Wills & Estates
Winter Term 2018

Lecture Notes – No. 9

INTERPRETATION OF WILLS

Overview: 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.

The Jurisprudence

A Will is a private document (like a contract or trust) whose terms may require clarification. Where a Court is called upon to interpret the words of the Will, the proceedings commence with an Application under the *Trustee Act*, section 60, to seek the Court's advice and direction:

> A trustee, guardian or personal representative may, without the institution of an action, apply to the Superior Court of Justice for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property or the assets of a ward or a testator or intestate.

One starts from the proposition that what the law seeks to do is to enforce the intention of the testator or testatrix and where the document displays a patent or latent defect - an ambiguity, or a conflict of terms, or perhaps an error - **'ascertaining the testator's true intention is the real and only purpose of the whole exercise [of interpretation];' *Haidl v. Sacher* (1980), 106 D.L.R. (3rd) 360, 368 (Sask. C.A.); cb, p.453, 479-480**.

There are, however, institutional and systemic values that are important as well. We wish to discourage litigation, provide for certainty and predictability in the application of rules, promote competent drafting, and remove impediments to the administration of estates.

Solicitor's Notes and Privilege

Where a question of interpretation arises, it may be placed before the Court as a question in respect of what the Estate Trustee should do in giving effect to the Will, and, the Court may assist the parties by ordering that the relevant evidence that might assist in the determination of the question (e.g. the solicitor's notes who drafted the Will) be made available. Such an Order for producing notes would read:

> THIS COURT ORDERS that the Estate Trustee [or Estate Trustee During Litigation] be and is hereby entitled to compel production of all solicitor records, notes and files relating to [the deceased] from any solicitor or law firm in possession of such relevant legal records in the same manner and to the same extent as [the deceased] would have been able, if he was alive, and that all productions received be produced to the other parties on request. The charges for the production of the records and files shall be paid from the Estate by the Estate Trustee [or Estate Trustee During Litigation], and the final determination as to payment of such cost and expenses shall be reserved to the Trial Judge.

One should note that the use of solicitor's notes in a Will challenge or in respect of a proceeding by which the Will is interpreted or rectified may allow for the notes to be admitted into evidence and that such a use is an exception to privilege; *Geffen v. Goodman Estate*, [1991] 2 SCR 353, 1991 CanLII 69 (S.C.C.).

Principles of Interpretation

In essence the use of settled rules of construction in preference to litigating every dispute as to ambiguity is an attempt to strike a pragmatic balance between flexibility and certainty in the approach to doctrine. This is true whether the private document at issue is a contract or a Will. A more certain approach to construction produces higher predictability in the resolution of disputes and thus the avoidance of litigation; a more flexible approach may yield a better result where the subjective intention of the testator can be discerned, but at great cost. Sometimes the courts are criticized as applying the rules of construction too strictly and apparently arbitrary manner. At least one judge warned of the 'ghosts of dissatisfied testators... who... wait on the other bank of the Styx to receive the judicial personages who have misconstrued their wills;' see **Perrin v Morgan [1943] 1 AC 399, 415; cb, p.452.** The modern tendency is to take a more pragmatic approach.

Please note that where a solicitor draws the Will – a person who is presumed to be an expert in the law who can be presumed to know the technical meaning of technical terms and the well settled rules of construction - the court will almost certainly apply the rules of construction strictly.

***Some* General Principles of Construction**

Rule	Explanation
The words in question are to be construed in the context of the whole will. Identical words have the same meaning.	The entire will should be read to determine the testator's intention. Thus, it may be clear that the gift in question is A rather than B property, given that B is referred to elsewhere in a manner that would be inconsistent with its identification as the property in question.
Effect is to be given to all words.	All words should be presumed to have meaning unless, taken as a whole, the word in question is superfluous or without meaning.
The 'ejusdem generis' rule.	'of the same kind' If general words are preceded by a list of specific things, the general words are construed to relate to the same genus, class or type of things.
The paramount intention of the testator is to be preferred over an interpretation of a specific intention that appears inconsistent.	An interpretation of the ambiguous words should not result in a construction which makes another part of the will meaningless where a reasonable alternative reading is available (for example, a restrictive interpretation) - the specific intent should be read as to preserve the paramount intent.
'The Golden Rule': The court favours an interpretation that does not lead to an intestacy.	Unless the testator clearly intended a partial intestacy, the court presumes against such a result – particularly where the whole of the estate or substantial property would be distributed on the basis of the intestacy rules.

Perrin v Morgan
[1943] 1 AC 399, 415 (H.L.); cb, p.464

The testatrix drew her own Will without legal assistance, and in it directed that 'all moneys of which I die possessed of shall be shared by my nephews and nieces now living.' On her death, her estate contained, inter alia, money on deposit (£689) and investments (£32,783) as well as other personal property. The issue was the meaning of the term 'money'.

Per Lord Simon LC:

> My Lords, the fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case - what are the "expressed intentions" of the testator. In the case of an ordinary English word like "money," which is not always employed in the same sense, I can see no possible justification for fixing on it, as the result of a series of judicial decisions about a series of different wills, a cast-iron meaning which must not be departed from unless special circumstances exist, with the result that this special meaning must be presumed to be the meaning of every testator in every case unless the contrary is shown. I agree, of course, that, if a word has only one natural meaning, it is right to attribute that meaning to the word when used in a will unless the context or other circumstances which may be properly considered show that an unusual meaning is intended, but the word "money" has not got one natural or usual meaning. It has several meanings, each of which in appropriate circumstances may be regarded as natural. In its original sense, which is also its narrowest sense, the word means "coin." Moneta was an appellation of Juno, and the Temple of Moneta at Rome was the mint. Phrases like "false money" or "clipped money" show the original use in English, but the conception very quickly broadens into the equivalent of "cash" of any sort. The question: "Have you any money in your purse?" refers presumably to bank notes or Treasury notes, as well as to shillings and pence. A further extension would include not only coin and currency in the possession of an individual, but debts owing to him, and cheques which he could pay into his banking account, or postal orders, or the like. Again, going further, it is a matter of common speech to refer to one's "money at the bank," although in a stricter sense the bank is not holding one's own money and what one possesses is a chose in action which represents the right to require the bank to pay out sums held at the call of its customer. Sums on deposit, whether with a bank or otherwise, may be included by a further extension, but this is by no means the limit to the senses in which the word "money" is frequently and quite naturally used in English speech. The statement: "I have my money invested on mortgage, or in debentures, or in stocks and shares, or in savings certificates," is not an illegitimate use of the word "money" on which the courts are bound to frown, though it is a great extension from its original meaning to interpret it as covering securities, and, in considering the various meanings of the word "money" in common speech, one must go even further, as any dictionary will show. The word may be used to cover the whole of an individual's personal property - sometimes, indeed, all of a person's property, whether real or personal. "What has he done with his money?" may well be an inquiry as to the general contents of a rich man's will. Horace's satire at the expense of the fortune-hunter who attached himself to childless Roman matrons, has its modern equivalent in the saying: "It's her money he's after." When St. Paul wrote to Timothy that the love of money is the root of all evil, he was not warning him of the risks attaching to one particular kind of wealth, but was pointing to the dangers of avarice in general. When Tennyson's Northern Farmer counselled his son not to marry for money, but to go where money is, he was not excluding the

> attractiveness of private property in land. These wider meanings of "money" are referred to in some of the reported cases as "popular" meanings, in contrast to the "legal" meaning of the term, but for the purpose of construing a will, and especially a home-made will, a popular meaning may be the more important of the two. The circumstance that a skilled draftsman would avoid the use of so ambiguous a word only confirms the view that, when it is used in a will, the popular as opposed to the technical use of the word "money" may be important. I protest against the idea that, in interpreting the language of a will, there can be some fixed meaning of the word "money," which the courts must adopt as being the "legal" meaning as opposed to the "popular" meaning. The proper meaning is the correct meaning in the case of the particular will, and there is no necessary opposition between that meaning and the popular meaning. The duty of the court, in the case of an ordinary English word which has several quite usual meanings which differ from one another is not to assume that one out of several meanings holds the field as the correct meaning until it is ousted by some other meaning regarded as "non-legal," but to ascertain without prejudice as between various usual meanings which is the correct interpretation of the particular document.

Koziarski v. Sullivan
2017 ONSC 2704 (Ont. S.C.J.)

Like *Spence v. BMO Trust Company*, this case raises the question of the Court's ability to interfere with the operation of a Will on grounds of public policy. In the Spence case it was racial discrimination that was at issue. Here it was an outmoded and artificial interpretation of the word "issue" in a Will that does not align with contemporary social policy respecting family structures.

The facts in this case are simple. A 1977 Will provided the following residuary bequest: "[t]o divide the remainder of my estate equally among such of my children as shall be living at the time of my death; provided that if any of my children shall predecease me, leaving issue him or her surviving, such issue shall take in equal shares *per stirpes* the share that such deceased child would have taken if living." The *Succession Law Reform Act* was enacted in 1978 and provided that "a reference to a person in terms of a relationship to another person determined by blood or marriage shall be deemed to include a person who comes within the description despite the fact that he or she or any other person through whom the relationship is traced was born outside marriage." This reversed the common law rule that "issue" was restricted to children born to a married couple. The statute, however, did not apply to the Wills made after March 31, 1978. Could the Court allow an "illegitimate" grand-child into the class of "issue" on the basis of policy alone?

Justice Gray held as follows:

> [1] In 1824 Burrough J. said the following about public policy: "it is a very unruly horse, and when once you get astride it you never know where it will carry you": see Richardson v. Mellish (1824), 2 Bing. 229, at p.252; 130 E.R. 294, at p.303.

[2] The dictum of Burrough J. is just as valid today as it was in 1824. That is not to say that judges do not make policy choices – they must make policy choices all the time. However, those policy choices are constrained by decisions of higher courts and, most importantly, by policy choices made by the legislature.

[3] In this case, what is raised is the entitlement of a child born out of wedlock to share in an estate. On one level, the policy choice would appear to be obvious – a child born out of wedlock is just as much the child of his or her parents as a child born to married parents. There should be no reason in principle why such a child should be treated differently. However, in this case the court is confronted with a policy choice that appears to have been made by the legislature that is contrary to the intuitive result.

[4] With a good deal of regret, I hold that in this case the respondent, who was a child born out of wedlock, is not entitled to share in the estate of his grandmother.

…

[63] The conundrum presented by these provisions is apparent: in view of s.1 (4), is it open to the court to apply the presumption spelled out in s.1(3) to wills made before March 31, 1978? With considerable regret, I do not think so.

[64] In the absence of s.1(4), and indeed in the absence of s.1(3), I would have little difficulty in arriving at the same policy choice made by the judges who decided the British Columbia cases. I say that, notwithstanding the authoritative judgment of the Supreme Court of Canada in Millar. One cannot overlook the changes in social norms since the Hill case was decided in 1873, and the Millar case in 1938. For the policy reasons outlined by Laskin C.J.C. in Brule, it makes little sense to construe the word "child" and similar terminology in anything but its ordinary meaning. If the court were free to apply its own notions of public policy, I would have little difficulty construing Jadwiga's will as proposed by Jesse's counsel. While public policy may be an unruly horse, there are times when it can be safely ridden to produce an appropriate result.

[65] However, where policy choices are made by the legislature they must be respected by the courts.

[66] Counsel for Jesse relies on the legislative debates that led up to the enactment of the Succession Law Reform Act in 1978. In my view, those debates actually appear to reflect a deliberate decision to restrict the interpretive change to wills made after March 31, 1978.

[67] When the bill leading to the Act received first reading, it does not appear that the presumption was to apply only to wills made after the effective date of the Act. The Attorney General, the Honourable Mr. Roy McMurtry (as he then was) stated:

By removing the consequences of illegitimacy in inheritance matters, the bill before the House introduces the additional principle of equality between children of a deceased person whether those children were born within or outside marriage.

[68] Prior to second reading of the bill, it appears that there were representations made by a special committee established by the Wills and Trusts Subsection of the Ontario Branch of the Canadian Bar Association. In the course of moving second reading, the Attorney General stated:

Perhaps the most important change that I propose to make at this time is the adoption of the Bar Committee's recommendation concerning s.1. That section would equalize the position of children within or outside marriage for the purposes of estates and would deem all references to a child in a will to include a child born outside the marriage.

Now, the Bar Committee pointed out that there may be many persons who have drawn their wills in reliance on the existing law under which a reference to a child is deemed to include only a child born within marriage. It has been stated that it would put these persons through a great deal of time, trouble and expense to rewrite their wills under the new law. And some of these persons may even, for example, have lost the mental capacity to revise their wills. I should say that I am not convinced, but on balance it perhaps would be fair to restrict the application of s.1 to wills made after the Act comes into force.

[69] It would appear that at the Committee stage, the recommendation of the Bar Committee was accepted, and the bill was amended so that the change in the presumption was to be effective only as of the date the Act came into force, as is
now reflected in section 1(4) of the Act.

[70] The amendment was opposed by the Opposition. Mr. Albert Roy (Lib., Ottawa East) said:

We're dealing here basically with illegitimate children. The wise and honoured members of the committee suggested that should be changed and should apply only to wills made after July 1, 1977.

[71] He also stated:

I think the amendment, as contemplated by the hon. members and as proposed by the Attorney General, is in some ways offensive to the whole package of this new legislation, the family property legislation, the Marriage Act and so on, because you know we seek, in Ontario, after this legislation, to legitimize children born out of wedlock. We proceed further to give some status and some obligations and rights to common-law relationships and children flowing from that type of relationship. Yet under this we may be 50 years down the way where we're still saying that certain illegitimate children will be denied because the wills were made before July 1, 1977.

> [72] Notwithstanding these concerns, the bill was enacted with s.1(4) included, as it now reads. The prediction made by Mr. Roy has come true. While 39 years have elapsed rather than 50, it remains the case that wills made before the effective date of the Act are treated differently than those made after that date.
>
> [73] In my view, to give effect to the argument of Jesse's counsel would to be read s.1(4) out of the *Succession Law Reform Act*. Notwithstanding the clear intention of the legislature that the change in the presumption should apply only to wills made after March 31, 1978, the change in the presumption would apply to all wills, whether made before or after that date. I know of no principle of law that would allow me to read out of the Act a provision that has been duly enacted by the legislature.

Thus the Application Judge held that his hands were tied. The legislative history made it clear that reading down the language of the statute would be improper given the point was clearly before the legislature. I understand that an appeal has been taken to the Court of Appeal.