of a writing which does nothing more than to purport to revoke an earlier will.

(iii) Retrospectivity

4.10 Assuming a dispensing power is desirable, should it apply only to the wills or purported wills of testators who die after the coming into operation of the legislation? This would seem to be desirable as otherwise the provision could create difficulties in regard to estates already in the course of administration.

4. VIEWS WELCOMED

4.11 The Commission has not formed any final view on whether there should be a dispensing power (whether in the form of a substantial compliance rule or otherwise) and, if there should, the form it should take or the standard of proof required. It welcomes views. The

\(^{11}\) Wills Act, s 10.

\(^{12}\) Id, s 15(c).
Commission also welcomes examples of actual cases known to commentators where a purported testamentary document was invalid, or was held to be invalid, due to failure to comply with the requirements of section 8 of the *Wills Act*. 
CHAPTER 5
QUESTIONS AT ISSUE

5.1 The Commission welcomes comment, with reasons wherever possible, on whether a "substantial compliance" or dispensing power provision as to invalidly executed wills should be enacted in Western Australia. If so,

(1) should the provision take the form -

(a) as enacted in South Australia and proposed in the Northern Territory? (paragraphs 3.2 and 3.9)
(b) as enacted in Queensland? (paragraph 3.6)
(c) as proposed in Tasmania? (paragraph 3.10)
(d) as enacted in Manitoba? (paragraph 3.13)
(e) as proposed in British Columbia? (paragraph 3.14)
(f) or some other form?

(2) Should the provision apply also to -

(a) alterations to wills? (paragraph 4.8)
(b) revocation of wills? (paragraph 4.9)

(3) If such a provision were introduced should it be confined to cases where the testator died after it came into effect? (paragraph 4.10)