

## Hand-written wills come with pitfalls

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GLOBE AND MAIL UPDATE  
JUNE 9, 2007 AT 6:00 AM EDT

It's no secret that, for your will to be valid, you have to be of sound mind when creating it. I remember reading about a resident of North Wales who stated in his will: "I abdicate the title 'King Charles I of Wales' which I claimed in 1977." And then there was the woman who wrote "I give to my grandchildren the sum of \$20 each for the purchase of thermal underwear." My suggestion? When you create your will, at least make it sound as though you're of sound mind.

But there's more to creating a valid will than having all your marbles. It's important to ensure your will is properly drafted and executed. The story of Frank Atherton will help explain.

### The story

Mr. Atherton died on Nov. 9, 2004. He had two sons, James and Alan, and 11 grandchildren. Mr. Atherton's last will, dated Nov. 20, 2003, divided his estate into three parts, with two parts being left to his son James, and one part to his grandchildren, split equally among them.

Just prior to his death, there was evidence that Mr. Atherton believed he had made a mistake by leaving nothing to his son Alan. So, he had handwritten two documents dated Nov. 6, 2004, while he was in the hospital. Those documents requested, among other things, that his son Alan receive Mr. Atherton's home, in trust, upon his death.

Mr. Atherton then asked one of his grandchildren, Caroline, to type up the documents. He also asked a family friend to attend the signing of these typed documents as a witness, once the documents were finished being typed.

Caroline returned to the hospital on Nov. 7, 2004, with the documents typed up. When she entered her grandfather's room she was surprised to see James and his wife there. She approached her grandfather to give him a kiss at which point he said to her "Everything is fine."

During the course of her visit, there was no mention of nor request for the typed papers. As it turns out, Mr. Atherton passed away two days later, before signing the typed documents that Caroline had prepared.

The real question is this: Were the two documents handwritten by Mr. Atherton considered to be valid testamentary documents – that is, do they constitute a valid will?

### The moral

I should mention that handwritten wills are not valid in all provinces. In those provinces where they can be valid, the handwritten will – also called a "holograph will" – must be entirely in your handwriting, and not partly typed and partly handwritten. Witnesses aren't required when a holograph will is prepared.

It's also important to know that not every note handwritten prior to death suddenly becomes a will. It's necessary that the deceased intended for the document to be a testamentary document. If the

deceased believed that a document required witnesses in order to be effective, the court will not find the holograph will to be a valid will.

In Mr. Atherton's case, it was clear that he intended for the documents to be typed, and for witnesses to be present for his signing of the will – which never happened. As a result, the Ontario Superior Court concluded that the two typed documents were not valid testamentary documents.

There can be many problems with holograph wills: It may not be clear whether you were under duress in writing the will, your intentions could be confusing, tax planning will generally be ignored, your writing might be illegible, or it could be altered by someone. Paying a lawyer to prepare your will is the best few bucks you can spend.

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