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Wills & EPAs - Commonly Occurring Issues

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Tricky, Sticky Wills and Codicils: Alteration, Amendment, Revocation, Rectification, Revival, and Republishing

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TRICKY, STICKY WILLS AND CODICILS: ALTERATION, AMENDMENT, REVOCATION, RECTIFICATION, REVIVAL, AND REPUBLISHING

SECTION 22

Let's begin with the definition of will as found in s. 1 of the *Wills and Succession Act*[1] ("*WSA*").

(1)(k) "will "includes

(i) a codicil,

(ii) a writing that

(A) alters or revokes another will,

(B) appoints a personal representative, or

(C) on the death of the testator, confers or exercises a power of appointment, and

(iii) any other writing that is a testamentary disposition.

ALTERATIONS

S. 22 of the *WSA* deals with alterations of a will and states:

22(1) Any writing, marking or obliteration made on a will

(a) is presumed to be made after the will is made; and

(b) is valid as an alteration of the will only if:

(i) in the case of a will made under section 15, the alteration is made in accordance with that section;

(ii) in the case of a will made under section 16, the alteration is made in accordance with that section; or

(iii) the Court makes an order under section 38 validating the alteration.

ALTERATION OF A WILL/NONCOMPLIANT WILL

Three leading legal cases in Alberta dealing with the alteration of a will or a noncompliant will since the inception of the *WSA* are: *Smith v Smith*[2]*, Woods v Cannon*[3]*, and Schultz v Schultz*[4].

[1] SA 2010, c W-12.2

[2] 2012 ABQB 677

[3] 2014 ABQB 614

[4] 2016 ABQB 367

Smith v. Smith: Handwritten Alterations

In this case the applicant was seeking advice and directions concerning the validity of handwritten alterations made to the will of Smith. The applicant was seeking an Order to the effect that the handwritten alterations were valid. The deceased executed the valid formal will on January 16, 2003 while he was living with his common-law spouse. The pair then separated in 2008 and the deceased sought to make alterations to his 2003 will. The deceased made handwritten alterations which removed his common law partner as his personal representative under his will and substituted his daughter, Mavis Smith, as his personal representative. He also removed his common law partner as the sole residual beneficiary of his estate and instead named his four children and his common law partner's granddaughter. These alterations were neither initialed by the deceased nor signed by witnesses. It is interesting to note that although the former common law partner was represented by counsel and served with notice, she mounted no defence or opposition to the application.

The altered will was not signed beside the alterations in the presence of two witnesses. Therefore, the court held that s. 38 was the only provision that could save the deceased testator's alterations. S. 38 of the *WSA* states:

> The court may, on application, order that a writing, marking or obliteration is valid as an alteration of a will, despite that the writing, marking or obliteration was not made in accordance with s. 22(1)(b)(i) or (ii), if the Court is satisfied on clear and convincing evidence that it reflects the testamentary intentions of the testator and was intended by the testator to be an alteration of his or her will.

Justice Gates found that the dispensation power can be invoked where the court is satisfied that the document or writing embodies (a) the testamentary intentions of the deceased or (b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will.

He went on to approve the *Sawatzky v Sawatzky*[5] decision from the Manitoba Court that the applicant must prove, on a balance of probabilities that the document embodies the deceased's testamentary intention, that is, that it is "a deliberate or fixed and final expression of intention as to the disposal of his/her property on death…" Justice Gates also confirmed *George v Daily*[6] where "…the greater the departure from the requirements of formal validity…, the harder it may be for the court to reach the required state of satisfaction" that the document contains the deceased's final testamentary intentions. Justice Gates found that the alterations to the will were valid, and stated:

[5] 2009 MBQB 222

[6] 1997,115 Man. R. (2d) (Man. C.A.)