MAY 2026 ■ VOLUME 25 NO. 2

STEP Inside

NEWSLETTER OF THE SOCIETY OF TRUST AND ESTATE PRACTITIONERS (**CANADA**)

REVISITING THE VALIDATION AND RECTIFICATION OF WILLS

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In 2025, the Alberta Court of King's Bench in *Smith Estate (Re)*[1] had an opportunity to review and confirm the law in Alberta on the validation or rectification of wills that do not comply with the formal requirements for validity set out in the *Wills and Succession Act*[2] (WSA). While the decision does not depart from previous case law, it reminds the reader that there are significant differences between the laws of Alberta and the laws of the other provinces on this subject, and it invites comparison to the relatively new dispensing provisions now in force in Ontario.

In *Smith Estate*, Justice D.A. Labrenz was presented with nine successive purported wills of the deceased Mr. Smith and asked to exercise the court's powers of validation and/or rectification under sections 37 and 39 of the WSA, respectively, to cure various deficiencies in the execution of the purported wills. The first five purported wills were signed by Mr. Smith in the presence of a single witness. Those wills therefore failed to meet the requirement under section 15 of the WSA that a testator must make or acknowledge his or her signature on a will in the presence of two witnesses, both of whom must be present at the same time and must sign the will in the testator's presence. The sixth and seventh purported wills were actually copies of the fifth, with various handwritten changes noted; neither was re-signed by Mr. Smith. The eighth and ninth purported wills were new documents, but again neither was signed by Mr. Smith. Accordingly, in addition to lacking the necessary witnesses, purported wills six through nine were also deficient under section 14 of the WSA, which stipulates that a valid will must be made in writing, "must contain a signature of the testator that makes it apparent on the face of the document that the testator intended, by signing, to give effect to the writing in the document as the testator's will," and must comply with the additional formalities required by section 15, 16, or 17 of the WSA or be validated by the court under section 37 of the WSA.[3]

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Justice Labrenz confirmed that purported wills one through five could be validated under section 37 of the

1 *Smith Estate (Re)*, 2025 ABKB 4.
2 *Wills and Succession Act*, SA 2010, c. W-12.2.
3 One of the applicants argued that the sixth and seventh purported wills met the requirement of being signed by the testator based on the presence of Mr. Smith's photocopied signature from his earlier execution of the fifth purported will. This argument was rejected by Justice Labrenz, who found that there was no apparent reason why Mr. Smith could not have re-signed these purported wills when he made the handwritten changes.

WSA, which permits the validation of a will that does not meet the requirements of sections 15 to 17 of the WSA "if the Court is satisfied on clear and convincing evidence that the writing sets out the testamentary intentions of the testator and was intended by the testator to be his or her will." However, purported wills six through nine could not be validated because they were not signed by Mr. Smith as required under section 14 of the WSA, which section 37 does not reference and therefore cannot cure. Justice Labrenz also concluded that those purported wills could not be rectified under section 39 of the WSA because section 39(2) states that the court's rectification power "applies to the omission of the testator's signature only if the Court is satisfied on clear and convincing evidence that the testator (a) intended to sign the document but omitted to do so by pure mistake or inadvertence, and (b) intended to give effect to the writing in the document as the testator's will." In this case, there was no evidence that Mr. Smith intended to sign any of the unsigned wills and that his failure to do so was inadvertent. As a result, the fifth purported will, as validated by the court, was held to be Mr. Smith's last will.

In reviewing the leading cases on the extent of the court's validation and rectification powers under the WSA,[4] Justice Labrenz reiterated that Alberta's legislative scheme differs from those of other provinces, noting that the dispensing power granted to the courts of British Columbia is "much broader."[5] Alberta's legislative approach represents "a middle position between jurisdictions like Manitoba, which permit a writing to be recognized as a will notwithstanding the lack of the deceased's signature, and jurisdictions like Prince Edward Island that require a signature in all cases."[6] While not discussed in the *Smith Estate* decision, it is noteworthy that a significant amendment to Ontario's *Succession Law Reform Act*[7] (SLRA) created a new validation power in 2022. Previously, the SLRA required strict compliance with the required formalities for wills (that is, the court could not validate a non-compliant will in any circumstances). Under new section 21.1 of the SLRA, the court can now validate as a will "a document or writing that was not properly executed or made under [the SLRA]" if it is satisfied that such document or writing "sets out the testamentary intentions of a deceased." It will be interesting to see whether these aspects of the WSA will similarly become more permissive in the future. Unless and until that happens, the interpretation of Alberta's existing legislation appears to be clearly settled.

4 See *Woods Estate (Re)*, 2014 ABQB 614; *Edmunds Estate*, 2017 ABQB 754, aff'd 2019 ABCA 34; and *McCarthy Estate (Re)*, 2021 ABCA 403.
5 *Smith Estate*, supra note 1, at paragraph 28.
6 Ibid., at paragraph 29, citing *Woods Estate*, supra note 4, at paragraph 22.
7 *Succession Law Reform Act*, RSO 1990, c. S.26.