Legal and Administrative Studies, www.jlas.upit.ro
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement – Year 2025, pp. 31-55

FOREGOING FRUMPY FORMALISM

Doug SURTEES
ORCID [ID]: https://orcid.org/0000-0002-0898-5487
E-mail: doug.surtees@usask.ca
Afiliation: College of Law, University of Saskatchewan, Canada

Abstract*: In Saskatchewan, Canada certain contracts must be signed and evidenced by writing. Similarly, wills must be signed and be in writing. Both areas of law have their own interpretive history. Two recent cases serve as examples of judges applying interpretations determining what constitutes a signature and what constitutes writing. One is a Court of Appeal contract law case holding that text messages provided the required writing, and an emoji provided the required signature. This case has been appealed to the Supreme Court of Canada. The other case is a wills law case involving a will created and transmitted on an iPad. The court used a broad approach in using its dispensing power to find the will valid even though it was not written or signed in a traditional sense. This trial decision case will not be appealed but will be impacted by incoming legislation which may require an opposite result. The author compares the cases and suggests the emoji contract case may provide future wills courts an alternative route to a similar result.*

Keywords*: Signature; signing; writing; wills; estates; contract law; interpretation; common law; substantial compliance; dispensing power; wills formalities.*

Introduction

This is a story of two cases from my home province of Saskatchewan, Canada. One is a lawsuit alleging a breach of contract. The other is an action for probate of a deceased person's Will. Normally contract law cases do not help inform probate cases for the simple reason that a Will is not a contract. However, this contract law case *may* help

develop our understanding of when the requirements for a valid Will have been met. These two cases have something in common; in order to decide the case being heard each court had to examine what writing is and what a signature is.

Foregoing frumpy formalism

The trial for the alleged breach of contract case was held in a small community called Swift Current, in the province's south. Large farms and ranches are big business in that region. The case is called 'Achter'. It was appealed to the Saskatchewan Court of Appeal1, which affirmed the trial judge's decision. The Supreme Court of Canada has granted leave to appeal the Court of Appeal decision (Supreme Court of Canada file number 41671). It is not known when the Supreme Court will issue a decision.

South West Terminal is a grain buying company. They set out to purchase grain from a farming corporation called Achter Land & Cattle, as they had previously done on several occasions over the previous nine years. On this occasion, South West Terminal's employee contacted the father and son who ran Achter and indicated that South West Terminal was willing to purchase 86 tonnes of flax, with a November delivery date, at a price of $17.00 per bushel, which equates to $669.26 per tonne. The South West Terminal grain buyer drew up the sales contract, signed it, and texted a photo of it to Chris Achter together with the message "Please confirm flax contract". Mr. Atcher texted back a 'thumbs up' emoji. By November, the price of flax had increased to $41.00 per bushel, which equates to $1,614.09 per tonne. Achter did not deliver any flax to South West Terminal.2

The court determined that the parties' words and actions must be examined in the context of their relationship, in order to determine if the

---

[1] *Achter Land & Cattle Ltd. v South West Terminal Ltd.*['Achter'], 2024 SKCA 115 (Sask. C. A.) affirming 2023 SKKB 116.

[2] *Achter KB, supra* n 1, Agreed Statement of Facts, 2023 SKKB 116 at paragraph 15.

elements of contract formation were present. In this case, the principals had a history of concluding grain contracts via text or email. In fact, South West's grain buyers stopped visiting farms in person once the Covid pandemic reached Saskatchewan in March 2020, preferring instead to complete contracts electronically. The previous four contracts between these parties were concluded by the same grain buyer signing the contract, texting a photo of it to Mr. Achter's cell phone asking him to confirm the terms of the contract. Mr. Achter confirmed three such contracts by texting back a very informal reply. He previously accepted three grain contracts by texting a reply which said "Looks good", another reply which said "Ok", or and yet another reply which said "Yup".[1] In this context the texting of the thumbs up emoji was found to be acceptance of the offer.

While this is interesting from a contract law point of view, it simply represents a standard application of the 'objective bystander' test in contract law, albeit applied in a modern context of text messages and emojis. Since Achter's words and actions would cause an objective bystander in the position of South West Terminal to reasonably conclude that Achter accepted South West Terminal's offer, Achter will be taken to have accepted the offer. Achter's purely subjective intention to accept is not relevant. This is simply an example of contract law applying the objective meaning of parties' words and actions.[2]

In addition to determining that the parties had reached a *consensus ad idem* the court also determined that the parties had agreed on the essential terms of the contract. Putting these formation issues to rest, the court turned to examine two other issues, which may have some

---

[1] *Ibid* at paragraph 19.

[2] The rule of law is that stated in Freeman v. Cook. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.
Smith v. Hughes (1871), L.R. 6 Q. B. 597.

resonance beyond contract law. Saskatchewan statute law provides that a contract for the sale of goods valued at $50 or more is not enforceable "unless some note or memorandum in writing of the contract is made and signed by the party to be charged…"[1] [emphasis added]. This aspect of the Saskatchewan legislation traces its history to *The Statute of Frauds*[2] passed in 1677, which became part of Saskatchewan law on July 15, 1870 when then current English statute law was automatically received in what became the Canadian provinces of Saskatchewan and Alberta (English Statutes Project, 1996).

The court treats the requirement of writing as a separate issue from the requirement of being signed. This means the court had two separate issues to consider in resolving the case. First, did the text messages fulfil the requirement that there be "some note or memorandum in writing of the contract"? Second, did the thumbs up emoji meet the requirement that the contract be "signed"?[3]

It is accepted law that the contract itself need not be in writing. If the contract is in writing, naturally this aspect of the requirement is met. However, the requirement is also met if the contract is evidenced by writing, such as where a written note or memorandum refers to the contract (Alberta Law Reform Institute, 1985, p. 31).

Like many other jurisdictions, Saskatchewan has legislation recognizing electronic documents. *The Electronic Information and Documents Act, 2000* ['c. E-7.22, SS 2002 *EIDA'*] section 8 recognizes the validity of electronic documents. It reads:

8 A requirement pursuant to any law that any information or document be in writing is satisfied if the information or document:

(a) is in an electronic form; and

(b) is accessible so as to be usable for subsequent reference.

---

[1] *The Sale of Goods Act*, c. S-1 RSS 1978, s. 6(1). The requirements are subject to some exceptions, not applicable in *Achter*.

[2] (1677) 29 Cha 2 c. 3.

[3] *Achter CA, supra* n 1 at paragraph 38.

The Court of Appeal reviewed case law which previously held that the writing requirement could be met through the exchange of text or email messages. The court agreed with the trial judge that the texts exchanged between the parties were writing in electronic form which remained accessible and therefore satisfied the 'note or memorandum in writing' aspect of *The Sale of Goods*/*The Statute of Frauds* requirement.[1]

It is important to emphasize that this aspect of the case is not directly applicable to Wills cases. The *EIDA* at subsection 4(1) expressly states that certain provisions including section 8 do not apply to Wills, trusts created by Wills, Health Care Directives, Powers of Attorney or other types of documents specifically excluded by regulation.

Having found the writing requirement to be satisfied, the court next turns to examine if the requirement that the writing be signed was met by Mr. Achter replying to the text which sent the contract, with a thumbs up emoji.

The *EIDA* states that "A requirement pursuant to any law for the signature of a person is satisfied by an electronic signature".[2]

The trial judge found that the text message including both the thumbs up emoji and the metadata accompanying the text, constituted an electronic signature. The metadata included Mr. Atcher's cell phone number and other information which identified Mr. Achter as the sender of the text. In other words, given the context in which the emoji and metadata were sent by text, they performed the functions associated with a signature.

The court adopted an explanation of the elements of an electronic signature in the *EIDA* from a case called *Embee*[3]. The court also clarified that the reference in *Embee* to email must be read as also including text messages.

The four elements of a signature under *EIDA* are:

---

[1] *Achter CA*, *supra* note 1 at paragraph 91.
[2] *EIDA*, *supra* n 11, ss. 14(1).
[3] *I.D.H. Diamonds NV v Embee Diamond Technologies Inc.*, 2017 SKQB 79, [2017] 9 WWR 172, aff'd 2017 SKCA 79.

(1) The presence of some type of "information" on the emails;

(2) Such information may be in electronic form;

(3) The information must have been "created or adopted [by the person] in order to sign a document"; and

(4) The information must be "attached to or associated with the document."[1]

In determining whether an electronic signature meets these *EIDA* requirements and therefore fulfills a statutory signature requirement, the court points out that it is necessary to examine the legislation which imposes the signature requirement. In this case the signature requirement is imposed by *The Sale of Goods Act*.[2]

The court explains that a modern approach to statutory interpretation "requires a court to focus on the 'text, context, and purpose' of the provision at issue".[3] The court points out that although a person writing their name, the so-called 'wet-ink signature', is the 'epitome'[4] of a signature, the court adds "In a digital world, I expect no serious dispute that it could include an image of the same".[5]

In determining what the verb 'to sign' means, the court turns to the *Oxford English Dictionary* and *Jowitt's Dictionary of English Law* for assistance.[6] The court says the *Oxford English Dictionary* indicates a person may 'sign' something by affixing a 'mark' to it, and *Jowitt's Dictionary of English Law* also says a person may 'sign' something by

---

[1] *Achter CA*, *supra* n 1 at paragraph 99.

[2] c. S-1, RSS 1978, at ss. 6(1) provides:

6(1) A contract for the sale of goods of the value of $50 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the contract or in part payment or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.

[3] *Achter CA*, *supra* n 1, paragraph 103.

[4] *Achter CA*, *supra* n 1, at paragraph 104, citing Stephen Mason. *The Signature in Law: From the Thirteenth Century to the Facsimile* (University of London Press, 2022), 4.

[5] *Achter CA*, *supra* n 1, at paragraph 104.

[6] *Achter CA*, *supra* n 1, at paragraph 105.

affixing a mark to it, and adds "any mark is sufficient if it shows an intention to be bound by the document".[1]

The court cites with approval Justice Layh in *Embee* where he held as a matter of interpretation a document may be signed not only by a wet ink signature but also by affixing any of a wide variety of marks to it. Examples of marks provided by Justice Layh include crosses, initials, pseudonyms, printed names, rubber stamps and in the case of at least one Will, a thumbprint.[2]

A person may sign a document, at least as required by *The Sale of Goods Act* by attaching their "name or other mark of agreement made for that purpose and in a way that identifies its maker and signifies an intention to contract for the sale of goods".[3] The court cited with approval the statement by Chief Justice Popescul of the Court of King's Bench in a case called *Wright*, that the fundamental purpose of a signature, whether electronic or otherwise, is that the "signature links the person to the document and is evidence of the person's *intention to be bound* by the document"[4] [emphasis in Court of Appeal quotation, not in original]. Interestingly, *Wright* was a criminal law case. The *EIDA* applied to the document in question. In deciding that Certificates of Analysis which were digitally signed were therefore signed and admissible as evidence of blood alcohol levels, the Court of King's Bench quoted with approval the trial judge's holding that "even absent specific legislation allowing for acceptance of electronic signatures, courts have considered an electronic signature as a valid signature simply under longstanding principles of common law… I find, therefore, that the provisions of the *EIDA* are helpful in this application, but they do not replace a broader analysis that has always been part of the common law. In my view, the real intent of the *EIDA* is to ensure that electronic forms

---

[1] *Achter CA*, *supra* n 1, at paragraph 105

[2] *Supra*, note 1, at paragraph 107.

[3] *Achter CA*, *supra* n 1, *supra* n 1, at paragraph 110.

[4] *Achter CA*, *supra* n 1, at paragraph 109 quoting from *R. v. Wright*, 2023 SKKB 236 at paragraph 172.

of signatures may be sufficient to meet the measure of what might be a written and signed document." [emphasis in original][1]

The King's Bench related a thoughtful analogy included by the trial judge in *Wright*. In 1999, Minister of Justice and Attorney General of Canada, Anne McLellan, appeared before the Standing Committee on Industry which was then considering federal legislation which would have an effect similar to *EIDA*. She read an excerpt from the *Public Documents Act* to the committee: "No public writ, deed or other document, is required to be on parchment, but when written on paper, is as valid in all respects as if written on parchment".[2] As Minister McLellan said: "We've gone from parchment to paper and now we're going to the electronic medium".[3] The common law is not be frozen in time. Sometimes judges must be creative when interpreting outdated statutes and legal rules. Their job is to undertake a purposive approach to legislation. When the context in which rules are applied has changed because of technology, an overly formalistic or literalist approach risks frustrating the true legislative purpose.

It warrants mentioning that the Court of Appeal decision in *Achter* was not unanimous. Barrington-Foote J.A. dissented. He accepted that one *could* sign a writing electronically. He said "Typing rather than writing your name, writing only your first or last name, or placing another mark that you use to represent yourself on the note or memorandum can constitute signing it…provided they were written on or inserted in the document in order to sign it…"[4]. He points out that cursive signatures "are often a stylized and unrecognizable scrawl that can better be called a mark than an attempt to write the words that constitute your name ... Further, the case law has never limited the word

---

[1] *R. v. Wright ['Wright']*, 2023 SKKB 236 at paragraph 162.
[2] R.S.C., 1985, c. P-28 at s. 2.
[3] *Wright, supra* n 25.
[4] *Achter CA, supra n 1*, at paragraph 206.

"signature" only to a handwritten first and last name or an "X". That is a matter of settled law."[1]

However, Barrington-Foote J.A. disagreed with the majority by holding that in the circumstances present, Mr. Achter did not sign the document by texting a thumbs up emoji.[2] He held, "There is no doubt that a text message that, whether alone or together with other text messages, constitutes a s. 6(1) note or memorandum, and that contains a mark or symbol that signifies assent, *could* meet the signature requirement. Further, I agree that in order to constitute a signature, it is *necessary* that the text message identify the party to be charged and signify an intention to be bound by the terms of the contract that is the subject of that note or memorandum. However, it is not *sufficient* to meet these two requirements."[3]

In other words, the dissent believed the text message could be signed, but the texting of an emoji was insufficient to do so. He said:

*"*The law has evolved to adapt to electronic means of communication, including emails and text messages. It was entirely possible to do so while respecting the spirit of the legislation. However, it is not necessary or appropriate to interpret s. 6(1) of The Sale of Goods Act in a manner that would mean any text message expressing assent to a note or memorandum - whether in words or by the insertion of a symbol that means "yes" - constitutes a signature. In my opinion, that is the effect of the majority's reasons. The concept of a signature did not fall by the wayside when emails, text messages and similar forms of electronic communication or messaging came to dominate.

Put differently, the signature requirement did not become obsolete due to the widespread use of emails and texts to make agreements. I take judicial notice of the fact that from a technical perspective, there are various ways to "sign" emails and text messages, and documents forming part of or are appended to such communications. The sender can, for

---

[1] *Achter CA, supra* n 1, at paragraph 206.
[2] *Achter CA, supra* n 1, paragraph 157.
[3] *Achter CA, supra* n 1, paragraph 191.

example, type their name in the text in a location and in circumstances that support the conclusion that it is a signature. They may use an app that enables them to insert a version of their cursive signature or can sign a physical copy of the document and append it to the digital medium in the form of a PDF or digital image. It is arguable that a "signature block" that is automatically inserted in the email or text message could be found to meet the signature requirement. A party in the position of SWT can provide for the other party to sign a contract by typing their name or initials, or by clicking on a specified location in the document."[1]

With respect I would suggest that such an approach introduces an unnecessary and unhelpful distinction between old fashioned technology like email and more current technology like texting. A contract formed by email looks and acts much more like a paper based transaction than a contract formed by texting. The test suggested by the dissent is essentially grafting paper based norms onto electronic transactions. As new ways of electronic communication become mainstream, such an approach is more and more likely to result in almost never finding a signature. The true test should not be whether the electronic document was signed in the way a paper based transaction might suggest. Rather it should ask whether the technology provides clear and compelling evidence which links the individual 'signing' to the document and establishes that person's intention to be bound by the document. After all, that is what the purpose of a signature requirement is.

At the moment the decision of the majority is the law in Saskatchewan. The Supreme Court will determine whether the law remains as stated by the majority or changes in some way.

At this point I would like to switch from a contract signed by an emoji to a Will written on an iPad. Wills in the past have been found on a variety of media including a tractor fender (Ellwand, 2014, pp. 1-26),[2] an eggshell,[3] and a napkin.[1] However in each of those cases the testator still

---

[1] *Achter CA, supra* n 1 at paragraph 212-213.
[2] *Re Harris Estate* (13 July 1948), Kerrobert, SK 1902 (Surr. Ct.).
[3] *Hodson v. Barnes* 43 T.L.R. 71.

wrote the words of the Will in the traditional sense. It was the medium not the writing which was unexpected.

The governing legislation for Wills in Saskatchewan is *The Wills Act, 1996*[2]. In order to have the Court of Probate accept a document as a person's Will, the one putting the Will forward must establish that the document complies with the relevant statute, for example that the formalities for executing a Will contained in the legislation have been complied with. In addition to the statutory requirements, there are a number of common law requirements which also must be complied with.

As an example, capacity has two aspects: age and mental capacity. Saskatchewan legislation requires a testator to be at least 18 years of age,[3] unless the testator is living in a spousal relationship.[4] The test for mental capacity is a common law test. The modern expression of that test began with *Banks v. Goodfellow*.[5] The *Banks* test requires that the testator understand the nature of a Will, the nature and extent of their estate, the 'moral' claims of others and be free from delusions which would affect the Will.

Anything put forward as a Will must be testamentary in nature. The testator must have formed a 'fixed and final intention' with respect to property disposed of by the Will. Testators may change their mind in the future, but at the time of executing their Will, they must have determined how they wish to distribute their property.[6] This too is a common law requirement.

There are of course other important common law requirements. The testator must know and approve of the contents of the Will. Probate may be denied if evidence of undue influence or coercion is established (Oosterhoff et al., 2021, pp. 205-261). These additional common law

---

[1] *Gust v Langan*, 2020 SKQB 42.
[2] *The Wills Act, 1996 ['Wills Act']*, c. W-14.1, SS, 1996.
[3] Ibid., s. 4.
[4] Ibid., s. 5.
[5] *Banks v. Goodfellow*, [1861-73] All ER Rep 47.
[6] *Bennett v Manitoba (Official Guardian)* (*Re Gray Estate*), [1958] SCR 392.

concepts are important in many circumstances, but are not central to the iPad Will case.

The Wills Act provides a few ways to validly execute a Will in Saskatchewan. The most common type of execution is formal execution. This occurs where a Will, which must be in writing,[1] is signed by the testator and two witnesses, in each others' presence. Testators may direct someone in their presence to sign on their behalf. This may occur for example if the testator is unable to sign the document.

Saskatchewan law also recognized International Wills. International Wills are based upon the "Convention Providing a Uniform Law on the Form of an International Will" (also known as the "Convention on International Wills" or the "Washington Convention").2 The legislation provides the format to create an International Will.[3] The purpose of the Convention is to provide a set of formalities which signatory countries will accept as creating a valid Will. Basically, in addition to the testator and two witnesses, an 'authorized person' must be present at the Will's execution. All lawyers in Saskatchewan are authorized persons under the legislation. Following the Will's execution, the lawyer must register the testator's name and description, address and date of the Will. No other form of Will needs to be registered in Saskatchewan. The international form of Will provides some certainty to individuals who want to ensure their Will is recognized by other signatory countries.

The Wills Act contains a somewhat anachronistic provision sometimes referred to as 'privileged Wills'. This vestige of the UK legislation allows sailors on a voyage, and members of the armed forces

---

[1] *Wills Act, supra* n 36, s. 6 which authorizes privileged Wills begins A member of the armed forces in actual service or a sailor in the course of a voyage, may make a will in writing…"; s. 7 authorizing formal Wills begins "Unless provided otherwise in this Act, a will is not valid unless: (a) it is in writing and signed…"; s. 8 which authorizes holograph Wills begins "A holograph will, wholly in the handwriting of the testator…".

[2] https://www.unidroit.org/instruments/international-will/.

[3] *Wills Act, supra n 36,* s. 41-51 and accompanying schedule.

in actual service to create a Will, regardless of their age, by simply signing the writing or directing someone to sign it in their presence.[1]

This brings us to the holograph Will. "A holograph will, wholly in the handwriting of the testator and signed by him or her, may be made without any further formality or any requirement as to the presence of or attestation or signature by a witness."[2]

Wills legislation must try to reconcile various goals (Alberta Law Reform Institute, 2000, p. 6.).[3] One goal is to give effect to the known intentions of the decedent. Another is to take steps to ensure that the document presented for probate is actually the Will of the testator, and that it accurately expresses the intention of a testator who had capacity at the time the Will was created. Rigid formalities can assist in providing evidence that the Will is true and proper. They can help provide safeguards against fraud. However, they can also work against the goal of giving effect to the known intentions of a testator who had capacity to create the Will.

Permitting holograph Wills as an alternative to formally executed Wills overtly provides individuals with a method to create a Will while complying with fewer formalities. The only formalities required for a holograph Will are that the Will be entirely in the testator's handwriting

---

[1] *Wills Act, supra* n 36, s. 6.

[2] *Wills Act, supra* n 36, s. 8.

[3] The Alberta Law Reform Institute stated its conclusions as follows:

Conclusion No. 1 The policy of the law is to allow persons to give directions by will as to how their property is to be disposed of on death.

Conclusion No. 2 The primary purposes of the will formalities prescribed by the Wills Act are

(a) to ensure that documents that are authentic and intended to express the testamentary intention of testators are admitted to probate, and

(b) to ensure that documents that are not authentic or are not intended to express the testamentary intentions of testators are not admitted to probate.

https://www.alri.ualberta.ca/2000/06/wills-non-compliance-with-formalities-final-report-84/.

and that it be signed by the testator.[1] I would argue that permitting holograph Wills also covertly allows judges to admit documents to probate in appropriate circumstances, even where the document is a letter written by the decedent.2 In some jurisdictions, but not in Saskatchewan, judges also found a way to admit documents which clearly were not entirely in the testator's handwriting. In the days of 'fill in the blank' Wills, where a person would buy a blank form Will and simply add in gifts and the names of beneficiaries, courts would admit the words the testator wrote, provided a dispositive intention could be discerned from those words alone. Unfortunately for many disappointed beneficiaries, the dispositive words were typically part of the pre-printed form.[3]

Fortunately, modern Canadian Wills legislation contains a provision permitting judges to overtly admit a document to probate, even though the formalities contained in the legislation have not been strictly complied with. The judge must be satisfied that the document embodies the testamentary intentions of the testator.[4] The court has no authority to admit a document which does not comply with other common law requirements such as having testamentary capacity or knowing and approving of the contents of the Will or that the Will must represent the testator's fixed and final intention. The dispensing power given to the court by legislation only applies to the legislated formalities.

---

[1] *Wills Act, supra* n 36, s. 8.

[2] *Re Henderson (Seekey),* [1982] NWTJ No 46, [1982] 2 WWR 262.

[3] *Re Forest* (1981), 121 DLR (3d) 552 (Sask. C.A.).

[4] *Wills Act, supra* n 36, s. 37 says:

37 The court may, notwithstanding that a document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing be fully effective as though it had been properly executed as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, where a court, on application is satisfied that the document or writing embodies:

(a) the testamentary intentions of a deceased; or

(b) the intention of a 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.

There has been some judicial disagreement over how much compliance with the formalities there must be before a judge can admit it to probate (Compare Re Mate Estate, 1999, S.J. No. 341 with Oh v Robinson, 2011, SJ No 325). Perhaps this relates to the marginal name of the section being 'substantial compliance' rather than 'dispensing power'. In Canadian law, a marginal name (called a "section heading") is not part of the legislation, and is included for convenience only.[1]

As the emoji case taught us, a requirement of writing and a requirement for a signature are separate. Under *EIDA* an electronic document can satisfy a requirement that a document be in writing if the document exists in an electronic form, and is accessible. Similarly, a requirement for a signature can be satisfied where a name or symbol is affixed to a document in circumstances which show the 'signer' intended to be bound by the document. The mark or name which was attached for this purpose links the person to the document.

EIDA expressly states that it does not apply to Wills.[2] This means that insofar as the emoji case is read only as a statutory interpretation case, it does not have any applicability to the iPad Will case. However, insofar as the emoji case is an application of the common law with respect to writing and signatures, its reasoning is available to be applied by judges determining whether or not to utilize the legislated dispensing power in Wills cases. In other words, the *EIDA* says it does not apply to Wills. It does not say that Wills *cannot* be signed electronically, just that *EIDA* is not authority for recognizing an electronic signature on a Will.

The common law never stops evolving.[3] Even where legislation has been passed so that certain issues are not litigated, the common law can

---

[1] *The Legislation Act* ['Legislation Act], c.L-10.2 SS 2019, s. 2-1

[2] *EIDA*, *supra* n 11, s. 4(1).

[3] "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins*, *supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the

still develop to address matters covered by the legislation. In other words, although the *EIDA* itself clearly does not apply to Wills, *common law* concepts of what counts as writing and what counts as a signature can and do apply to Wills.

Changes in society often require enduring common law principles to be applied in a new context. And they *must* be applied because the common law is not frozen in time. We live in an electronic information age today. We should not be, and are not, rigidly bound by conceptions developed in a different era. The common law has previously recognized changes in what counts as a signature. At one time, Christians in England would sign a document by affixing a cross or their seal to the document. As times changed, the common law changed to recognize other marks and the writing of one's name as a signature (Mason, 2022, pp. 14-17). Times have changed again. *The Wills Act* provides that certain formalities must be observed, unless they are dispensed with by a court. These formalities include the Will being in writing (or 'handwriting' in the case of holograph Wills) and being signed. The common law must determine what counts as being signed, and what counts as writing. The definition of what counts as writing is subject to a legislative definition:

"writing" or a similar term includes words represented or reproduced by any mode of representing or reproducing words in visible form; («écrit »)[1]

There are two things to note about the legislative definition of writing. The first is that it is inclusive not exclusive. It says that writing includes the representation of words in visible form. It does not say that it excludes other representations which require assistance to be visible. The second thing to note is that it does not say the representations must

---

law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

R. v. Salituro, [1991] 3 S.C.R. 654 paragraph 37.

[1] *Legislation Act*, supra n 11, c. L-10.2, SS 2019, s. 2-29 "writing".

be in visible form at all times. Emails and electronic messages may require a machine language which is not visible to people, but once the text or email message is created it can be saved and sent and printed, and arguably exists in visible form. The same applies to any communication created on a computer. It would be an excess of formalism to maintain that when a book is closed tight, the symbols on the pages inside are not in visible form. They still exist although they may not be seen at the moment. A message sent on an iPad likewise also exists, although it cannot be read until the message is opened.

The requirement that a Will be signed may be met by the typing of one's name. As with the emoji case this should not be understood as saying the typing of one's name is always a signature. It is simply an assertion that the typing of one's name, like the affixing of a symbol could in the right circumstances be considered a signature.

The critical question then becomes 'what are the right circumstances to make such a finding?' The right circumstances are those where evidence has satisfied the court that the *functions* the requirements of writing and of a signature were intended to serve, have been served.

A signature serves several functions in the context of a Will. The primary function is evidential. Stephen Mason divides this function into a series of primary and secondary evidential functions.[1] As Chief Justice Popescul said in *Wright*, the "signature links the person to the document and is evidence of the person's *intention to be bound* by the document".[2] While each of the evidentiary functions is important, evidence other than that of a wet signature can also be presented to adequately meet these functions.

Mason also lists a cautionary function and a protective function. He says requiring a signature brings the importance of the document to the signer's mind.[3] The one receiving the document can rely on the signature as proof of the signer's identity and that the signer intends to be bound by

---

[1] *Mason, supra* n 56, pages 8-10.
[2] *Wright, supra* note 24, paragraph 172.
[3] *Mason, supra* n 56, page 9-10.

the document. I am not convinced that in this modern age, a signature necessarily serves these functions. In the context of a Will however, the requirements that the testator have a fixed and final intention to adopt the words of the Will as their own, would seem to adequately serve the same function.

Mason also lists a channelling function and a record keeping function.[1] The idea here is that adding a signature clarifies the moment the document becomes effective, focuses the mind on the binding nature of the document and provides a record of what occurred. Again, in the context of a Will, I would challenge how a signature serves these functions. The signature does not provide a record. The document does that. No Will takes effect until the testator's death, and any Will can be changed at any time prior to death provided the testator retains capacity. Therefore, the precise moment of the Will's creation is typically not the critical issue. The critical issues are whether the testator had capacity at the time of giving instructions, and whether the Will was effective at the date of death. In any event, other evidence can serve these important functions. I suggest that unless expressly forbidden by statute, it is open for judges to accept an electronic signature on a Will as effective. As Chief Justice Popescul said in *Wright*, 'even absent specific legislation allowing for acceptance of electronic signatures, courts have considered an electronic signature as a valid signature simply under longstanding principles of common law…'.[2] [emphasis in Court of Appeal quote, not in original].

The function a requirement of writing serves is also presumably evidentiary. Oral Wills, also known as nuncupative testaments, are generally not recognized. It does not have to be this way. In relatively recent times oral Wills had been recognized for sailors, fishermen and military personnel in some circumstances (Alberta Law Reform Institute,

---

[1] *Mason, supra* n 56, pages 9-10.

[2] *Wright, supra* note 24, Wright at paragraph 171.

2007, pp. 41-42).[1] In addition, although not an oral Will, the law does recognize a *donatio mortis causa*[2], which is a deathbed gift. In fact, it is a gift made in contemplation of death and dependant upon death for its effectiveness. Since it is a type of gift and not a type of Will, delivery or its equivalent, but not writing, is required. Oral Wills have been recognized at different times in history, but as a matter of policy are generally ineffective today.

Given that Wills disputes arise only at a time when the person whose property is being divided is not able to provide evidence, the law has made a policy choice to require a written record before the decedent's expressed wishes will be given effect. Because this will result in some decedent's wishes not being given effect, the law in most if not all jurisdictions imposes a plan for the distribution of intestate decedent's property. This intestate distribution scheme presumably respects common wishes, or at least embodies the state's view of what common wishes in that particular society ought to be.

Importantly, the functions that writing serves can be served equally well with electronic writing. It is true that in order to do so, additional evidence, beyond the Will itself may be required. However, extrinsic evidence is often available. If a judge has reasonable suspicions that the electronic writing is fraudulent or otherwise does not represent the actual intentions of the testator, the judge can and should require the propounder of the Will to adduce evidence to overcome those suspicious circumstances before accepting the electronic document. However, I submit that it is open for a judge in appropriate circumstances to conclude that writing in electronic form clearly comes within the common law definition of writing, unless it has been clearly and definitively excluded by statute.

---

[1] The Alberta Law Reform Institute indicated that Newfoundland and Labrador Nova Scotia, England, Australia and New Zealand allowed oral Wills in the privileged Will situation as well as for fishers at sea in the case of Newfoundland and Labrador.

[2] See generally: *Rahman v. Hassan et al.,* [2024] EWHC 1290 (Ch).

The issue before the court in the iPad Will case[1] was whether an electronic message can be recognized as a Will. I have already stated my conclusion that this could be done through a common law determination that the message is in writing and the typed name is a signature. In the iPad Will case, the judge used the court's dispensing power to arrive at this conclusion. While this seems to be an appropriate use of the dispensing power, this route may not always be available to a judge. Some jurisdictions may have restricted their dispensing power in ways which prevent its use in the circumstances before the judge. Indeed, if and when *The Wills Amendment Act, 2022* comes into force in Saskatchewan, the legislation will expressly state that a holograph Will "may not be an electronic will". [2]

Let us examine the facts of the iPad Will case. A woman named Kim was in the hospital in very precarious condition. She was weak, and had trouble breathing. Evidence established that "Kim was unable to speak because of her difficulty breathing and unable to write with a pen because she had no strength to hold a pen".[3] She could however hold the stylus to her iPad. She communicated with others by touching the stylus to the iPad thereby typing letters.

Kim, Brenda Kuffner, Wayne Kuffner and Carol Haines were siblings. Their mother was alive at the time of Kim's death, but both her and Carol passed away approximately a year later. Ryan Haines and Rheanne Haines were Carol's children.

On May 19, 2023 Kim sent a message to Brenda and Wayne. Part of that message said "This may be goodbye. I love you." which clearly indicated that Kim knew she may soon pass away. Later that day she sent Brenda and Wayne the following message:

My holographic will Rheanne Haines to be executor.

[1] *Haines v. Kuffner Estate ['Haines']*, 2024 SKKB 51.
[2] Bill 110 of 2022, *The Wills Amendment Act, 2022* s. 6 modifying s. 8 of the existing legislation.
[3] *Haines, supra* n 65, paragraph 5.

House and contents to Ryan Haines.
Balance of investments to be split 60% to Ryan Haines and 40% to Rheanne Haines. Rheanne to be pet guardian.

May 19, 2023. Kim Kuffner

Brenda and Wayne immediately went to the hospital to see Kim, but by the time they arrived Kim had lost consciousness. She passed away two days later. Kim had never married and had no children. Since her mother was alive at the time of Kim's death, she would inherit Kim's estate if Kim died without a Will.[1] Other than the message above, no document which could be a Will was found.

Rheanne and Ryan Haines were Kim's niece and nephew. They were near in age to Kim and had close a relationship. Rheanne had rented a room in Kim's house while attending university, and Ryan rented a basement apartment in Kim's house.

Rheanne, as executor brought a court application for an order declaring the message sent by Kim's iPad to be her Will. The judge now has to determine if this message typed on an iPad, and sent electronically can constitute Kim's Will. It clearly does not meet any set of formalities for executing a Will. There are no witnesses, it may not be signed and it may not be in writing. The application was granted.[2]

In order to declare the iPad Will valid, the judge must find that all the essential requirements of a Will, other than the formalities, have been met. The dispensing power only permits a court admit a document to probate, where the *formalities* required by the legislation have not been strictly complied with. Other requirements including that the document embodies the testator's testamentary intentions, and that the testator had capacity at the required time, cannot be dispensed with.

---

[1] *The Intestate Succession Act, 2019* c. I-13.2 SS, 2019 s. 8.

[2] The application was brought under *The Wills Act*, 1996, s. 37. *Haines, supra n 65*, paragraph 2,4.

The formalities are contained at s. 7 for a formal Will and s. 8 for a holograph Will. The court reproduces both sections,[1] but does not expressly specify which section the iPad Will is being considered under. Nor does it specify exactly which formalities were not complied with.

The court found that Kim had capacity and that she intended the message to be her Will.[2] It found the message was testamentary in nature and that it represented Kim's final wishes. In making this determination the court says "Although she could no longer write, and thus the formal requirements of the *Act* respecting a holographic Will were not met, I conclude that the message is testamentary in nature and that it represents Kim's deliberate and final intentions as to the disposition of her estate."[3] This implies that section 37 is being applied to the holograph Will provisions. However, if it is, it is unfortunate that the court did not tell us how it determined that the Will was in 'handwriting'. Is the court expanding the common law understanding of handwriting because the testator was unable to write in any other way but to select letters with the iPad stylus? This is not unreasonable. The meaning of 'handwriting' is not entirely clear."[4]

Alternatively, the court may be dispensing with the formality of handwriting as well as with the formality of a signature. If so, I would applaud the decision as a bold application of the dispensing power to

---

[1] *Haines, supra* n 65, paragraph18.
[2] *Haines, supra* n *65,* paragraphs 31-33.
[3] *Haines, supra* n *65,* paragraph 34.
[4] Almost 40 years ago in 1986 the Uniform Law Conference of Canada recommended holograph Wills sections use the more inclusive term 'own writing' which was defined as including "handwriting, footwriting, mouthwriting or writing of a similar kind." Saskatchewan amended its legislation in 1989, but unfortunately reverted to the undefined word 'handwriting' in *The Wills Act, 1996* s. 8 and ss. 11(3).
See: *Creation of Wills, supra* n 63., 80, 81.
Currently only Nunavut uses the more inclusive term.
"In this section, "own writing" means handwriting, footwriting, mouthwriting or writing of a similar kind."
The Wills Act, RSNWT, 1988, c. W-5, s. 5.1(1).

bring about a just decision – but a more in-depth explanation of the decision in the judgement would have been more helpful for future cases. Given that the legislation is being amended to specify that a holographic Will cannot be an electronic Will, the need for an explanation increases. The amending legislation has been passed and has received Royal Assent but is not yet in force.[1] Will section 37 remain available to judges to accept an unsigned 'handwritten' Will after the amendments come into force?

In this case, it is most likely that the court was using its dispensing power to validate the Will as a holograph Will by dispensing with the signature and the handwriting formalities. However, it may also be that the court is expanding the common law understanding of handwriting by including words tapped out with the iPad stylus, and is also expanding the common law understanding of a signature by including Kim tapping out her name on her iPad as her signature.

A signature is required under both section 7 and 8. The court refers to a 2008 case which held an electronic signature did not constitute an effective execution of a testamentary document.[2] The court says that section 37 should be broadly interpreted to validate a Will, even if there is *no compliance* with the formalities. Of course, both holograph and formal Wills require a signature. If it is appropriate to use section 37 to save an unsigned holograph Will, it would presumably also be appropriate to use section 37 to save an unsigned formal Will. The court could (and perhaps did) do this by using the dispensing power to also dispense with the requirement of witnesses. This would be an effective use of the dispensing power to recognize the Will as a formal Will under section 7. This is a critical distinction, because the upcoming limitation

---

[1] Bill 110 is now SS 2023, Chapter 45, *The Wills Amendment Act*, 2023/Loi modificative de 2023 sur les testaments (https://publications.saskatchewan.ca/#/products/121379) . It will come into force on a date determined by an Order in Council. No such Order in Council has been passed as of April 10, 2025.

[2] *Buckmeyer Estate (Re),* 2008 SKQB 260 quoted at *Haines, supra* n 65, paragraph 22.

on Wills in electronic form only applies to holograph Wills created under section 8.[1]

Kim faced dire circumstances. Communication through an electronic device, in her case, her iPad, was the only method of communication available to her. [2] It appears that in the clear absence of suspicious circumstances, both the dispensing power and common law developments are possible avenues for future judges to give effect to a testator's wishes when the best the testator can do is imperfectly express those wishes. Thank goodness for creative, caring and compassionate judges who are willing to forego frumpy formalism.

References

Achter Land & Cattle Ltd. v South West Terminal Ltd.['Achter'] (2024). SKCA 115 (Sask. C. A.) affirming 2023 SKKB 116.

Banks v. Goodfellow, [1861-73] All ER Rep 47.

Bennett v Manitoba (Official Guardian) (Re Gray Estate), [1958] SCR 392.

Bill 110 of 2022, The Wills Amendment Act, 2022.

Buckmeyer Estate (Re), 2008 SKQB 260 quoted at Haines.

Gust v Langan, 2020 SKQB 42.

Haines v. Kuffner Estate ['Haines'], 2024 SKKB 51.

---

[1] Although the judge in the iPad Will case presumably based her decision on the s. 8 formalities associated with a holograph Will, my point is that she waived those formalities to reach a just and proper decision on the facts before her. The same rationale applies to waiving the s. 7 formal Will formalities, although the requirement of witnesses would also have to be waived. If a court is satisfied that the typed document should be valid as a holograph Will (which does not require witnesses) then logically it should be satisfied that it should be valid as a formal Will because the effect is identical. In order to make the document valid as a formal Will, the formality of witnesses would have to be waived. This would allow a court to save a Will, even if future legislation prevents a holograph Will from being an electronic Will.

[2] *Haines, supra* n 65, paragraphs 5, 36.

Hodson v. Barnes 43 T.L.R. 71.
https://publications.saskatchewan.ca/#/products/121379
https://www.unidroit.org/instruments/international-will
I.D.H. Diamonds NV v Embee Diamond Technologies Inc., 2017 SKQB 79, [2017] 9 WWR 172, aff'd 2017 SKCA 79.
Legislation Act, supra n 11, c. L-10.2, SS 2019, s. 2-29.
Rahman v. Hassan et al., [2024] EWHC 1290 (Ch).
Re Henderson (Seekey), [1982] NWTJ No 46, [1982] 2 WWR 262.
Re Forest (1981), 121 DLR (3d) 552 (Sask. C.A.).
R. v. Wright ['Wright'], 2023 SKKB 236.
R.S.C., 1985, c. P-28 at s. 2.
Re Harris Estate (13 July 1948), Kerrobert, SK 1902 (Surr. Ct.).
R. v. Salituro, [1991] 3 S.C.R. 654
Smith v. Hughes (1871), L.R. 6 Q. B. 597.
The Alberta Law Reform Institute, https://www.alri.ualberta.ca/2000/06/wills-non-compliance-with-formalities-final-report-84/
The Intestate Succession Act, 2019 c. I-13.2 SS, 2019 s. 8.
The Legislation Act ['Legislation Act], c.L-10.2 SS 2019, s. 2-1
The Sale of Goods Act, c. S-1 RSS 1978, s. 6(1).
The Signature in Law: From the Thirteenth Century to the Facsimile. (2022). University of London Press, 4.
The Wills Act, 1996 ['Wills Act'], c. W-14.1, SS, 1996.
The Wills Act, RSNWT, 1988, c. W-5, s. 5.1(1).