Wills & Estates
Winter Term 2018

Lecture Notes – No. 8

BACKGROUND (NON-EXAMINABLE)

Jurisdiction and Judicial Function

Surprisingly the nature of the Court's jurisdiction in dealing with wills has become uncertain in the last few years; we will consider the nature of the question in general, and then consider it again in the context of the question of admission of extrinsic evidence in respect of the interpretation of words in the will.

(a) Historical Context

English probate law and practice (from which the practice in Ontario is descended) developed from a number of sources, principally the introduction of developed continental concepts after the Norman Conquest. Prior practice seems to have been influential to some extent but it's really impossible to judge to what extent. Unfortunately very little accurate information is available in respect of Anglo-Saxon succession norms; only around 60 will-type documents remain in existence from the pre-Norman period. Even the great legal historians and text writers fundamentally disagree about how land and chattels passed in Anglo-Saxon England. It seems clear to all that the judiciary at the time, such as it was, had little to say on the matter. Seemingly, land was retained by the King after the death of his subject and chattels were informally taken by close kin. In the few wills that remain, transmission of property was of less concern than the application of part of the deceased's possessions to secure remediation of the deceased's soul by pledging property to charity to ensure that devotions were to be said for the deceased. It would seem then that wills in the manner in which we conceive them were exceedingly rare which may be a natural corollary of the focus on possession rather than ownership in this period of legal history in England.

The Norman Conquest brought a developed system that put English probate law onto the road to its modern form. Before the Conquest, there had been no ecclesiastical courts in England. After the Conquest, everything changed. Canon law provided the tenets of the law of succession and the Church's ecclesiastical courts provided the machinery for its implementation. The Normans brought with them the legal culture of a Europe in which the Church transcended the various kingdoms. The Church developed a common law of sorts that spoke to matters that one would today consider completely secular as well as a jurisdiction over clergy and wrongs as defined by religious doctrine. Rather quickly after the Conquest, this legal machinery was imported into England and a separate system of spiritual courts that looked to canon law for authority was introduced. Thus there arose a parallel system of courts that looked alternatively to the Church and the Crown for their authority. The ecclesiastical claim over testamentary questions proceeded from Church doctrine that the right to possession of property is of divine origin based upon an interpretation of a passage from the bible ('And said, Naked came I out of my mother's womb, and naked shall I return thither: the Lord gave, and the Lord hath taken away; blessed be the name of the Lord;' Job 1:21). Thus, given

that religious doctrine was the source of law, it was canon law rather than secular law that was to govern post-mortem transmission of at least some of the assets of the decedent (chattels). A will that comported with canon law and, early on, which was specifically allowed by the Pope, was effective. Intestate succession fell to the ecclesiastical courts as it was canon law that set out the rights of the decedent's kin and the Church to a portion of his property.

Real property passed under the law of descent with the common law courts having complete jurisdiction. The ecclesiastical courts had no jurisdiction in matters involving land. Wills dealing with land were only allowed in the 16th century and such wills were initially proved in the manner of deeds in the common law courts. Together with the introduction of ecclesiastical concepts and courts into English law, the Norman conquest also brought with it feudalism and the principle of primogeniture by which real property passed inter-generationally to the worthiest male heir who was obligated as vassal to his lord. Thus, despite the fact that the feudal system may have had a 'comparatively transitory political or public side, [it] also had a permanent private law aspect in the scheme of land tenure and inheritance as later developed and applied in the common law courts.' That is, land passed by a set of rules that became modern property law as developed exclusively in the common law courts and without reliance on norms that proceeded from succession law and probate practice.

The central role of the executor emerged over time. This is the crucial and distinguishing feature of English probate law and results from the interaction of canon and secular law and ecclesiastical and temporal courts. A great deal of scholarship considers the emergence of the executor as a facet of English law. Surprisingly, it was not from Roman, French, or Anglo-Saxon law that the executor came into English law. It was through canon law building upon English custom which found its roots in Germanic testamentary customs that made their way into England with the Saxons. Thus, rather than the universal heir of Roman law (where the heir became the ancestor as a matter of law, inheriting rights and obligations directly), the executor emerged in relation to the distribution of that part of the decedent's chattels through the office of 'almoner' or 'confessor' who was responsible for distributing the 1/3rd part of the decedent's chattels to good works and 'on whom the church imposed a fiduciary's burden since he was a priest.' By the 14th century, the administrator was no longer a delegate of the local Bishop but was appointed from among 'the next and most lawful friends' of the decedent and later from his widow and children. Such an executor (whether appointed in 'common form' or after contentious proceedings) swore an oath to administer his office faithfully. If he committed a wrong, a remedy could be had. The important point here is that the role of executor developed from early sources as the principal feature of English succession law. By the development of truly modern probate practice in the early 18th century, appointing and supervising the executor fell to the ecclesiastical courts in parallel with Chancery. In many ways, the resolution of the issue in this appeal lies in understanding that the admission of documents to probate and the appointment of the executor (with fiduciary duties) is of critical importance in the process of administering a decedent's estate. Hence, the need to have regard for the quality of the probate and the rule that all relevant documents propounded must be read together before admitting any of them are admitted to probate so that the executor's duties can be performed.

Substantive succession law matured into a complete model by the 17th century. With the 1857 reforms abolishing the jurisdiction of the ecclesiastical courts in testamentary

matters and creating the Probate Court, a single secular English court dealt with wills disposing of property of any sort and with complete jurisdiction over questions of probate. With the English Reformation in the 16th century, English common law and statutory law entered into a period of substantial development. For the law of succession, this meant the enactment of a number of statutes that modernized the law substantially. The *Statute of Wills* (1540) changed the law of succession dramatically in that it allowed land to pass by a testamentary instrument. The *Statute of Distributions* (1670) set out the features of the intestacy rules. The *Statute of Frauds* (1677) dealt with transactions of various types and required writing either for the transaction to be effective or writing for the transaction to be enforceable. The use of nuncupative (oral) wills, common and conventional in earlier
centuries, was thus cut back dramatically.

(b) The Development of Modern Probate Practice

The ecclesiastical courts had jurisdiction in testamentary causes, both in respect of contentious and non-contentious matters. Originally the ultimate appeal was to the Pope in Rome. After the English Reformation in the 16th century, appeals were to secular courts and modern probate practice took shape in earnest. The ecclesiastical courts were tied to the three levels of principal Church officials: the Archdeacon's Courts, the Bishop's Courts, and the Archbishop's Courts. Conventional non contentious ('common form') probate questions were normally resolved in the Consistory Court of the Bishop (before an 'ordinary' Bishop or his surrogate – hence 'surrogate courts') in whose diocese the decedent was resident. The Archiepiscopal Courts were divided into five separate courts: Audience, Faculties, Peculiars, Arches, and the Prerogative Court. The Prerogative Court had principal jurisdiction over testamentary matters. The Prerogative Court dealt with more complex cases (based on the size of the estate or the location of its assets across multiple dioceses) in common form and contentious proceedings. As today, non-contentious proceedings in these courts were dealt with in summary proceedings based on written materials. A professional versed in canon law (a proctor) practiced in such courts, in the manner of a solicitor. Each court had a registrar (who was a public notary) and a scribe (which entered the results in Act books which contained the name of the deceased, the date of the grant of probate, the identity of the executor, the inventory of goods, claims, and the fees charged). In contentious proceedings, an advocate acted for the disputants. Contentious proceedings were normally held at Doctors' Commons (from the 'doctors of civil law' who practiced in the Prerogative Court and the Court of Arches 'commoning together' as with the other colleges) since about 1511.

The limitations on the ecclesiastical courts' jurisdiction, the intrusion of the common law courts through Writs of Prohibition, and the lack of power of common law courts to order injunctive relief all worked to reform the legal machinery for granting probate. Eventually, in 1857, the jurisdiction of the ecclesiastical court was abolished and the Court of Probate established. As succession law gained a more conventional form in the 18th century, probate practice became more conventional. The ecclesiastical courts operated in the manner of common law courts. The difficulties in administering a system in which three separate courts had a role resulted in a move for reform. A number of commissions of inquiry began to look at the court structure in England from about the 1830s. As a result of the various committees' recommendations, the English Court of Probate was created in 1857. In 1875, the English Probate Court was transferred to the Probate, Divorce and Admiralty Division of the High Court of Judicature pursuant to the

Supreme Court of Judicature Act 1875, 38 & 9 Vict., c. 77. Thereafter, jurisdiction over probate was transferred to the Family Division and more lately to the Chancery Division within the High Court.

In Ontario, substantive English law was received into Upper Canada by the Statutes of Upper Canada 1792, 32 Geo. III, c. 1. The Probate Court was created in 1793 and remained the court having jurisdiction over probate until the 1858 creation of the Surrogate Court; Surrogate Courts Act of 1858, 22 Vict., c.93. Thus the English reforms that created the Probate Court had local effect in the various colonies, including Ontario. Today, of course, jurisdiction rests with the Ontario Superior Court of Justice.

Key points:

- In the 19th century, there still was a strict division between certain types of courts – mainly courts of common law, and, courts in which the judge exercised an equitable jurisdiction. In England, this was manifested in the law of succession through 'probate courts' (courts of law which were part of the High Court after the 1857 reforms) and 'courts of construction' (Chancery). These distinctions were received in post-confederation common law Canada.

- The probate courts would examine the Will for compliance with formalities and inquire into whether a final and settled intention to dispose of property through the testamentary instrument was evident on its face; if so, the Will was admitted to probate. At common law, extrinsic evidence was not admissible in respect of the Will. The court would interpret it on its face.

- Chancery judges (the 'court of construction') were bound to accept the Will in the form in which it emerged from probate (unless it could be set aside based on fraud, mistake, or undue influence), but could admit evidence to construe ambiguous terms in the Will. The court of construction could also ignore an unnecessary or inaccurate portion of a description in the Will, or infer a correction of a drafting error by implication from the text of the Will.

- Thus, whereas 'interpretation' of the words used in the Will to ascertain the true intention of the testator was a matter that might not admit of evidence, 'construction' of the words in the Will could be informed by the use of evidence in the context of the established rules of construction to presume the probable intention of the testator.

Please note that while Ontario used to retain the distinction between probate courts that would admit the will to probate and those that would supervise the administration of the estate and the executor, those courts' differing jurisdictions are now fused in the Superior Court of Justice.

PROCEDURE: RULE 74 AND RULE 75 OF THE RULES OF CIVIL PROCEDURE

Please look at Rules 74 and 75 of the Rules of Civil Procedure which provide the procedure for obtaining various types of court orders.

ORDERS FOR ASSISTANCE

Kinds of Orders
74.15 (1) In addition to a motion under section 9 of the Estates Act, **any person who appears to have a financial interest in an estate** may move,

Order to Accept or Refuse Appointment
(a) for an order (Form 74.36) requiring any person to accept or refuse an appointment as an estate trustee with a will;
(b) for an order (Form 74.37) requiring any person to accept or refuse an appointment as an estate trustee without a will;

Order to Consent or Object to Proposed Appointment
(c) for an order (Form 74.38) requiring any person to consent or object to a proposed appointment of an estate trustee with or without a will;

Order to File Statement of Assets of the Estate
(d) for an order (Form 74.39) requiring an estate trustee to file with the court a statement of the nature and value, at the date of death, of each of the assets of the estate to be administered by the estate trustee;

Order for Further Particulars
(e) after receiving the statement described in clause (d), for an order for further particulars by supplementary affidavit or otherwise as the court directs;

Order to Beneficiary Witness
(f) for an order (Form 74.40) requiring a beneficiary or the spouse of a beneficiary who witnessed the will or codicil, or who signed the will or codicil for the testator, to satisfy the court that the beneficiary or spouse did not exercise improper or undue influence on the testator;

Order to Former Spouse
(g) for an order (Form 74.41) requiring a former spouse of the deceased to take part in a determination under subsection 17 (2) of the Succession Law Reform Act of the validity of the appointment of the former spouse as estate trustee, a devise or bequest of a beneficial interest to the former spouse or the conferring of a general or special power of appointment on him or her;

Order to Pass Accounts
(h) for an order (Form 74.42) requiring an estate trustee to pass accounts; an

Order for Other Matters
(i) for an order providing for any other matter that the court directs.

APPLICATION OR MOTION FOR DIRECTIONS

75.06 (1) Any person who appears to have a financial interest in an estate may apply for directions, or move for directions in another proceeding under this rule, as to the procedure for bringing any matter before the court.

Service
(2) An application for directions (Form 75.5) or motion for directions (Form 75.6) shall be served on all persons appearing to have a financial interest in the estate, or as the court directs, at least 10 days before the hearing of the application or motion.

Order
(3) On an application or motion for directions, the court may direct, (a) the issues to be decided; (b) who are parties, who is plaintiff and defendant and who is submitting rights to the court; (c) who shall be served with the order for directions, and the method and times of service; (d) procedures for bringing the matter before the court in a summary fashion, where appropriate; (e) that the plaintiff file and serve a statement of claim (Form 75.7); (f) that an estate trustee be appointed during litigation, and file such security as the court directs; (f.1) that a mediation session be conducted under rule 75.1; (g) such other procedures as are just.

(4) An order giving directions shall be in Form 75.8 or 75.9.

RECTIFICATION (GENERALLY)

A mistake that is induced by fraud can result in a disposition being set aside. An innocent mistake, on the other hand, might be capable of rectification. We will return to this point when we consider rectification as part of the interpretation of the Will and the admissibility of extrinsic evidence at which point we will consider the judgment of the Court of Appeal in **Rondel v. Robinson Estate, 2011 ONCA 493**.

The jurisdiction of the Court to rectify a Will proceeds from the same considerations that guide the rectification of legal instruments generally. Thus, Brown J. recently explained in **Canada (Attorney General) v. Fairmont Hotels Inc., 2016 SCC 56 (S.C.C.)**:

> **A. General Principles and Operation of Rectification**
>
> [12] If by mistake a legal instrument does not accord with the true agreement it was intended to record — because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement — a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a

discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions (Swan and Adamski, at §8.229).

[13] Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is "a potent remedy" (Snell's Equity (33rd ed. 2015), by J. McGhee, at pp. 417-18). It must, as this Court has repeatedly stated (Shafron v. KRG Insurance Brokers (Western) Inc., 2009 SCC 6 (CanLII), [2009] 1 S.C.R. 157, at para. 56, citing Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., 2002 SCC 19 (CanLII), [2002] 1 S.C.R. 678, at para. 31), be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts": Performance Industries, at para. 31. It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement (Swan and Adamski, at §8.229). It is not concerned with mistakes merely in the making of that antecedent agreement: E. Peel, The Law of Contract (14th ed. 2015), at para. 8-059; Mackenzie v. Coulson (1869), L.R. 8 Eq. 368, at p. 375 ("Courts of Equity do not rectify contracts; they may and do rectify instruments"). In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend not the instrument recording their agreement, but the agreement itself. More to the point of this appeal, and as this Court said in Performance Industries (at para. 31), "[t]he court's task in a rectification case is . . . to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other".

[14] Beyond these general guides, the nature of the mistake must be accounted for: Swan and Adamski, at §8.233. Two types of error may support a grant of rectification. The first arises when both parties subscribe to an instrument under a common mistake that it accurately records the terms of their antecedent agreement. In such a case, an order for rectification is predicated upon the applicant showing that the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement: Ship M. F. Whalen v. Pointe Anne Quarries Ltd. (1921), 1921 CanLII 57 (SCC), 63 S.C.R. 109, at p. 126; McInnes, at p. 820; Snell's Equity, at p. 424; Hanbury and Martin Modern Equity (20th ed. 2015), by J. Glister and J. Lee, at pp. 848-49; Hart v. Boutilier (1916), 1916 CanLII 631 (SCC), 56 D.L.R. 620 (S.C.C.), at p. 622.

[15] In Performance Industries (at para. 31) and again in Shafron (at para. 53), this Court affirmed that rectification is also available where the claimed mistake is unilateral — either because the instrument formalizes a unilateral act (such as the creation of a trust), or where (as in Performance Industries and Shafron) the instrument was intended to record an agreement between parties, but one party says that the instrument does not accurately do so, while the other party says it does. In Performance

> Industries (at para. 31), "certain demanding preconditions" were added to rectify a putative unilateral mistake: specifically, that the party resisting rectification knew or ought to have known about the mistake; and that permitting that party to take advantage of the mistake would amount to "fraud or the equivalent of fraud" (para. 38).

Obviously there are significant differences between a contract and a Will, and the jurisdiction to rectify errors in Wills is somewhat more limited. The most common types of errors are drafting error by the solicitor who drew the Will.

Re Morris
[1970] 1 All ER 1057 (Eng. Prob. Ct); cb, p.253

Here the testatrix glanced at or read at least part of her second Will before executing it. She instructed her solicitor to prepare it to alter her original Will, but the second text contained mistakes (it revoked a whole clause containing various dispositions rather than a specific disposition in a sub-clause) – it was held that evidence was admissible to prove the error and to rectify the mistake notwithstanding that the testatrix appeared to have read the Will at least in part.

Latey J approved the words of Sachs J in *Crerar v Crerar* (unreported, 1956, Ch) who said of the method to be followed by the Court:

> . . . to consider all the relevant evidence available and then, drawing such inferences, as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition. **The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption of law.**

Latey J then said:

> **The testatrix was competent, did (as I have found) in a literal, physical sense read the codicil and did duly execute it, and if the rule in *Guardhouse v Blackburn* survived, I should be bound to find that she knew and approved of the contents of it. But that rule does not survive in any shape or form and on all the evidence I have no doubt at all that she did not in fact know and approve its contents.**

In *Brander*, the mistake was in executing the wrong Will:

Re Brander
[1952] 4 DLR 688 (BCSC); cb, p.259

Here a husband and wife executed mutual Wills but signed the wrong ones; notwithstanding, the Will was admitted by rectifying the mistake. Contra, *Re Meyer* [1908] P. 353 (Eng. Prob.)

In **Re Malichen Estate (1994), 6 E.T.R. (2d) 217 (Ont Gen Div); cb, p.260, fn 87** a similar result was achieved. Salhany J said:

> 3 Mr. Logan was helpful in providing me with a number of authorities in Saskatchewan, Manitoba, British Columbia and Alberta where an identical situation occurred. There appeared to have been no reported decisions of a similar nature in Ontario. In *Re Bohachewski* (1967), 60 W.W.R. 635 (Sask. Surr. Ct.), R*e Brander Estate*, [1952] 4 D.L.R. 688 (B.C. S.C.), *Re Thorleifson* (1954), 13 W.W.R. 515 (Man. Surr. Ct.) and *Re Knott Estate* (1959), 27 W.W.R. 382 (Alta. Dist. Ct.), wills were admitted to probate where the same error occurred. There does not seem to be anything in the Ontario Succession Law Reform Act or the Estates Act which prohibits the court from following these decisions in correcting the will and admitting it to probate in the form obviously intended by the testator.
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> 4 Accordingly, I am ordering the will signed by George Stephen Malichen to be admitted to probate with the following changes…