Wills & Estates
Winter Term 2014

Lecture Notes – No. 10

Particular Expressions

(i) Plain and Ordinary Meaning of Words

Perrin v Morgan [1943] 1 AC 399:
See Lecture Notes No. 9.

(ii) Words Defined by the Testator

Re Helliwell
[1916] 2 Ch 580; cb, 479

At one time, the interpretation of words of kinship ('nephews') excluded illegitimate relations; in this case, the words of the testator were given an extended meaning, to include such relatives.

Per Sargant J:

> The testator died on July 28, 1906, and his widow died on April 18, 1915, so that the capital of the estate now becomes distributable. **The question now is whether there are included amongst the class to take not only the two persons expressly included, namely, the illegitimate son of the testator's legitimate brother and the illegitimate son of the testator's natural sister Mary, but also the legitimate descendants of the testator's natural sister Sarah**.
>
> Now, on looking carefully at the special words of inclusion here, it is, I think, fairly clear that the testator is intending in the case of John Rushworth Feather, as in the case of William Henry Hey, to cure the disqualification due to an individual illegitimacy, and is not directing his mind to any disqualification due to the illegitimacy, in the former case, of the legatee's parent. The illegitimacy of Mary, as well as that of Sarah, was an old story which had been kept in the background during the whole of the testator's life, though he was no doubt aware of it. And it seems to me that he deliberately ignores it in this clause of his will, and speaks of Mary Wright as his sister in as full a sense as that in which he speaks of John Helliwell as his brother. Further, by directing that the two named persons, John Rushworth Feather and William Henry Hey, shall take with his other nephews and nieces, he impliedly recognizes them as included in his view as members of the class of nephews and nieces. Accordingly he is obviously using both the word "sister" in relation to the parent of a nephew, and the word "nephew" itself, in a sense going beyond the strict legal meaning of the word, and as including in the case of the word "sister" a natural sister, and in the case of the word "nephew" a son of a natural sister. Were the question here whether

The use of the term sister indicates that, notwithstanding her birth outside marriage, her children are treated as blood kin and referred to us such in the will.

Technique: Construing words in the context of the document.

> legitimate children of Mary Wright formed members of the class to take, there could be but little doubt that it should be answered in the affirmative. And when **once the words "sister" and "nephew" are shown to be used in a wider or looser sense than their strict legal meaning, it is difficult to limit them to one of the two natural sisters and her children only, quite apart from the antecedent improbability that the testator here should be intending to include the illegitimate child of Mary while excluding the legitimate children of Sarah. The fact that the latter are not expressly mentioned may well be explained by the view I have adopted that the testator was only expressly attempting to cure personal illegitimacy.**

Please recall that the common law treatment of illegitimacy has been abolished in Ontario.

> The Children's Law Reform Act, RSO 1990, c.C12, provides:
>
> 2. (1) For the purposes of construing any instrument, Act or regulation, unless the contrary intention appears, a reference to a person or group or class of persons described in terms of relationship by blood or marriage to another person shall be construed to refer to or include a person who comes within the description by reason of the relationship of parent and child as determined under section 1.

(iii) Terms of Art

A highly technical arrangement was not to be preferred over the natural meaning of the words, especially as it was imposed by statute.

Re Cook
[1948] Ch 212 (Ch); cb, p. 482

This case deals with the meaning of technical words.
Here a statute sought to convert an interest in freehold land held in joint tenancy into personal property through the creation of a statutory trust between the joint tenants.

The question was whether the term 'personal property' include the house? No – personal property does not technically include land notwithstanding that the statutory trust might render the testatrix's interest in the house to be personal rather than real property. [I don't think a modern court would decide the issue this way.]

Dice v. Dice Estate
2012 ONCA 468

The testator's will provided that the residue would go to his wife for life, remainder to (i) pay his wife's funeral and burial and thereafter (ii) 'equally... between [his son]... and [his daughter', *per stirpes*.' The son survived the father but dies before his mother. This raised an issue that we will deal with in some detail later, 'lapse'; that is, disposition of a gift to a person who has died before the testator. In this case, the question was whether the gift to the son went to his estate or to his children or to his sister.

Per stirpes = a gift to a person and if s/he is dead at T's death, to their issue
Per capita = a gift to a person and if s/he is dead at T's death, the gift lapses

Per Simmons J.A.:

[36] **The parties agree on the proper approach to the interpretation of a will. First, and foremost, the court must determine the intention of the testator when he made his will. The golden rule in interpreting wills is to give effect to the testator's intention as ascertained from the language that was used**: National Trust Co. Ltd. v. Fleury, 1965 CanLII 18 (SCC), [1965] S.C.R. 817 at p. 829; Brown Estate (Re), 1934 CanLII 49 (SCC), [1934] S.C.R. 324, at p. 330; Singer v. Singer, 1931 CanLII 12 (SCC), [1932] S.C.R. 44, at p. 49. Underlying this approach is an attempt to ascertain the testator's intention, having regard to the will as a whole.

[37] **Where the testator's intention cannot be ascertained from the plain meaning of the language that was used, the court may consider the surrounding circumstances known to the testator when he made his will – the so-called "armchair rule"**: Re Burke, [1960] O.R. 26 (C.A.), at p. 30; Re Shamas, [1967] 2 O.R. 275 (C.A.), at p.279, citing Perrin v. Morgan, [1943] A.C. 399 (U.K. H.L.), at pp. 420-21.

[38] Under this rule, the court sits in the place of the testator, assumes the same knowledge the testator had of the extent of his assets, the size and makeup of his family, and his relationship to its members, so far as these things can be ascertained from the evidence presented. The purpose of this exercise is to put the court in, as close as possible to, the same position of the testator when make his last will and testament.

...

[42] I am inclined to agree that the overall scheme of Mr. Dice's will does not provide much, if any, support for the conclusion that Mr. Dice intended Eddie and Marlene's share of the residue to go to their respective children if either of them predeceased their mother, the life tenant.

[43] Although Mr. Dice's will treats his two children more or less equally, that tells us very little about his intentions in the event that one of his children should predecease his wife. For example, did he want the deceased's child's share to go to the deceased child's estate, which might imply a gift to the deceased child's spouse, or did he want the deceased child's share to go to the deceased's child's children? The fact that Mr. Dice treated his two children relatively equally does not address this question. Moreover, while treating his two children relatively equally might suggest that Mr. Dice would not want a deceased's child's share to go to Mr. Dice's surviving child if the deceased child had a spouse or children, it is hardly conclusive of the issue.

...

[78] For reasons that I will explain, I conclude that, in this case, the mostly likely meaning of the phrase "per stirpes" is that it conveys the testator's intention to benefit, at least, his children's children in the event either or both of his children predeceased his wife.

....

[83] I acknowledge that no persuasive authority exists to specifically support the conclusion that the direction to divide the residue of his estate "equally, between [his] son, James Edgar Dice, and [his] daughter, Marlene Marguerite Buck, per stirpes" means that Eddie's share of the estate should go to his children.

[84] In my view, however, none is required. Rather, the governing principle is that the court must strive to ascertain the intention of the testator.

[85] In this case, neither the other provisions of his will nor the evidence of surrounding circumstances that was adduced provide much help in assessing the intention of the testator concerning the meaning of the residue clause. At most, what is evident is a general intention to benefit his children more or less equally.

Son died before life tenant. If no 'per stirpes' clause:

Did his share vest on his father's death (and thus go to his estate; i.e. his second wife), or lapse and go to his sister (class gift)?

[86] What does seem clear, however, is that the testator intended that the words "per stirpes" should have some meaning. If that were not the case, he could have omitted them. Had he done so, Eddie's share would have gone to his estate if the presumption of early vesting applied. Or if, as the application judge found, the presumption of early vesting was rebutted by the other language of the residue clause (apart from the phrase per stirpes) and the residue did not vest until after the life tenant's death, Marlene contends that the gift to Eddie would have lapsed and the entire residue would have passed to her.

[87] The question thus remains: What did the testator, intend by the words "per stirpes"?

Usually used in conjunction with a class gift to 'issue' to indicate that a pre-deceasing child's gift goes to his or her issue rather than lapse.

[88] Absent any other indicators of intent, it seems to me that, at a minimum, these words reflect an intention that the gift neither passes to Eddie's estate nor to Marlene. Even if used improperly, it seems to me that, having regard to the traditional meaning of the phrase "per stirpes" when used in conjunction with the term "issue", the most logical meaning is that the use of the phrase conveys an intention, to benefit, at least, the testator's children's children.

[89] Viewed in this way, I do not agree that a gift to named children, per stirpes, necessarily creates a contradiction in terms. Rather, in the context of Mr. Dice's will, which provides no other indication of the testator's intention, both aspects of this disposition can be viewed as an elaboration of his intention. That is, the disposition reflects both an intention to benefit each of the testator's children, as well as intention to benefit, at least, each child's children in the event that either or both of the named children fail to survive the life tenant.

[92] Despite my conclusion, I agree with Cullity J. that terms such as "per stirpes", if used at all, are best used in their traditional sense – otherwise, the testator runs the risk of having his or her words ignored.

See how fun the law of wills can be?

Partial Intestacies

What happens when a person gives a gift to a person for life, remainder to go on as an intestacy – when is the class of person entitled determined, on the death of T or the death of the life tenant? Normally the 'class closing' rules (which we will cover) say that a class of legatees closes on the death of T. The default rule is the same in this situation. Thus, if A (father) died giving to B (child) for life, the remainder going as on an intestacy then D (another child) would be entitled to at least a portion of the remainder. If D died before B, his Estate would take the gift. A contrary intention of T displaces this rule – as in *Fleury*.

National Trust Co. v. Fleury
[1965] SCR 817; cb, p. 484

Here the testator settled a testamentary trust with certain provisions as to the remainder interest to be distributed according to the intestacy rules. A question of interpretation arose as to the timing of the application of the rules (on the death of the testator or on the death of the life tenant). Rather than apply a technical rule, the majority of the court held that the subjective intention of the testator could be discerned and applied to resolve the ambiguity. Ritchie J said:

> In the construction of wills, the primary purpose is to determine the intention of the testator and it is only when such intention cannot be arrived at with reasonable certainty by giving the natural and ordinary meaning to the words which he has used that resort is to be had to the rules of construction which have been developed by the Courts in the interpretation of other wills. It is to be remembered that such rules of construction are not rules of law and that if their application results in attributing to the testator an intention which appears inconsistent with the scheme of the will as a whole, then they are not to prevail.

The Admissibility and Use of Extrinsic Evidence

The primary role of the court is to give effect to the testator or testatrix's intention, whether proved subjectively or presumed objectively. Each Will is unique and it is the role of the judge to determine testamentary intention from the language used in the Will and consideration of the circumstances surrounding the making of the Will, where it is appropriate to consider those circumstances.

Rondel v Robinson Estate
2011 ONCA 493

In this case the testatrix was a naturalized Canadian who was born in Spain and moved to Canada as an adult. She owned property in the UK, Spain, and Canada. She was married; her husband developed dementia and was incapable. She later began a relationship with Rondel. In 2002, she made a will in Spain to deal with real property and personalty in Europe in favour of her sisters and Rondel. She made a second will in Canada that same year to deal with Canadian assets. In 2005, the incapable husband died. The testatrix instructed her solicitor to draft a new will which would not leave

property to her sisters; she changed her instructions a day later to include one sister. The new will was drafted but the solicitor failed to inquire about other wills. The testatrix executed the new will which contained a revocation clause in respect of all other wills. The residuary clause disposed of 'all my property of every nature and kind and wheresoever situate'. She made a new will in 2006 (so as to add a $1 million gift to. Rondel) on the same terms. The addition of this specific bequest was the only change from the 2005 Will. After her death, a question arose in respect of the validity of the 2002 Spanish will. The issue on appeal was whether evidence of the testarix's intention to revoke or maintain the 2002 will was admissible. Held: Not admissible. The court held that the common law rule disallowing direct evidence of the testator's intention divorced from the interpretation of an ambiguity remains good law.

Per Juriansz J.A.:

> 23 **... [t]he general rule of the common law is that in construing a will, the court must determine the testator's intention from the words used in the will, and not from direct extrinsic evidence of intent.**
>
> 24 Of course, it is always possible that the testator's expression of her testamentary intentions may be imperfect. When a will takes effect and is being interpreted, the testator is no longer available to clarify her intentions. Extrinsic evidence is admissible to aid the construction of the will. The trend in Canadian jurisprudence is that extrinsic evidence of the testator's circumstances and those surrounding the making of the will may be considered, even if the language of the will appears clear and unambiguous on first reading. Indeed, it may be that the existence of an ambiguity is only apparent in the light of the surrounding circumstances...
>
> 25 The extrinsic evidence tendered by the appellant and Mr. Silverman, however, goes beyond providing evidence of the facts and circumstances surrounding the making of the testator's 2006 Canadian Will...
>
> 26 This evidence goes beyond attempting to establish the facts and circumstances surrounding the testator's 2006 Canadian Will. Rather, it purports to directly address what she intended to include in her Will but did not include. The evidence is conclusory in nature...
>
> **27 The law properly regards the direct evidence of third parties about the testator's intentions to be inadmissible. There would be much uncertainty and estate litigation if disappointed beneficiaries like Dr. Rondel could challenge a will based on their belief that the testator had different intentions than those manifested in the will.**
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> ...
>
> 29 An exception to the general rule excluding direct extrinsic evidence of intent in a court of construction arises where there is an "equivocation" in the will. The principle is set out in Feeney, *The Canadian Law of Wills: Volume 2 Construction*, 2d ed. (Toronto: Butterworths, 1982), at p. 56:
>
> > There is an equivocation only where the words of the will, either when read in the light of the whole will or, more usually, when construed in

> the light of the surrounding circumstances, apply equally well to two or more persons or things. In such a case, extrinsic evidence of the testator's actual intention may be admitted and will usually resolve the equivocation.

30 In *Bruce Estate, Re* (1998), 24 E.T.R. (2d) 44 (Y.T. S.C.), the court held that the term "equivocation" is a term of art that has a special meaning in law. The court cautioned against simply equating it with either ambiguity or mere difficulty of interpretation, otherwise there would be no need for rules of interpretation and construction.

31 The affidavits of Mr. Silverman, Ms. Budi and Dr. Rondel do furnish evidence of some of the surrounding circumstances in this case. Before drafting her Will, Mr. Silverman did not ask the testator about her previous Will, did not review her assets and their location with her, and did not canvass with her the people who she might consider including in the Will. Nor, did she offer any of this information to Mr. Silverman. Taken together, this evidence might give rise to speculation that the testator did not turn her mind to the effect the 2006 Canadian Will would have on the 2002 Spanish Will and the European assets. However, when considered in the light of all the surrounding circumstances including this evidence, there is not the slightest equivocation in the testator's 2006 Canadian Will. The words of the 2006 Canadian Will are clear. As the application judge found, this was not a case about a typographical error, a solicitor's misunderstanding of the testator's instructions or a solicitor's failure to implement the testator's instructions. Rather, the solicitor drafted the testator's Will in accordance with her instructions to deal with the "entire residue of my estate", and she reviewed and approved of the language in the Will before executing it.

Evidence of surrounding circumstances might be admissible to cure an ambiguity but here the will was clear. Moreover, direct evidence about T's intentions per se is not admissible.

32 The admissible evidence of the surrounding circumstances cannot support the inference that the testator did not intend to revoke the Spanish Will. Mr. Silverman and Dr. Rondel need to rely on the direct evidence of the testator's intent in their affidavits, and urge this court to expand the common law to allow them to do so.

33 It has been previously suggested that such evidence should be admitted to aid the interpretation of wills. The court's attention was drawn to a 1982 report of the Law Reform Commission of British Columbia that recommended eliminating the exclusionary rules of evidence and admitting all evidence in aid of interpretation that meets the normal evidentiary test of relevance. The recommendation was not accepted.

34 I prefer the different view taken by the Succession Law Reform Project reporting to the British Columbia Law Institute in a 2006 Report:

> **The view that has prevailed in the Succession Law Reform Project, however, is that removing all restrictions on admission of extrinsic evidence of intent would allow excessive scope for attempts to secure an interpretation contradicting the actual terms of the will. Fabrications or fantasies of the "he really meant**

> **me" or "he always said I would get the house" variety could be advanced much more easily than they can be under the present law. The Testate Succession Subcommittee and Project Committee were not as confident as the Commission had been that litigation over the meaning of wills would not increase if evidence of testamentary intent were made admissible without restriction. They were not prepared to endorse the former Commission's recommendation to abrogate entirely the exclusionary rule regarding extrinsic evidence of intent.**

35 I agree...

36 A testator of sound mind knows her intentions and is able to express them. The very raison d'être of a written will, formally executed, is to record the testator's own expression of intentions. The formalities required for the proper execution of the will advance that goal by confirming that the will provides an accurate record of those intentions.

37 Third-party evidence of a testator's intentions gives rise to both reliability and credibility issues. Credibility is a concern because would-be beneficiaries can, without fear of contradiction by the deceased, exaggerate their relationship and fabricate the promises of requests. Reliability is a concern because testators are not obliged to write their wills to accord with the sincere or mendacious assurances they may have given to those close to them. Until they die, testators may freely revoke or vary the directions they have given for the distribution of their estates. The evidence of third parties, who cannot directly discern the mind of the testator, is logically incapable of directly proving the testator's intent.

38 In my view, there is no question about the good sense of the common law rule excluding direct extrinsic evidence of a testator's intent.

A Practical Approach

1. Where to start? Do the 'ordinary meaning' of the words reveal an ambiguity?

Assuming that the Will can be admitted to probate, the first question to be determined in dealing with the provisions of a Will is whether there is any problem requiring judicial inquiry at all.

If the court can interpret the will by merely giving effect to the plain and ordinary meaning of the words (reference usually being made to dictionary definitions) on the factual presumption that the words were used in the Will consistent with their ordinary usage, then the matter may well be sufficiently settled without further inquiries.

2. Can the words as used in the Will be construed to remove the ambiguity?

If there is an ambiguity with the terms expressed in the Will, the 'rules of construction' are available to the court to construe the probable intention of the testator or testatrix.

3. Will evidence as to the 'surrounding circumstances' to the making of the Will assist?

Assuming that the will can be admitted to probate on the basis that it is (i) formalistically valid and (ii) represents a final and settled intention of the testator or testatrix (and where the intention of the testator has not been tainted by fraud, mistake, or undue influence such that it is invalid), evidence can be admitted to assist in the construction of the terms of the Will in some cases.

As reinforced in *Rondel v Robinson Estate*, direct evidence of the testator's 'true intention' through some oral or written statement that is contrary to a provision in the Will is not admissible - the Will is itself the primary evidence of the testator's intention.

Evidence *may* be lead as to the 'surrounding circumstances' to the making of the will which clarify specific terms that are ambiguous. Thus, in Re Burke (1959), 20 D.L.R. (2d) 396, 398 (Ont. C.A.), Laidlaw J.A. said:

> The Court is now called upon to construe a particular document and, at the outset, I emphasize what has been said before so frequently. The construction by the Court of other documents and decisions in other cases respecting the intention of other testators affords no assistance whatsoever to the Court in forming an opinion as to the intention of the testator in the particular case now under consideration. Other cases are helpful only in so far as they set forth or explain any applicable rule of construction or principle of law. Each Judge must endeavour to place himself in the position of the testator at the time when the last will and testament was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give due weight to those circumstances in so far as they bear on the intention of the testator. He should then study the whole contents of the will and, after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator. When an opinion has been formed as to that intention, the Court

> should strive to give effect to it and should do so unless there is some rule or principle of law that prohibits it from doing so.

[this passage is often quoted in the cases; for a recent example, see Pressman v. Pressman, [2005] O.J. No. 2619; 140 A.C.W.S. (3d) 405 (Ont Sup Ct); Rudling Estate v. Rudling, 2007 CanLII 51794 (Ont Sup Ct);Re Wade, 2008 CanLII 56707 (Ont Sup Ct)]

This approach to evidence respecting the 'surrounding circumstances' is often referred to as 'the armchair rule' as set out Boyes v. Cook (1880) 14 Ch.D. 53, 56 (C.A.), per James LJ: '[y]ou may place yourself, so to speak, in his arm-chair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention.' Examples: the meaning of particular word that had a special meaning for the testator; the age and education of the testator; the proper names or nicknames of people named in the will; or the meaning of terms in another language that are used in the will.

Use of Evidence in Respect of 'Surrounding Circumstances'

Haidl v. Sacher
[1979] 2 Sask R 93 (C.A.), cb., p.492

The Will contained the following bequest:

> 3.I GIVE, DEVISE AND BEQUEATH all my property of every nature and kind whatsoever and wheresoever situate to my said Trustees upon the following trusts, namely:
>
> ...
>
> (h) To deliver all the rest and residue of my Estate whatsoever and wheresoever situate including any property over which I may have a general power of appointment, to the following **persons in equal shares, share and share alike**:
>
> (i) Donnie Sacher
> (ii) Jerry Sacher
> (iii) Phyllis Haygarth
> (iv) Blair Luterbach
> (v) Florence Tischynski
> (vi) Elsie Luedtke
> (vii) Tillie Rothwell
> (viii) The Children of, Hebert Haidl, that may be living at the date of my death.

Did the highlighted term intend a stirpital or per capita distribution? Could evidence be led on point? Per Bayda JA:

> 6. The circumstances of this case and the issues addressed to us on appeal call for a consideration, at the outset, of this question:
>
> Does the law require the "ordinary meaning" rule of construction to be applied to subparagraph (h) without admitting and taking into account any

surrounding circumstances at all and that the meaning so ascertained shall prevail unless it is found that such an application produces a meaning which is unclear and ambiguous in which event such surrounding circumstances may then be admitted and looked at (procedure "A")?

Or, does the law require those surrounding circumstances to be admitted at the start and that the "ordinary meaning" rule of construction be applied in the light of those surrounding circumstances (procedure "B")?

7. Before proceeding to answer this question, I note two matters. First, there is no disagreement between the parties that the proper approach in construing the subparagraph under scrutiny here requires the application of the "ordinary meaning" rule of construction as the initial step and that it should so be done in the light of the contents of the whole will. The disagreement lies in the role that the surrounding circumstances should play, if any, in the application of that rule. The second matter is that the term "surrounding circumstances" as used in these reasons refers only to indirect extrinsic evidence. It has no reference whatever to direct extrinsic evidence of intent, the admission of which is governed by a different set of conditions. The former consists of such circumstances as the character and occupation of the testator; the amount, extent and condition of his property; the number, identity, and general relationship to the testator of the immediate family and other relatives; the persons who comprised his circle of friends, and any other natural objects of his bounty (see: Feeney, The Canadian Law of Wills: Construction p. 17). An example of the latter is the instructions which the testator gave to his solicitor for the preparation of the will. (As one finds, for instance, in Reishiska v. Cody (1968), 62 W.W.R. 581.)

8. There is a distinct divergence in the authorities as to whether procedure "A" or procedure "B" as I have termed them is the correct approach in law. Procedure "A" has its origin in a literal, traditional, strict - constructionist stance or to use the expression Lord Denning used in his dissenting judgment in Re Rowland, [1963] Ch. 1 (C.A.), at page 9, in "the 19th century view"; procedure "B" on the other hand in a liberal, "subjective intention" stance.

After reviewing the foreign and domestic authorities, Bayda JA held:

21 In the end, it must be said that the Canadian authorities tend to put forward procedure "B" as the proper approach. In my respectful view, it is the approach most likely to elicit the testator's intention and for that reason the more desirable approach. After all, ascertaining the testator's true intention is the real and only purpose of the whole exercise. Hence, the learned Chambers Judge, in the matter before us, did not err in admitting evidence of the testator's relationship to the beneficiaries named in his will, and particularly those mentioned in sub-paragraph (h) as part of the surrounding circumstances, in the light of which he then sought to interpret the testator's language by applying the "ordinary meaning" rule.

Re Carrick
[1929] 3 D.L.R. 373 (Ont HCJ), cb, p.502

The Will contained the following distribution:

> To the Protestant Orphan Boys' Home, Toronto, the sum of $3,000 for its objects and purposes.
> To the Protestant Orphan Girls' Home, Toronto, the sum of $3,000 for its objects and purposes.

The problem was that nether institution existed. Did T intend to make gifts to the “Girls' Home” or the “Protestant Orphans' Home” which did exist?

Wright J held:

> From the affidavits filed it appears that the mother of the testator was in her lifetime greatly interested in the institution known as the Boys' Home and that the work done there was the frequent subject of discussion between the testator and his mother. The affidavit of Mrs. Allen further states that the testator told her, on the occasion of making his first will, that he had made a bequest of $3,000 to the Boys' Home on George St. and that when he made the second will he had stated he had left the gifts to the charities exactly as before.
>
> She further deposes that she had never at any time heard the testator refer to the institution known until 1926 as the Protestant Orphans' Home, on Dovercourt Rd., Toronto.
>
> An affidavit of S. J. Brien, a cousin of the testator, has also been filed, and in it she deposes that the testator stated to her that he was making or had made a bequest of $3,000 to the Boys' Home on George St.
>
> **If this evidence is admissible, it would clearly show the institution intended to be benefited by the testator, but the authorities are not in agreement as to whether extrinsic evidence of this nature is admissible to aid the Court in solving a difficulty such as that raised in the present case. The law appears to be that extrinsic evidence is admissible only to determine which of several persons or things was intended under an equivocal description. See Hawkins on Wills, 2nd ed., p. 14. Are the descriptions here equivocal so as to admit the extrinsic evidence?**
>
> ...
>
> **Can it be said that the language used in the will under consideration describing the beneficiaries is equally applicable? Neither of them comes within the exact designation in the will, one being the Boys' Home and the other the Protestant Orphans' Home. It will be noted that in one description the word "Protestant" appears, and not the word "Boys," whereas in the other the term "Boys" appears but not the word "Protestant." So it would appear that the description is equally applicable to either of these institutions. Applying the reasoning and principle of the decisions already referred to, I am of opinion that**

extrinsic evidence is admissible, and that the declarations of the intention of the testator, both before and after the dates of the wills, are admissible.

In addition, the Court has a right to consider the circumstances and the interest of the testator and his family in the Boys' Home, and the fact that so far as disclosed he had no connection with or interest in the other institution known as the Protestant Orphans' Home.

Having regard to all the evidence, and particularly the declarations of the testator, it is reasonably clear that the legacy was intended for the Boys' Home. I so hold.

Drafting Errors

Errors can be of many causes and varieties. For example, fraud that induces a mistaken belief by the testator about some fact, an error by the solicitor drawing the Will in respect of the estate plan (e.g. no residuary clause), or the spouse of a beneficiary witnesses the Will (invalidating the gift). Here we consider errors in the drafting of the Will and whether the error might be rectified.

The jurisdiction of the court to correct the error is based on an implicit or explicit finding that the words in question were not known to and approved by the testator or testatrix (a fiction of course). Ultimately we are more concerned with testamentary intent and the exercise of testamentary freedom than technicalities.

Omissions

- The court cannot alter the wording of the Will to give effect to what the judge thinks that the testator ought to have intended.

- **The court can, however, omit, substitute or insert words that give effect to the testatrix's intention where the court has discerned that intention; in other words, the court's reading of the Will gives effect to the Will as it was intended to be read.**

- Where it is clear on the face of a Will that the testator has not accurately or completely expressed his or her meaning by the words used, and it is also clear which are the words omitted, those words may be supplied in order to express the intention more completely.

- There is some divergence in the cases respecting the standard to be used – some older cases talk of the court being convinced that the case for the insertion / substitution is so strong that no other reasonable inference can be taken (see Re Midgley [1955] Ch 576; Re Craig (1978), 42 OR (2d) 567 (C.A.), cb, p.506), in other cases the court need only be reasonable certain (Re Raiter (1979), 24 OR (2d) 603 (H.C.J.)).

Re Freeman's Estate
(1975), 58 DLR (3d 541 (NSSCTD); cb, p. 508

The testator in his Will provided as follows:

> THIRD: Devise of the entire estate to executors and trustees upon trust:
> (1) To pay debts, taxes, etc.;
> (2) To transfer personal and household effects to Mrs. Freeman;
> (3) To hold the testator's home and summer home for Mrs. Freeman during her lifetime provided that, with the consent of Mrs. Freeman the executors could dispose of either property. Upon the death of Mrs. Freeman, the "house fund" falls into and forms part of "the residue of my estate;"
> (4) and (5) To hold the balance of the estate in trust for Mrs. Freeman for her lifetime. She is to receive the income derived therefrom and the executors have the power to encroach on capital for her benefit;
> (6) On Mrs. Freeman's death to pay the remaining expenses of her last illness and burial out of the capital of the estate;
> (7) **Should my wife predecease me or die within thirty days of my death, I give and bequeath** to my sister, Miss Hazel Josephine Freeman, 102 Glenelg Street West, Lindsay, Ontario, the sum of Fifty Thousand Dollars ($ 50,000.00) and to divide the rest and residue of my estate into twenty- three shares to be distributed as follows... [and then set out the names of various legatees]

In this way, the testator gave a life estate to his wife with a power to encroach on the capital, with the residue to go to named people if the wife pre-deceased him or died within 30 days of his death. **No provision was made should the wife survive him for more than 30 days. It was held that there was a clear implication that the named residuary legatees should have the residue in that case as well.** After reviewing the authorities, Dubinsky J held:

> Irrespective of how it came about, there is no doubt whatsoever in my mind that there is an omission in the will. I find it passing strange -- indeed, I find it incredible -- that this testator, who from the other contents of the will (some of which I have set forth earlier) took such great care to dispose of his estate to named legatees, would intend an intestacy as to any portion thereof. It is most unreasonable, in my view, to say that he would intend to dispose of his assets as he did on his wife's death if she predeceased him or died within 30 days of his death, but would want them to go by way of intestacy if she died, for example, 31 days or 60 days or 90 days or some longer period after his death. Moreover, it is to be remembered that he had two sisters, not one. Mrs. Ila Langille is a sister but in his will the testator only made provision for the other sister, Hazel Elizabeth Freeman. Is it to be said that it was his intention that if his wife survived him by more than 30 days, the sister Ila Langille who for reasons best known to the testator did not warrant the slightest mention in his will, should, on his wife's death, take one-half of his estate on intestacy? I do not think such a suggestion could ever be made.

[applied in Re Black (1982), 37 O.R. (2d) 219 (HC) in a case with almost exactly the same facts].

Surface Errors

Re Macdonnell
(1982), 35 OR (2d) 578 (C.A.); cb, p. 515

The testatrix made a Will which made provided various gifts her sister on the condition that she survive the testatrix. If that condition was not fulfilled, then the Will went on to make specific gifts after the following wording:

> Clause 3(e):
> If and in the event that my sister, the said Achsah Ena MacDonnell has predeceased me, then and in such event I make the following special bequests: ...

The sub-clause following the various bequests read:

> **3(f)(37)**
>
> ALL the rest and residue of my Estate I direct my Trustees to divide into three equal shares and to pay the shares as follows: ...

The executors of the Will applied for the advice and direction of the Court – specifically, did the residue clause only speak to the situation where the sister predeceased the testatrix or more generally? Here the sister survived the testatrix and was the only heir at law. If the disputed clause was interpreted to apply only to the circumstance in which the sister predeceased the testatrix, the effect would be to give the sister both the gifts under the Will and a share of the residue on the intestacy (which would be the whole of the residue in this case).

The Court held that the proper construction was to hold that the scheme of the will supported the view that the testatrix intended that the residue clause would operate if the sister survived her, and that '3(f)(37)' should be read as '3(f)' with a more general application. Per Lacourcière J.A:

> That the intention of the testatrix was to dispose of all her property can be determined by reading the will as a whole. She uses the words "... declare this to be and contain my only last will and testament" and "I give, devise and bequeath all my estate both real and personal of whatsoever kind and wheresoever the same may be situate ..." upon certain trusts. Thereafter, in cl. 3(c), the testatrix directs her trustees that her share of the premises then owned as tenant in common with her sister "shall fall into and form part of the residue of my estate" if certain events happen. There are other references in the will to the residue. This shows an awareness of the residue on the part of the testatrix. The scheme of her will reveals an intention to dispose of all her property...
>
> ...
>
> In the case at Bar, I find no compelling reason to conclude that the testatrix, by cl. 3(f)(37) of the will, intended to dispose of the residue of the estate only in the event that her sister predeceased her. To reach this conclusion, one would have to find that the testatrix intended an intestacy as to the residue of

> her estate if her sister survived her. The clear intention of the testatrix was to provide her sister with a life interest in the residue, with no power to encroach on the capital except for personal loans of capital in the event of severe illness or incapacity. The interpretation of the will urged upon us by the respondent would mean that the testatrix intended, by means of an intestacy, to leave the residue of her estate to her sister as her sole surviving heir-at-law, an intention clearly inconsistent with the life interest in the residue and with her stated declaration to dispose of all her estate.
>
> I must therefore conclude that the insertion of the numeral 37 before the words "all the rest and residue of my estate ..." was a clerical error which should be deleted to give full effect to the intention of the testatrix. Clause 3(f) provided for 36 "special bequests" in the event that the testatrix's sister had predeceased her. I agree with the appellant that sub-cl. 37 is not a bequest but a disposition of residue which is inconsistent with the rest of the will unless the numeral 37 is deleted completely. A Court of construction is bound to eliminate a numeral which is inconsistent with the general scheme of the will and frustrates the intention of the testatrix. The learned author of Jarman on Wills (8th ed., 1951), makes it clear at p. 2071, para. XIX that words and limitations may be transposed, supplied or rejected, where warranted by the immediate context, or the general scheme of the will.

Errors in Description

The maxim *demonstratio non nocet, cum de corpore constat* ('a false or mistaken description does not vitiate') operates such that non-essential or surplus words which are inaccurate may be ignored provided that the remaining true descriptive words are sufficiently certain. For the rule to apply, the description as written must itself be uncertain and the true words of the description apply to only one subject. The difficulty in the cases usually involve the issue of what are essential or non-essential descriptors.

Re Beauchamp
(1975), 8 OR (2d) 2 (H.C.J.); cb, p.519

In this case the will conveyed certain parcels of land but the lot numbers specified were incorrect. Extrinsic evidence was admissible to cure the defect. Per Cory J.:

> The principles upon which a Court should proceed in a case such as this are set out in Re Butchers [1970] 2 O.R. 589 (HC) and may be summarized as follows:
>
> 1. Courts of construction have always attempted, where reasonably possible, having regard to the actual wording of the will, to give effect to every devise or bequest mentioned in the will and, in fact, to give some meaning and effect to all of the words in a will. They have leaned against allowing any expression denoting a gift to be totally ineffective or to fail because of misdescription, error in wording, lack of clarity or for any similar reason.

2. A will must be in writing and the intention of the testator should therefore be gathered from the written words expressed in that particular document together with any codicil thereto. It necessarily follows that the consideration of extrinsic evidence to contradict or add to the plain meaning of words used in the will have always been denied by Courts of construction. Such practice would effectively destroy the sanctity and legal effect of the will and would lend itself to all sorts of abuses whereby various witnesses might attempt to give evidence to the testator's intentions apart from or in opposition to his last will as gathered from a whole reading of the whole will.

3. There are certain limited occasions when for specific purposes only, extrinsic evidence must be considered in attempting to interpret the testator's intentions as expressed in the will. One of these exceptions is based on the principle that it is the duty of the Court of construction in interpreting a will to put itself as much as possible in the testator's chair. The words of the will must be interpreted not only by a literal reading of it, but the Court must, when reading the will, have a knowledge of the circumstances surrounding the testator at the time of the making of the will and up to and until his decease. This principle applies to descriptions of recipients of the testator's assets and of the assets themselves.

4. There is also the right where there is a latent defect or ambiguity under the principle of falsa demonstratio non nocet, cum de corpore constat, to consider extrinsic evidence in order to attempt to resolve the ambiguity. A latent defect is by definition one which does not appear on the face of the will and is one which, therefore, can only be found to exist upon examining the will in the light of surrounding circumstances.

5. The three categories of cases where the principle of falsa demonstratio apply are as follows:

(a) Where an object is described without sufficient certainty in the first place, additional words, which have no application to anything, may be rejected.

(b) Where there is a complete description and the testator goes on to add words for the purpose of identifying or elaborating a previous description, these words, if consistent with the previous description, may be rejected.

(c) Where there is one continuous description and there is something answering the part of it and something answering to the other part but the two together are inconsistent, the question is: which are the leading words of the description? In the first class of cases under this head there is no repugnancy between the general terms and the particular super-added description; in the second and third class there is a repugnancy between two parts of a description.

Daradick v. McKeand Estate
2012 ONSC 5622

This case deals with the doctrine of rectification and the use of extrinsic evidence. The testatrix made a new will with a lawyer. She had made two previous wills with another lawyer who had since retired. The third will was made with the lawyer who took over his practice. The lawyer swore an affidavit in which he deposed that he took instructions "house moms name – $165,000 to go to Virginia") but that through inadvertence the will was drafted without a suitable provision clause leaving the house to Virginia. Both the testatrix and Virginia reviewed the 2010 will with the drafting solicitor's law clerk before the testatrix executed the will. Could the error be rectified through the admission of extrinsic evidence.

Matheson J.

> [30] Does the court have the power to rectify a will when the testator's instructions have not been followed by the lawyer drafting the will?
>
> [31] It would appear that the law with respect to rectification is changing.
>
> [32] The courts must be very vigilant when it comes to considering rectification. The reason is quite obvious, the testator is dead. The courts are then left with evidence that may be tainted by self interest.
>
> ...
>
> [38] In the Robinson Estate v. Rondel, [2010] O.J. No. 2771, Mr Justice Belobaba wrote the following at paragraphs 24, 25, 26 and 27:
>
> 24. Where there is no ambiguity on the face of the will and the testator has reviewed and approved the wording, Anglo-Canadian courts will rectify the will and correct unintended errors in three situations:
>
> (1) where there is an accidental slip or omission because of a typographical or clerical error;
> (2) where the testator's instructions have been misunderstood; or
> (3) where the testator's instructions have not been carried out.
>
> **25. The equitable power of rectification, in the estates context, is aimed mainly at preventing the defeat of the testamentary intentions due to errors or omissions by the drafter of the will. This is a key point.** Most will-rectification cases are prompted by one of the above scenarios and are typically supported with an affidavit from the solicitor documenting the testator's instructions and explaining how the solicitor or his staff misunderstood or failed to implement these instructions or made a typographical error.
>
> 26. Courts are more comfortable admitting and considering extrinsic evidence of testator intention when it comes from the solicitor who drafted the will, made the error and can swear directly about the testator's instructions. They are much less comfortable relying on affidavits (often self-

serving) from putative beneficiaries who purport to know what the testator truly intended.

27. Here is how Feeney's puts it:

[T]he application for rectification is usually based on the ground that, by some slip of the draftsman's pen or by clerical error, the wrong words were inserted in the will; the mistake may be latent in the letters of instruction or other documents. Yet, when the mistake is that of the draftsperson who inserts words that do not conform with the instructions he or she received, then, provided it can be demonstrated that the testator did not approve those words, the court will receive evidence of the instructions (and the mistake) and the offending words may be struck out.

[39] The Ontario Court of Appeal upheld the decision of Justice Belobaba. See Robinson Estate v. Rondel, [2011] O.J. No 3084.

...

41 Surrounding circumstances include circumstances surrounding the making of the will; the testator's property at the time of the will; the testator's use of property; the testator's relationship to named and potential beneficiaries; and prior wills. See: Harmer Estate, supra, at para. 30 and 31; Mistakes in Wills in Canada, supra, pp. 211-214.

42 In my view the above principles concerning when a court can delete or add words to a will apply not only in circumstances where a word or words are omitted but also where an incorrect word or words are contained therein. In either case, **before a court can delete or insert words to correct an error in a will, the Court must be satisfied that:**

(i) Upon a reading of the will as a whole, it is clear on its face that a mistake has occurred in the drafting of the will;

(ii) The mistake does not accurately or completely express the testator's intentions as determined from the will as a whole;

(iii) The testator's intention must be revealed so strongly from the words of the will that no other contrary intention can be supposed; and

(iv) The proposed correction of the mistake, by the deletion of words, the addition of words or both must give effect to the testator's intention, as determined from a reading of the will as a whole and in light of the surrounding circumstances.

FINDINGS

[41] From the material filed and the cases cited, I am able to make the following findings. I am also mindful of the fact that there was no rebuttal

evidence called by the respondents. The only documentation filed was some case law.

[42] Because there was no rebuttal evidence led, I am able to surmise that the facts stated in the affidavits of the applicant and Mr. Calvin Beresh are not challenged.

[43] I make the following findings:

1. The Testator had made two wills with her previous solicitor Mr. Banks. These wills were dated the 15th day of January 1992 and the 15th day of April 2005.

In each will she left the matrimonial home at 5 Birchmount to her daughter, provided her husband was not alive at the time of her death.

2. Her husband, James Cecil Lauren McKeand also made a will dated the 15th day of January 1992, and a codicil dated the 18th day of April 1997. By those documents he left the matrimonial home at 5 Birchmount to his daughter, provided his wife was not living at the time of his death.

3. Mr. Banks died and Calvin William Barry Beresh took over his practice. The Testator had him update her will. Her husband and son James had died.

4. She also wanted to leave some small bequests to family members.

5. Mr. Beresh took notes, and one note states that the property known as 5 Birchmount would still go to her daughter Virginia. These notes were made at the time of his taking instructions from the Testator.

6. In the unchallenged affidavit of Calvin Beresh, he acknowledges that he made an error and did not include the matrimonial home in her will.

7. In the affidavit of Virginia Daradick she outlines the financial input into the matrimonial home, the time and care that she gave to her father and mother. She and her family moved into the matrimonial home of her mother so that she could give better care to her mother.

[44] I acknowledge that changing a will is not to be taken lightly. It is a document that the courts will not change except in the most exceptional circumstances.

[45] I find that the error of Mr. Beresh can and should be corrected. Not to do so would be tragic. If the will were not rectified then the only other course

of action would be a lawsuit against the lawyer or the estate. This would be very costly.

[46] Therefore, the will of Ruth Caroline McKeand will be rectified by adding that the property known as 5 Birchmount Avenue, Welland, will be bequeathed to Virginia Laurel Daradick. All other terms will remain the same.

[47] I may be spoken to with respect to costs or, if counsel agree, I will entertain written submissions on the following time schedule: The applicant shall file with the court her submissions within 30 days of the release of these reasons; the respondents shall have 15 days from the receipt of the applicant's submissions; the applicant shall have five days to respond to the respondents' submissions.