THE DISCRETE FUNCTIONS OF COURTS OF PROBATE AND CONSTRUCTION[1]

Paper prepared for the

Law Society of Upper Canada
19th Annual Estates and Trusts Summit – Day One
3 November 2016

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[1] This is a somewhat modified version of a paper that I first presented at the STEP Canada 18th Annual Conference, 9-10 June 2016 and that was published in the Conference materials. I am greatly indebted to my colleague, Arieh Bloom, for sharing his research into the issues discussed in this paper with me and for his comments on an early draft of the paper. I am also very much indebted to my colleague, Laura Cardiff, for her very careful editing of the paper. And I am very grateful to the Honourable Maurice Cullity for reading not one, but two drafts of the paper and giving me the benefit of his comments and suggestions. Of course, I bear responsibility for any errors that remain.

1. Introduction

Once upon a time . . . . No gentle reader, with great respect to the Brothers Grimm and other fairy talers, this is not that kind of story, if only because it doesn't end with "and they all lived happily ever after." And yet there are aspects of this story that resemble a fairy tale and recently there have been glimmerings of better times on the horizon. So perhaps you will forgive me for beginning this paper in a rather whimsical way.

Once upon a time in common law Canada there were two separate courts charged with matters testamentary: surrogate courts and the superior court. The jurisdiction of the surrogate courts was to determine whether a document purporting to be a deceased person's will was in fact her last will and, if it concluded that it was, it would grant letters probate. The superior court did have coordinate jurisdiction over probate, but rarely exercised it. Moreover, this jurisdiction was not inherent, but entirely statutory.[2] Its real function was to construe a will that had received its imprimatur from the surrogate court. In other words, it took the will as probated and then, if necessary, determined what it meant.

But all this changed in the late 1900s and early 2000s. During this period, all Canadian common law jurisdictions, except New Brunswick and Nova Scotia, abolished their surrogate courts and transferred the jurisdiction of those courts to their superior courts.[3] In Ontario this happened in 1990.[4] Did this mean that the distinct jurisdiction of the surrogate courts disappeared and was

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2 *Mutrie v. Alexander* (1911), 23 O.L.R. 396 at 401, *per* Middleton J. (H.C.); *Re Weil*, [1961] O.R. 751, 29 D.L.R. (2d) 308, affirmed [1961] O.R. 888, 30 D.L.R. (2d) 91 (C.A.); *Re Deutsch* (1976), 18 O.R. (2d) 357, 82 D.L.R. (3d) 567 (H.C.).

3 New Brunswick and Nova Scotia retain separate probate courts. See *Probate Court Act*, S.N.B. 1982, c. P-17.1, s. 2(1), Probate Court of New Brunswick; *Probate Act*, R.S.N.S. 1989, c. 359, s. 109, courts of probate.

4 By the *Court Reform Statute Law Amendment Act*, S.O. 1989, c. 56, s. 48(1). The Act came into force on 1 September 1990. Section 48 did retain some of the provisions of the former *Surrogate Courts Act*, R.S.O. 1980, c. 491 and s. 48(24) renamed these remnants the *Estates Act*.

merged into the jurisdiction of the superior court? There are comments and assertions in a number of cases suggesting that this is what happened.

Fortunately, as I shall point out, recent cases have served to correct these erroneous views in large measure. Nonetheless, I think it important to explore why the cases came to this conclusion and to make sure that it does not happen again. Seneca's aphorism, spoken some 2000 years ago is apt: *Errare humanum est, perseverare autem diabolicum*, that is, to err is human; to persist [in committing the same errors] is of the devil. The burden of this paper is to affirm that the superior court has two discrete roles today, a probate role and a construction role and those two roles must be kept distinct. If one keeps that in mind, one is less likely to make the same errors again and again.

The statute governing the superior court is the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The relevant statutes in the other provinces are:

AB: *Judicature Act*, R.S.A. 2000, c. J-2, ss. 2(2), 6(1), Court of Queen's Bench. Since 31 March 2001 the court also exercises surrogate jurisdiction, the *Surrogate Court Act*, R.S.A. 2000, c. S-25, having been repealed by R.S.A. 2000, c. 16 (Supp.), s. 37.

BC: *Supreme Court Act*, R.S.B.C. 1996, c. 443, s. 9, Supreme Court of British Columbia; and see *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, Part 6, Administration of Estates.

MB: *Court of Queen's Bench Act*, C.C.S.M., c. C280, s. 32, Court of Queen's Bench; *Court of Queen's Bench Surrogate Practice Act,* R.S.M. 1987, c. C290, s. 6.

NB: *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 9(1), Court of Queen's Bench of New Brunswick; *Probate Court Act*, S.N.B. 1982, c. P-17.1, s. 2(1), Probate Court of New Brunswick.

NL: *Judicature Act*, R.S.N.L. 1990, c. J-4, s. 3, Supreme Court of Newfoundland; Part VI confers jurisdiction over probate and administration on the trial division of this court.

NU: *Judicature Act*, R.S.N.W.T. (Nu.) 1988, c. J-1, ss. 3, 9, 10, Nunavut Court of Justice.

NT: *Judicature Act*, R.S.N.W.T. 1988, c. J-1, ss. 3, 9, 10, Supreme Court of the Northwest Territories.

NS: *Judicature Act*, R.S.N.S. 1989, c. 240, s. 4, Supreme Court of Nova Scotia; *Probate Act*, R.S.N.S. 1989, c. 359, s.109, courts of probate.

PE: *Judicature Act*, R.S.P.E.I. 1988, c. J-2.1, s. 8(1), Supreme Court of Prince Edward Island; s. 13 confers jurisdiction upon the Estates Division to deal with matters vested in it by the *Probate Act*, R.S.P.E.I. 1988, c. P-21, ss. 1, 2.

SK: *Queen's Bench Act*, S.S. 1998, c. Q-1.01, s. 9, Court of Queen's Bench for Saskatchewan; *Queen's Bench (Surrogate Procedures) Amendment Act*, S.S. 1992, c. 62, repealed the *Surrogate Court Act*, R.S.S. 1978, c. S-66, and conferred probate jurisdiction on the Court of Queen's Bench.

YT: *Supreme Court Act*, R.S.Y. 2002, c. 211, s. 4, Supreme Court of the Yukon Territory.

In the course of the paper I shall make critical remarks about the previous cases. It gives me no pleasure to do so and I am very mindful of my obligation to respect the judges for their office. But it is necessary to be forthright in correcting what I think is a serious misconception about the two roles of the court.

But there is more. It is not simply the judges who have taken a wrong turn. First and foremost it is counsel who, like lost sheep, have erred and strayed from orthodox ways[5] and failed to assist the courts correctly. In our legal system we maintain the courteous *façade* that judges know the law. And so one sometimes still hears the polite remark in court: "As your Honour knows . . ." In fact, in very many cases her Honour does not know; nor can she be expected to know all the law. She relies on able counsel to quote the relevant law to her, so that she can make a considered decision on the issues presented by the case. The legal profession is said to be a learned profession.[6] But that means that lawyers must ensure that they know the law, so that they can properly assist the court. When one reads some of the cases I mentioned, one wonders whether counsel did any research at all, or whether they were aware of the history of the area of law in which they are practicing. In his *Summa Theologiae*, Thomas Aquinas described this as *ignorantia affectata*, that is, a wilful lack of knowledge that cannot be excused, but is inculpatory.[7] It may have been acceptable for Henry Ford to declare that history is bunk, but it will not do for the legal profession, for the law is founded in history. For lawyers, George

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5 *Cf.* Isa. 53:6; *Book of Common Prayer*, General Confession.

6 See *Incorporated Council of Law Reporting for England and Wales v. Attorney-General*, [1972] Ch. 73 (C.A.) at 92, per Sachs L.J., and at 101, per Buckley L.J.

7 Aquinas was not the only person who railed against ignorance. So did Edward Coke. In the Preface to the second volume of his Reports, published in 1602, he notes that most of the problems that come before the court are the result of the work of amateur conveyancers, such as "parsons, scriveners and such like imperites." *Imperite* is an old word, largely fallen out of use. It serves as both an adjective and a noun and means "unskilled, ignorant" and a person of that description. Coke was knighted in 1603, appointed Chief Justice of the Common Pleas in 1606, and transferred to the King's Bench as Chief Justice in 1613. However, he ran afoul of King James I, who removed him from the latter position in 1616. See Theodore F.T. Plucknett, "Genesis of Coke's Reports" (1942), 27 Cornell L. Rev. 190 at 205 and *passim*.

Shakespeare also excoriated ignorance. Thus, for example, he has Lord Say declare: "Ignorance is the curse of God; Knowledge is the wing wherewith we fly to heaven." *King Henry VI, Part II*, Act 4, Scene 7. So also in *Twelfth Night*, Act 4, Scene 2, the Fool exclaims: "there is no darkness but ignorance." *Cf.* Eph. 4:18; 1 Pet. 1:14, 2:15.

Santayana's dictum: "Those who cannot remember the past are condemned to repeat it,"[8] is an apt reminder that we neglect history at our peril. Too often lawyers demonstrate in court that they have not done their research.[9] And so, to adapt an old exhortation, the profession is destroyed for lack of knowledge.[10]

To be fair, the problem is greatly exacerbated by the fact that virtually every case can be found online. And so the profession is drowned in data. But the data are mostly dross. Still, if I may be forgiven a mixed metaphor, it is the lawyer's duty to winnow the data, so as to separate the wheat from the chaff and make submissions accordingly.

But I do not wish to be understood as tarring all lawyers with the same brush. There are also cases in which counsel provided the law to the court in a very clear and comprehensive manner in their facta, but the court failed to understand the argument presented.[11]

Technically, we should now speak of the superior court exercising its probate and construction functions, but for the sake of convenience I shall refer promiscuously to courts of probate and construction and to the court exercising its probate and construction functions. I eschew the cumbersome expression mandated by the Ontario Rules,[12] "grant of a certificate of appointment of estate trustee" in favour of the more economical and convenient term, "grant of probate."[13]

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8 *The Life of Reason: or The Phases of Human Progress* (1905), vol., I, chapter XII.

9 The following is an example. Lawyers and judges often call an attorney a "power of attorney". In another context I recently pointed out that this is an egregious solecism. A power of attorney is a document that appoints an attorney and endows her with certain powers. To call the attorney a "power of attorney" calls to mind the ludicrous image of a document with arms and legs and a silly grin on its face. Surely only the fecund and fevered imagination of a Mary Wollstonecraft Shelley, who conceived the mad scientist, Victor Frankenstein, could have engendered such a monstrosity? A quick reading of s. 7 of the *Substitute Decisions Act*, S.O. 1992, c. 30 would have informed the lawyers and judges of the correct terminology.

10 Hos. 4:6.

11 See, *e.g.*, *Bermingham v. Bermingham Estate* (2007), 32 E.T.R. (3d) 292 (S.C.J.); and, at the Court of Appeal, *Robinson Estate v. Robinson*, 2010 ONSC 3484 (Belobaba J.), aff'd *sub nom*. *Rondel v. Robinson Estate*, 2011 ONCA 493, 106 O.R. (3d) 321.

12 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rules 74 and 75. These rules replaced the former *Surrogate Court Rules*, R.R.O. 1980, Reg. 925 and came into effect on 1 January 1995. See O. Reg. 484/94.

13 Indeed, Rule 74.01 continues to refer to "probate" and the *Estates Act*, R.S.O. 1990, c. E.21 continues to speak of "probate" throughout.

Except in quotations from cases and texts, I shall also follow the modern practice of using the term "testator" to refer to a person, whether male or female, who has died leaving a will.[14]

I shall cover muchwhat in this paper, for the topic is vast.[15] I do not apologize for that; the subject matter is what it is and is made complex by errors and misconceptions. I include a good bit of history to correct those errors and misconceptions. I shall, however, provide a list of "take-away" points to make the topic more accessible.[16]

2. Origin of Courts of Probate and Their Jurisdiction

2.1 Origin

The law of probate was developed over the centuries in England in the ecclesiastical courts. Its origin was not common law, but canon law.[17] There were a number of such courts,[18] but the most important were the consistory court in each diocese, presided over by the bishop or his surrogate, and the prerogative court that fell under the jurisdiction of the Metropolitan of the ecclesiastical

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[14] It would be good if we could adopt other gender neutral terms too. In another context I recently proposed the adoption of *remainderer* to describe a person who becomes entitled to an interest in property after a preceding life estate. In that respect, I said: "*Remainderman* is clearly no longer appropriate in 2016; the circumlocution, 'the persons entitled to the remainder' is awkward; and one certainly doesn't want to employ the silly *remainder person*, although I have seen it used. Moreover, the suffix *–er* (or *–yer* in some cases) is a very convenient one, with strong Anglo-Saxon antecedents, to convert inanimate objects into animate ones involving human actors, *e.g.*, park/parker, hunt/hunter, law/lawyer, farm/farmer, *etc*. And we already have a well-known cousin of *remainderer* that employs that suffix, namely, *reversioner*. *Quod erat demonstrandum*."

[15] I know, I could instead have chosen a more prosaic or pedestrian word. Or I could have quoted from Lewis Carroll's poem, "The Walrus and the Carpenter" in *Through the Looking Glass and What Alice Found There*:

> "The time has come," the Walrus said,
> "To talk of many things:
> Of shoes—and ships—and sealing wax—
> Of cabbages—and kings—
> And why the sea is boiling hot—
> And whether pigs have wings."

But *muchwhat* is so much more economical and apt. It is a perfectly good Middle English word that is not effete.

[16] See §7, *infra*.

[17] See C.D. Freedman, "Probate Contests and the New Law of Summary Judgment" (2014), 34 E.T.P.J. 199 at 204.

[18] For a description of them see *ibid*., p. 206

province by way of special prerogative. As there were two ecclesiastical provinces in England, Canterbury and York, ecclesiastical jurisdiction was divided between them. The prerogative courts had jurisdiction over larger estates and estates with assets in more than one diocese.[19] A proctor, who was trained in canon law, practiced in non-contentious matters in the ecclesiastical courts, whereas an advocate, or doctor of civil law, represented parties in contentious proceedings.[20]

Originally the ecclesiastical courts had complete jurisdiction over probate and the administration of personal property. However, the common law courts controlled the succession to freehold estates, including the probate of wills of real property. From the latter part of the 16th century onwards the chancery courts acquired jurisdiction over the administration of the assets of a deceased person. They did this, for example, by compelling accounting against executors and giving various kinds of relief to legatees. Eventually, the courts of chancery took over the administration of estates completely and the ecclesiastical courts retained only the right to grant probate and letters of administration.

In England s. 3 of the *Court of Probate Act 1857*[21] took away the jurisdiction of the ecclesiastical courts over probate and administration and s. 4 gave it to the newly established Court of Probate. Section 23 of the Act conferred the same powers upon the court as the Prerogative Court of the Archbishop of Canterbury had. Further, it provided that all duties imposed on Ordinaries or on the Prerogative Court shall be performed by the Court of Probate. The Act also provided that the practice of the court should follow the practice of the Prerogative Court.[22]

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19 There were also other courts, known as royal peculiar, peculiar, and manorial courts that exercised probate jurisdiction. When the *Court of Probate Act 1857*, c. 77, abolished these courts in 1858, it was estimated that there were at least 372 of them. See *Macdonell, Sheard and Hull on Probate Practice*, 3rd ed. by Rodney Hull and Maurice C. Cullity (Toronto: Carswell, 1981), p. 2 ("Macdonnell, 3rd ed."). See also the 4th edition of this text by Rodney Hull and Ian Hull (Toronto: Thomson/Carswell, 1996), p. 2 ("Macdonnell, 4th ed."); and the 5th ed. by Ian M. Hull and Suzanna Popovic-Montag (Toronto: Thomson Reuters/Carswell, 2016), p. 2. The fourth and fifth editions are, perhaps understandably, less detailed in their description of the history of courts of probate. See also Charles Howard Widdifield, *Surrogate Court Practice and Procedure*, 2nd ed. (Toronto: Carswell, 1930), pp. 2ff ("Widdifield").

20 See Freedman, footnote 17, *supra*, at 206.

21 *Court of Probate Act 1857*, footnote 19, *supra*.

22 Widdifield, footnote 19, *supra*, at 4; Macdonnell, 3rd ed., footnote 19, *supra*, at 2; Macdonnell, 4th ed., footnote 19, *supra*, at 2.

The *Supreme Court of Judicature Act 1873*[23] abolished the Court of Probate, transferred jurisdiction over probate matters to the High Court of Justice and assigned those matters to the Probate, Divorce and Admiralty Division of that court. Section 70 provided that the rules in force in the Court of Probate should remain in effect. By the *Land Transfer Act 1897*,[24] the Probate, Divorce and Admiralty Division also acquired jurisdiction over wills of real property.[25]

The *Administration of Justice Act 1970*[26] abolished the Probate, Divorce and Admiralty Division. It transferred contentious probate matters to the Chancery Division and non-contentious matters to the Family Division of the High Court of Justice. This continued under the *Senior Courts Act 1981*.[27]

It is of particular interest that s. 25(1) of the *Senior Courts Act* defines the probate jurisdiction of the High Court as that which it had before the commencement of the Act. That jurisdiction was defined by s. 20 of the *Supreme Court of Judicature (Consolidation) Act 1925*,[28] which stated that the High Court

> shall, in the exercise of its probate jurisdiction, perform all such like duties with respect to the estate of deceased persons as were immediately, before the commencement of the *Court of Probate Act 1857*, to be performed by ordinaries generally, or by the Prerogative Court of Canterbury in respect of probates, administrations and testamentary causes and matters which were at that date within their respective jurisdictions.[29]

This demonstrates that in England the probate jurisdiction of the High Court remains distinct. As we shall see below, the same is true of that jurisdiction in Ontario.

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23 36 & 37 Vict., c. 66, s. 31. The Act was amended by the *Supreme Court of Judicature Act 1875*; 38 and 39 Vict., c. 77.

24 60 & 61 Vict., c. 65, s. 1.

25 Some 13 years after Ontario—see text at footnote 36, *infra*.

26 1970 (U.K.), c. 31, s. 1.

27 C. 54, s. 5. And see *Constitutional Reform Act 2005*, c. 4 (U.K.).

28 C. 49.

29 This provision derived from s. 23 of the *Court of Probate Act*, footnote 19, *supra*. For the definition of "Ordinary," see footnote 33, *infra*. See further *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*, 20th ed. by John Ross Martyn and Nicholas Caddick (London: Sweet & Maxwell, 2013), p. 6. See also Widdifield, footnote 19, *supra*, pp. 3-4; Macdonnell, 3rd ed., footnote 19, *supra*, p. 2; and Macdonnell, 4th ed., *ibid*., p. 4.

As I already mentioned, the ecclesiastical courts were not courts of common law; nor were they courts of equity.[30] They had developed a unique body of law, practice and procedure, and rules of evidence that differed in many respects from those observed in the courts of common law and chancery. Moreover, as I also mentioned above, the ecclesiastical courts were served by a specialized bar. It should be clear from the foregoing discussion that this law and practice did not change with the court mergers just mentioned, but were simply carried forward to the new courts.

In Canada each common law jurisdiction established surrogate (or probate) courts. In Ontario this happened in consequence of the *Property and Civil Rights Act*.[31] It stipulated: "in all matters of controversy relative to Property and Civil Rights resort shall be had to the Laws of England as the rule for decision of the same," except as altered or modified by Upper Canada statutes. Those laws were as they existed on 15 October 1792, the date of reception of English law in Upper Canada.

On that date the ecclesiastical courts still had jurisdiction over matters testamentary in England. But it was inconvenient and undesirable to import such courts into Upper Canada, so the Legislature devised a new system. The *Probate and Surrogate Courts Act*[32] established a Court of Probate in the province, presided over by the Governor or Lieutenant Governor who, by virtue of his commission and instructions, was Ordinary of the province.[33] He was given the right to appoint an Official Principal, *i.e.*, judge, and a registrar. In addition, the Act made provision for establishing a surrogate court in each of the several districts then existing in the province, each of which was presided over by a Surrogate.[34] An appeal lay from the surrogate courts to the Court of Probate. The Court of Probate had exclusive jurisdiction over larger estates and estates with assets in two or more districts.

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30 I shall develop this point further in an Excursus in §4, *infra*.

31 S.U.C. 1792, c. 1.

32 S.U.C. 1793, c. 8.

33 The title "Ordinary" normally applied to a bishop or archbishop in the exercise of his judicial powers in ecclesiastical cases but was extended also to the Lieutenant Governor.

34 A "Surrogate" was originally a qualified deputy appointed by a bishop to act for him in the bishop's consistory court. Under the 1793 Act, the surrogates appointed by the Lieutenant Governor were therefore his deputies.

In 1858 the Legislature enacted the *Surrogate Courts Act*.[35] It abolished the old Court of Probate and vested all probate jurisdiction in new surrogate courts established in each county, presided over by the county court judge. These surrogate courts acquired jurisdiction over wills of real property in 1886 by the *Devolution of Estates Act*,[36] which provided that all property of a deceased person would thenceforth vest in the deceased person's personal representative as trustee. This system remained in effect until 1990.

The surrogate courts did not have inherent jurisdiction. They derived their powers entirely from statute (and from what they inherited from the ecclesiastical courts).[37]

The Canadian surrogate courts did, indeed, inherit the unique law and practice of probate from the English ecclesiastical courts and like the ecclesiastical courts, were not courts of common law or equity.[38] The Canadian surrogate courts generally applied the unique system of probate law efficiently and well.[39]

That the surrogate courts inherited the law and practice of probate from the English ecclesiastical courts is evident from the fact that the Lieutenant Governor was commissioned and instructed to serve as Ordinary in the province and that he could appoint a Surrogate to preside over the surrogate courts. Thus, although the ecclesiastical courts were not imported into Upper Canada, their terminology was, at least in part. It is also evident from the early cases. Thus, for example,

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35 S.C. 1858, c. 93. The Act was amended by the *Surrogate Courts Act*, S.C. 1859, c. 16.

36 S.O. 1886, c. 22, s. 4(1). The phrase "as trustee" did not appear in s. 4(1) of the original Act, but was added in the *Devolution of Estates Act*, S.O. 1910, c. 56, s. 3(1). See now *Administration of Estates Act*, R.S.O. 1990, c. E.22, s. 2(1). The effect of the addition, "as trustee," was to render all interests under wills equitable, thereby ensuring that the common law remainder rules could no longer destroy executory interests in wills. See *Re Robson*, [1916] 1 Ch. 116. *Re Crow* (1984), 12 D.L.R. (4th) 415, which holds otherwise, must be regarded as decided *per incuriam*, since *Re Robson* appears not to have been cited to, or considered by the court.

37 *Re Mercer* (1912), 26 O.L.R. 427 at 429, 4 D.L.R. 589, *per* Middleton J. Justice Middleton was a very able judge, whose opinions are still respected. I submit that his opinion on this issue is to be preferred to that of Meredith C.J.C.P. in *Re Wilson and Toronto General Trusts Corp*. (1906), 13 O.L.R. 82 at 88 (C.A.), who reached a different conclusion. O'Driscoll J. followed *Re Mercer* in *Re Huffmon and Breese* (1974), 3 O.R. (2d) 416 (H.C.). It should be noted, however, that Widdifield, footnote 19, *supra*, at 5, note 10, cited *Re Wilson and Toronto General Trusts Corp*. and made no mention of *Re Mercer*.

38 See text at footnote 30, *supra*.

39 See also Freedman, footnote 17, *supra*, at 202ff.

in *Grant v. Great Western Railway Co.*,[40] Draper C.J. considered the respective jurisdictions of the Court of Probate and the surrogate courts under the *Probate and Surrogate Courts Act*.[41] In a learned judgment he concluded that the Legislature intended the law of probate as administered by the ecclesiastical court in England to be the law administered by the courts created by the Act of 1793. In *Cunnington v. Cunnington*,[42] Moss J.A. followed the *Grant* case, stating:

> The surrogate courts of the Province are invested with the authority and jurisdiction over executors and administrators . . . conferred in England on the Ordinary under 21 Henry VIII, c. 5, except in so far as the same may have been revoked by subsequent legislation or rules.

Similarly, in *Re Hiltz*[43] Mowat V.C. followed the practice of the ecclesiastical courts in a case arising in a surrogate court.[44]

Moreover, until 1978, Rule 90 of the *Surrogate Court Regulations*[45] provided:

> Where no provision is made in these rules or in the rules of the Supreme Court and no analogy can be found therein, the practice shall be as in the Probate Divorce and Admiralty Division of the High Court of Justice in England.

As I noted above,[46] that was the same as the practice in the ecclesiastical courts. There seems to be no record of the reason why this rule was repealed,[47] but one may surmise that it was thought no longer necessary, since everyone knew what the law and practice in the surrogate courts were and where they originated.[48]

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40 (1858), 7 U.C.C.P. 438, affirmed 5 U.C.L.J. 210 (C.A.).

41 Footnote 32, *supra*.

42 (1901), 2 O.R. 511 at 518 (C.A.)

43 (1877), 1 Chy. Ch. 386.

44 See also Macdonnell, 3rd ed., footnote 19, *supra*, pp. 4-5.

45 R.R.O. 1970, Reg. 806.

46 Text at footnote 29, *supra*.

47 By O. Reg. 143/1978, which revised the *Surrogate Court Rules* and did not retain Rule 90.

48 See further Macdonnell, 3rd ed., footnote 19, *supra*, p. 18.

2.2 Jurisdiction

The jurisdiction of courts of probate was to determine that a person had died and whether the document or documents presented to it constituted the person's will.[49] If the will appeared to comply with the statutory requirements of age and formalities and looked to be unexceptional on its face, probate in common form would readily be granted as an administrative matter. However, the court would try issues such as compliance with formalities, capacity, undue influence and fraud, and knowledge and approval of the contents, if interested persons raised them. If these were resolved in favour of the will, the court would grant probate in solemn form, or probate *per testes*. Other issues might arise as well, such proof of death and proof of the contents of a lost will.

In the process of resolving these various issues, the court of probate would apply its own rules of admissibility of evidence. As distinct from courts of construction, courts of probate had wide latitude in admitting evidence. They could admit not only evidence of surrounding circumstances, but also direct evidence of the testator's intention, including hearsay evidence. Hearsay evidence is often admitted, for example, when determining whether words that conflict with the testator's intention should be deleted from the will. Such evidence may consist of affidavits provided by family members and the solicitor who drafted the will, or of the recollections and notes of the solicitor, or all of these. Indeed, hearsay evidence is often the only evidence available to prove the contents of a lost will. Courts of probate also have a limited jurisdiction to construe the will. Their role in this respect is not to determine the meaning of the will, but to determine whether the words of the will agree with the testator's intention.[50]

Justice Cullity explained the basis of the jurisdiction of the courts of probate as follows:[51]

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[49] Of course, the courts also had jurisdiction over intestate estates, but that jurisdiction is not relevant to the current discussion.

[50] For this description of the jurisdiction of the court of probate I have made grateful use of the excellent comment of the Honourable Maurice Cullity, "Rectification of Wills–A Comment on the *Robinson* Case" (2012), 31 E.T.P.J. 127. See especially pp. 130 and 135-36. The case in question is *Robinson Estate v. Robinson*, footnote 11, *supra*. In my opinion, this comment should be required reading for all persons engaged in estate litigation in Ontario.

[51] *Otis v. Otis*, 2004 CanLII 311, 7 E.T.R. (3d) 211. This case should also be required reading. See also *Ettorre v. Ettorre Estate*, [2004] O.J. No. 3646, 11 E.T.R. (3d) 208 at para. 41, another decision of Cullity J.

[23] In its origins - and throughout its long history - the jurisdiction has always been inquisitorial in the sense that it was the function and obligation of the court "to ascertain, and pronounce, what is the last will or what are the testamentary documents constituting the last will of the testator, which is or are entitled to be admitted to probate".[52]

[24] The role of the court is not simply to adjudicate upon a dispute between parties. The judgment of the court granting probate does not bind only the parties to the proceeding. Unless, and until, it is set aside, it operates *in rem* and can affect the rights of other persons. For this reason and - and perhaps more fundamentally - because the court is understood to have, in a sense, a responsibility to the testator, it would not grant probate in solemn form on an unopposed application without evidence.[53] Nor, as a general rule, would it pronounce against a testamentary instrument solely on the ground that all interested parties consented to probate of an earlier will:

> The consent of parties interested proves nothing; no person's consent can make a will no will.[54]

[25] Consistently with this traditional approach, an English court exercising probate jurisdiction in more modern times dismissed a motion for probate of a will without a codicil that left a substantial bequest to a person other than the executrix and sole beneficiary under the will. The executrix had cited the beneficiary under the codicil to propound it, or show cause why the will should not be admitted to probate without it. The beneficiary did not appear to the citation but it was held that the court could not pass over the codicil without evidence of its invalidity. Cairns J stated:[55]

> I approach the matter with the conviction that it is the duty of a court of probate to give effect, if it can, to the wishes of the testator as expressed in testamentary documents. Sometimes it is impossible to discover the true intention of the testator, because there may be doubts about his testamentary capacity, or about whether he knew and understood the contents of some document propounded, or there may be doubts about the formalities of execution. In such cases a compromise is often reached, and given effect by the court. Where certainty cannot be achieved, it is often better that a will which is prima facie valid should be admitted to probate than that there should be a prolonged investigation into allegations of incapacity or undue influence; and it is sometimes better than a will or, codicil should be pronounced against, where there are good reasons for suspecting its validity, although by a full inquiry it might be possible to remove those suspicions. It is proper that in either of these cases, terms should be agreed (and if all parties are not *sui juris* approved by the court), to take account of the doubts which remain.
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> It is a different matter when a court is invited to pass over a document which is apparently a valid testamentary document, as to which there is no evidence of invalidity, particularly when that document is in the form of a codicil which names no executor, so

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52 *Re Heys*, [1914] P. 192 (P. D.), at page 196.

53 Widdifield, *Surrogate Court Practice and Proceedings* (second edition, 1930), at pages 434 - 5.

54 *Re Watts* (1837), 1 Curteis 594 (Prerog. Ct.), at page 595.

55 *Re Muirhead*, [1971] P. 263 (P.D.A.), at page 265.

> that the executor under the will is the executor under the codicil as well. I should be reluctant to pass over the codicil in such circumstances, unless I were compelled by authority to do so.

[26] The special responsibility of the court is described in rather more emphatic terms in Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate*:[56]

> Where the court is asked to pronounce against what purports to be the last will of the deceased, evidence must be called to show a lack of due execution, incapacity or whatever ground is alleged for the invalidity of the will. It is the duty of the probate court to give effect if it can to the wishes of the testator as expressed in testamentary documents and it should not, therefore, pronounce against what it knows to be the last will in date without making an inquiry as to its validity. A court cannot pronounce against a will by consent and therefore a fortiori cannot pronounce against a will in a case of default without sufficient evidence. Although it has been suggested that where there is a genuine belief in the invalidity of a later will and the action has become undefended the court may pronounce against the will in solemn form without further evidence, this suggestion, based on an extension of the principle in *Morton v. Thorpe*,[57] is, it is submitted, wrong.

[27] Consistently with these principles, the court in *Killick v. Pountney*[58] required evidence before it pronounced against a will on the ground of the undue influence of an executor and beneficiary who failed to appear. The brief report states that the court held that:

> The inquisitorial function of a judge in a contested probate action was to seek the truth as to the testator's true last testament notwithstanding the manoeuvres of the parties, including the silence of a defendant.

However, until quite recently, at least in Ontario, Justice Cullity was the voice of one crying in the wilderness.[59] This was true especially with respect to the power of a court of probate to correct mistakes in a will, as I shall discuss below.

The following quotation from the reasons of Sir J.P. Wilde[60] in the leading case, *Guardhouse v. Blackburn*,[61] is also apt on the issue of the jurisdiction of the court of probate:

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56 (17th edition, 1993), at page 430.

57 (1863), Sw. & Tr. 179.

58 [1999] T.N.L.R. No. 277 (Ch. D.).

59 Isa. 40:3.

60 In passing, I draw attention to the fact that later cases and texts often refer to the judge as Lord Penzance. James Plaisted Wilde, having been knighted in 1860, was not, however, raised to the peerage as Baron Penzance until 1869, some three years after the decision in *Guardhouse v. Blackburn*. It may also be of interest that Lord Penzance was a proponent of the view that William Shakespeare could not have written the plays generally attributed to him, but that Francis Bacon must have been the playwright. In *Re Hopkins' Will Trusts, Naish v. Francis Bacon Society Inc*.,

> I venture to think that the ecclesiastical courts created a difficulty (perpetually recurring) for themselves, when they attempted to adapt the well-known rules as to parol evidence, and patent and latent ambiguities, existing in the courts of law and equity, to cases of probate, to which such rules were not properly applicable. For the question in such cases is not what intention ought to be assigned to the words of a given written paper, but to what extent does a given written paper express the testamentary intentions of the deceased. And the function of the court is not to construe a written paper, the validity of which is admitted, but to gather the necessary facts and to pronounce on the validity of the paper. Although it be right to adhere to the writing, and exclude all parol testimony in the former case, it is clearly impossible, to do so in the latter. Indeed, the Court of Probate, setting about to ascertain the will of the deceased, could not stir a step in the inquiry without some proof beyond the mere writing.

One other aspect of the role of the court of probate that deserves to be underlined is that the court has an obligation not only to the deceased and interested parties, but to society. Society has a real interest in being assured that the will of a deceased person is indeed his last will and that the executors named have power to administer the estate. As Haley J. said in *Oestreich v, Brunnhuber*:[62]

> The procedure leading to a declaration by the court that a will is the last will of a person is more than a matter between the parties. It is a declaration which can be relied on by all the world and, therefore, commands full evidence before the court when any issue of validity has been raised.

Similarly, Professor David Freedman wrote:[63]

> The law [of probate] is an admirably conservative area of law for three good reasons – first we take great care to give effect to the testamentary intentions of the deceased as represented in his or her will where it is possible to do so. Second, we recognize that the estate trustee owes duties to those interested in the estate and must transact with third parties to administer the estate. We wish to ensure that the probate grant as a recognition of *in rem* rights in the estate's assets is not later impeachable to the prejudice of all. Third, we participate in a transnational system that builds on approximation of laws. Thus, Ontario probate grants may be "resealed" in other jurisdictions and foreign grants may be "resealed" in Ontario. This

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[1965] Ch. 669 (Ch. Div.), the court held that a gift in trust for the Society's objects was charitable, since the gift served the advancement of education. The objects included the study of evidence favouring Bacon's authorship of the plays.

61 (1866), L.R. 1 P. & D. 109 at 114-15.

62 [2001] O.J. No 338 (S.C.J.), quoted by Cullity J. in *Ettorre v. Ettorre Estate*, footnote 51, *supra*, para. 42

63 Footnote 17, *supra*, p. 200.

> allows for the administration of estates with assets in different jurisdictions without replicating probate proceedings unnecessarily.

Probate therefore confers transactional certainty.

3. The Role of the Court of Construction

The court of construction was originally the Court of Chancery in England. As a result of the merger of the courts in the second half of the nineteenth century, the High Court inherited the equitable jurisdiction to interpret wills in England. In Canada the superior courts also inherited that jurisdiction.

If a question arises about the meaning of a will, the superior court takes the will as probated by the court of probate and interprets it. Its jurisdiction to interpret the will is broad, but it is restricted in the kind of evidence it can admit. As I pointed out above,[64] a court of probate can admit direct evidence of the testator's intention. However, the jurisdiction of a court of construction is much more limited. Older case law followed the objective approach to interpreting wills. This required the court to begin the process of construction by looking only at the will, without regard to any other evidence. Then it attempted to discover subjects and objects in the outside world that matched the descriptions in the will. If everything matched, that was the end of the process. The court did not consider extrinsic evidence surrounding the making of the will. It was thought that admitting such evidence would engage the court in making a will for the testator, contrary to the policy of the *Wills Act*.[65] Only if there was no match with outside subjects or objects could the court consider extrinsic evidence to resolve the ambiguity.

This restrictive approach to interpretation often caused the court to defeat the testator's intention.[66] Modern case authority has established that a court of construction can "sit in the testator's armchair" immediately when it begins to interpret the will, that is, it can admit

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64 In §2.2, *supra*.

65 7 Will. 4 & 1 Vict., c. 26 (1837).

66 For two particularly egregious examples, see *Higgins v. Dawson*, [1902] A.C. 1 (H.L.); and *Nat. Society for the Prevention of Cruelty to Children v. Scotland Nat. Society for the Prevention of Cruelty to Children*, [1915] A.C. 207 (H.L.).

evidence of surrounding circumstances even if the will appears to be clear and unambiguous on its face.[67] Courts today therefore try to ascertain the subjective intention of the testator.[68]

But the court of construction cannot admit direct evidence of the testator's intention save in the exceptional cases of equivocation and gifts to persons known by the testator to be dead when he made his will. An equivocation arises when the will accurately describes two or more persons or objects. This sometimes happens, for example, when the testator makes a gift to a member of her extended family, but there are two persons that share the same name.[69]

On the other hand, the court of construction does have a limited power to read words into the will to give effect to the testator's intention. This has been called a power to correct errors or omissions in a will by implication.[70] Thus the court has power to "complete the testator's will" by supplying words that have been omitted through inadvertence, clerical error, or similar reason, if satisfied that an omission has occurred and that it is able to discover what the testator meant from the will or admissible evidence.[71] Similarly, the court may sometimes admit extrinsic evidence to correct errors in a will if the error is apparent and the actual intention of the testator is clear.[72] If it is not clear, the notes of the drafting solicitor are often admitted in evidence.[73] In addition, the court of construction has power to reject the inaccurate description of property or

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67 The leading modern case on point is *Haidl v. Sacher* (1979), 106 D.L.R. (3d) 360 (Sask. C.A.), although there were earlier cases that took a similar approach. See, e.g., *Marks v. Marks* (1908), 40 S.C.R. 210 at 212-13, *per* Idington J. The leading English case, *Perrin v. Morgan*, [1943] A.C. 399, [1943] 1 All E.R. 187 (H.L.) also espoused this approach. See especially the speech of Lord Romer in that case. See also *Re Kaptyn Estate*, 2010 ONSC 4293, paras. 30-31, 38, *per* D.M. Brown J.

68 See *Oosterhoff on Wills: Text Commentary, and Materials*, 8th ed. by Albert H. Oosterhoff, C. David Freedman, Mitchell McInnes, and Adam Parachin (Toronto: Thomson Reuters/Carswell, 2016), §13.6.

69 See *ibid.*, §13.6.2. See also *Re Kaptyn Estate*, footnote 67, *supra*, paras. 35-37, *per* D.M. Brown J.

70 See Law Reform Commission of British Columbia, *Report on Interpretation of Wills* (LRC 58) (Vancouver: The Commission, 1982), pp. 43, 46ff ("BCLRC Report").

71 See, *e.g.*, *Re Whittrick*, [1957] 1 W.L.R. 884, [1957] 2 All E.R. 467 (C.A.); *Central and Nova Scotia Trust Co. v. Freeman* (1975), 58 D.L.R. (3d) 541 (N.S.S.C, T.D.), which support a relaxed test. But see *Re Craig* (1978), 42 O.R. (2d) 567, 149 D.L.R. (3d) 483, 2 E.T.R. 257 (C.A.), which supports a strict test.

72 See, *e.g.*, *Re Ferguson Estate* (1980), 6 Sask. R. 316 (Q.B. But see *Re MacDonnell* (1982), 35 O.R. (2d) 578, 133 D.L.R. (3d) 128 (C.A.), which holds to a strict test.

73 See, *e.g.*, *Re Hoedl Estate*, 2012 ONSC 6857, 85 E.T.R. (3d) 296.

persons under the *falsa demonstratio* principle[74] and can admit extrinsic evidence for that purpose.[75]

4. The Abolition of the Surrogate Courts and the Transfer of their Jurisdiction

As mentioned above, in almost all Canadian common law provinces and territories the surrogate courts were abolished and their jurisdiction was transferred to and assumed by the superior courts. What did this mean?

It is interesting to note that s. 11(2) of the *Courts of Justice Act*[76] describes the jurisdiction of the Superior Court as follows:

> The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.

Surrogate courts were not courts of common law or equity,[77] so one might wonder how the Superior Court acquired jurisdiction over probate. It is not a great mystery. The Ontario surrogate courts were entirely creatures of statute and only had the jurisdiction their constating statutes conferred on them.[78] That is why s. 7 of the *Estates Act*[79] now directs that an application for a grant of probate or letters of administration shall be made to the Superior Court of Justice.

The "merger" of the courts was not without precedent. As I pointed out above,[80] in the second half of the nineteenth century the courts of common law and equity were merged into one superior court in England. A similar merger took place in Ontario by the *Ontario Judicature Act, 1881*[81] and like mergers occurred in most common law jurisdictions. But in addition, in England the Probate Court was also merged into that one superior court. But no English court has ever

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74 *Falsa demonstratio non nocet, cum de corpore* [or *persona*] *constat*, *i.e.*, an incorrect description does not avoid a gift if the property [or the person] has already been described properly.

75 See, *e.g.*, *Re Beauchamp* (1975), 8 O.R. (2d) 2 at 4-5, 56 D.L.R. (3d) 644 (H.C.); *Abram Estate v. Shankoff*, 2007 BCSC 1368, 25 E.T.R. (3d) 69.

76 Footnote 4, *supra*.

77 See text at footnote 30, *supra*, and the Excursus below.

78 See text at footnote 37, *supra*.

79 Footnote 13, *supra*.

80 Text at footnote 23, *supra*.

81 S.O. 1981, c. 5.

maintained that this merger ended the distinct law and practice in probate. On the contrary, that distinction was and is maintained.[82]

In addition, the orthodox view of the effect of the merger of courts of common law and equity was that although the courts were merged, the two systems of law were not. Ashburner applied a fluvial metaphor to describe the effect of the merger of the courts. He said:[83]

> . . . the two streams of jurisdiction, though they run in the same channel, run side by side, and do not mingle their waters.

However, later Lord Diplock commented:[84]

> By 1977, this metaphor has in my view become most mischievous and deceptive. The innate conservatism of English lawyers may have made them slow to recognize that by the Supreme Court of Judicature Act 1873 the two systems of substantive and adjectival law formerly administered by courts of law and Courts of Chancery (as well as those administered by courts of admiralty, probate and matrimonial causes), were fused.

The Ontario Court of Appeal quoted Lord Diplock's comment with approval in *Le Mesurier v. Andrus*[85] and four members of the Supreme Court of Canada followed both cases and adopted the fusion theory in *Canson Enterprises Ltd. v. Boughton & Co*.[86] The other four members of the court rejected that theory. It is worth noting that the authors of the leading Australian text on equity soundly condemned the "fusion fallacy." They pointed out that the House of Lords "was emboldened to essay opinions upon the significance of the Judicature system" even though the House contained no equity lawyer when it decided *United Scientific Holdings Ltd. v. Burnleigh Borough Council* "and was led by one common lawyer (Lord Diplock) who was so ill-informed as to state[87] that the Statutes of Uses and of Quia Emptores played no contemporary part in

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82 This is evident, for example, from the very thoughtful judgment of Latey J. in *Re Morris*. [1971] P. 62, [1970] 1 All E.R. 1067. And see §2.1, *supra*.

83 W. Ashburner, *Principles of Equity*, 2nd ed. by Denis Browne (London: Butterworth and Co. Limited, 1933), p. 18.

84 In *United Scientific Holdings Ltd. v. Burnleigh Borough Council*, [1978] A.C. 904 at 925 (H.L.).

85 (1986), 84 O.R. (2d) 1 at 9, 25 D.L.R. (4th) 424 (C.A.), leave to appeal to S.C.C. refused [1986] 2 S.C.R. v (note).

86 (1991), 85 D.L.R. (4th) 129 (S.C.C.).

87 Footnote 84, *supra*, at 924.

English Property Law."[88] None of these cases was concerned with exclusively equitable constructs, such as trusts, however, but with damages, in which there has been considerable overlap and commingling. So it is true that law and equity grew together over the years and influenced each other, but a complete fusion of the two systems is not possible for institutions such as the trust that presuppose a distinction between legal and equitable rights.

Even if it is technically incorrect to speak of a merger of the superior courts and the surrogate courts in Canada, we can make a similar observation about the assumption by the superior courts of the jurisdiction of the surrogate courts. Since that took place, it has become apparent that some facets of the two systems of law have converged, albeit only in procedural respects. This is evident, for example in the ability of the court in the exercise of its probate jurisdiction to grant summary judgment,[89] an issue that was still being debated in *Ettorre v. Ettorre*.[90] So also the awarding of costs in estate litigation now conforms to the awarding of costs in civil litigation generally. The Ontario Court of Appeal said in *McDougald Estate v. Gooderham*:[91]

> The modern approach to awarding costs, at first instance, in estate litigation recognizes the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognizes the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

Thus, the court can order costs to be paid out of the estate if: (1) reasonable grounds existed to question the execution of the will, knowledge and approval, the capacity of the testator, or the existence of undue influence; or (2) if there is a reasonable dispute about the interpretation of the will. To deny costs from the estate in such circumstances would work at cross purposes with the

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88 *Meagher Gummow & Lehane's Equity Doctrines and Remedies*, 5th ed. by J.D. Heydon, M.J. Leeming, and P.G. Turner (Chatswood NSW: LexisNexis Butterworths, 2015), §2-055 and see also §§2-360, 2-375, and 5-295 in which they discuss and criticize the three cases. It is indeed regrettable that equity has not been taught as a discrete subject in Canadian law schools for many years.

89 See, *e.g.*, *Smith Estate v. Rotstein*, 2011 ONCA 492, application for leave to appeal to S.C.C. dismissed, 2012 CanLII 8367 (SCC)

90 Footnote 51, *supra*, paras. 42-47.

91 (2005), 255 D.L.R. (4th) 435 (C.A.) at para. 85, reversing 2014 ONSC 6706, 6 E.T.R. (4th) 218.

twin goals of ensuring that estates are properly administered and the wishes of competent testators are carried out.[92]

However, the substantive aspects of the law of probate cannot be fused with the law administered by courts of common law and equity, because that would interfere with the special policy considerations that underlie the function of a court exercising probate jurisdiction that I already discussed.[93] Further, In *Otis v. Otis*[94] Cullity J. opined that despite the transfer of probate jurisdiction to the Superior Court and the replacement of the old *Surrogate Court Rules*[95] with Rules 74 and 75 of the *Rules of Civil Procedure*,[96] the nature of the jurisdiction had not changed in any material respect. In *Neuberger v. York*,[97] which I shall discuss in greater detail below, Justice Gillese, writing for the Ontario Court of Appeal, concurred,[98] agreed also with Justice Cullity's description of that jurisdiction in paras. 23-26 of his reasons, reproduced above,[99] and recognized that some legal and equitable doctrines cannot be applied by a court exercising its probate jurisdiction, because they are "antithetical to the policy considerations which govern probate."[100]

Excursus

I have said that courts of probate were not courts of common law or equity.[101] I shall now attempt to substantiate that assertion. This is important because of two provisions of the *Courts of Justice Act*. I have already quoted s. 11(2) of that Act[102] and have shown that it

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92 *Sawdon Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 ONCA 101 at para. 85, per Gillese J.A.

93 In §2.2, *supra*.

94 Footnote 51, supra, para. 22.

95 Footnote 12, *supra*.

96 *Ibid*.

97 2016 ONCA 191 at para. 103, application for leave to appeal dismissed 15 September 2016, 2016 CanLII 60508 (SCC).

98 *Ibid*. para. 67

99 *Ibid*., para. 68.

100 *Ibid*, para. 103.

101 See text at footnotes 30 and 38, *supra*, as well as text following footnote 76, *supra*.

102 Text at footnote 76, *supra*.

was not sufficient of itself to confer jurisdiction on the Superior Court of Justice over probate matters. For the sake of convenience I shall reproduce s. 11(2) again:

> The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.

The other provision is s. 96(1). It states:

> Courts shall administer concurrently all rules of equity and the common law.

Section 96(2) is also relevant. It provides:

> Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails.[103]

Do these provisions introduce rules of equity and common law into the unique law of probate that is now administered by the Superior Court of Justice? I submit that they do not. I believe that when the Legislature abolished the surrogate courts and assigned the jurisdiction of those courts to the Superior Court it simply failed to give consideration to the effect of ss. 11(2) and 96(1) on the jurisdiction that it assigned to the Superior Court of Justice.

This is also suggested by the history of these provisions. The original Ontario statute that merged the courts of common law and equity, the *Ontario Judicature Act*,[104] established the Supreme Court of Ontario, with two divisions, the Court of Appeal for Ontario and the High Court of Justice. The latter consisted of three divisions: Queen's Bench, Common Pleas, and

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[103] It is interesting to note that this provision, which derives from s. 109(2) of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, is more restrictive than its predecessor, s. 25 of the *Judicature Act*, R.S.O. 1980, c. 223. It provided in part (emphasis supplied):

> . . . generally in all matters in which there is any conflict *or variance* between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity prevail.

Arguably, "variance" is a wider concept than "conflict" and one wonders why the phrase "or variance" was dropped.

It is passing strange that lawyers almost always insist on using the spatial subordinator, "where," as in s. 96(2). It is almost always inappropriate. A temporal subordinator, such as "when," would be more correct, although the conditional, "if," would be better still in this particular sentence, since one is not sure whether a conflict will arise. See Ronald Carter and Michael McCarthy, *Cambridge Grammar of English* (Cambridge: Cambridge University Press, 2006), §453.

[104] Footnote 81, *supra*.

Chancery.[105] Section 9 provided that the High Court had the same jurisdiction as the former three courts: Queen's Bench, Common Pleas, and Chancery. The Act says nothing about the court having "all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario," as s. 11(2) of the current legislation provides. However, this was clearly implied, since the former three courts had that jurisdiction and they inherited it from the equivalent English courts. The next major revision, the 1913 *Judicature Act*[106] also did not contain the explicit language of s. 11(2), but it was implied by the definition of the court's jurisdiction as "the jurisdiction, power and authority that on the 31st day of December, 2012 was vested in the Court of Appeal and the Divisional Courts of the High Court."[107] The substance of this language remained unchanged until the 1984 *Courts of Justice Act*.[108] Section 2(2) of this Act introduced the language now contained in s. 11(2) of the current Act. The 1984 Act predated the abolition of the surrogate courts by six years, so it beggars belief that surrogate courts were regarded in 1984 as courts of common law or courts of equity, since their jurisdiction was not regulated by the *Courts of Justice Act*. Nor is it conceivable that the jurisdiction of the surrogate courts suddenly became a common law or equitable jurisdiction when their jurisdiction was transferred to the superior court in 1990. The only reasonable conclusion is that the probate jurisdiction remained unchanged as a *sui generis* jurisdiction.

But all this does raise the question: what are courts of equity and courts of common law? Historically, courts of common law were King's Bench, Common Pleas, and Exchequer, established by the Norman conquerors of England after 1066. These courts administered the common law of England. Courts of equity developed later to mitigate the rigours and inflexibility of the common law. Canadian jurisdictions inherited both courts of common law and equity and their respective rules, as is evident from ss. 11(2) and 96(1) of the *Courts of Justice Act*.

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105 *Ibid*., s. 3.

106 S.O. 1913, c. 19.

107 *Ibid*., ss. 12 and 13.

108 Footnote 103, *supra*.

Unfortunately, the term "common law" is a very imprecise phrase. Originally it referred only to the decisions of the judges of the common law courts. In that sense, it drew a distinction between those decisions, decisions of other courts, such as ecclesiastical courts and manorial courts, decisions of the emerging court of equity presided over by the Lord Chancellor, and early statute law. The term is also used to distinguish the laws developed in England and in countries that derive their law from England from the law developed in other countries that have typically encoded their laws and whose law is usually referred to as "civil law." Later, the term "common law" was often used to refer not only to the decisions of the judges in the common law courts, but also to the early English statutes.

Probate law simply does not fit this model. As I have already mentioned,[109] it was developed in the ecclesiastical courts by clerics who were trained in canon law, which is a form of civil law. And it was that body of law that was inherited by the later probate courts. Moreover, for several hundred years before the probate jurisdiction of the ecclesiastical courts was terminated in 1858, the judges of these courts were drawn from lawyers who practiced in them. In consequence, probate law never adopted common law or equitable concepts. Instead, it developed its own principles and rules.

It is perhaps not generally understood, but the concept of testamentary capacity is a *sui generis* concept that we inherited from the ecclesiastical courts. It is similar to capacity concepts that were developed in other areas of the law, but it is not the same. However, it seems to be incorrect to speak of a capacity hierarchy in the sense that a greater degree of soundness of mind is required for testamentary capacity; instead, capacity is said to be transaction specific, rather than category specific.[110]

Similarly the law of undue influence as applied by ecclesiastical courts and later by courts of probate is a *sui generis* concept.[111] The unique approach of probate courts to undue influence is evident in the cases.[112] Thus, for example, the probate approach differs from the

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109 In §2.1, *supra*.

110 See John E.S. Poyser, *Capacity and Undue Influence* (Toronto: Thomson Reuters/Carswell, 2014), p. 629. For the statement of testamentary capacity generally, see *ibid*., pp. 4ff.

111 See *ibid.*, p. 301.

112 See, *e.g.*, the directions to the jury by Sir J.P. Wilde in *Hall v. Hall* (1868), L.R. 1 P. & D. 481, and similar directions to the jury by Sir James Hannen in *Wingrove v. Wingrove* (1885), 11 P.D. 81. See

equitable concept of undue influence in that it does not raise a presumption of undue influence against a person who stood in a fiduciary or confidential relationship to the testator,[113] although equity raises such a presumption in the context of *inter vivos* gifts.[114] Indeed, to overcome the probate rule requires a statutory amendment.[115]

The editors of the current edition of *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*[116] agree. With respect to undue influence, the text, after describing the equity definition of undue influence, says under the heading "Chancery definition of undue influence does not apply in probate":[117]

> The erroneous view has sometimes been formed, strengthened by a misapprehension as to the effect of the Judicature Acts, that where the Chancery Court would presume undue influence the probate court would do likewise. The error of this view is clear from *Parfitt v. Lawless*[118] where Lord Cranworth's dictum in *Boyse v. Rossborough*[119] "Undue influence cannot be presumed" was quoted with approval; instead it must in probate cases be proven.
>
> The Chancery Division will not, on the grounds of fraud or undue influence, set aside or refuse to enforce provisions of a will pronounced valid by the probate court . . .[120]

The text continues under the heading "Undue influence as understood in probate":[121]

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also *Craig v. Lamoureux* [1920] A.C. 349 at 357, 50 D.L.R. 10 (P.C.), *per* Lord Haldane; *Re Marsh Estate; Fryer v. Harris* (1991), 41 E.T.R. 225 (N.S.C.A.).

113 *Parfitt v. Lawless* (1872), L.R. 2 P. & D. 462 at 468, *per* Lord Penzance; *Stephen v. Austin*, 2003 BCSC 341, 50 E.T.R. (2d) 255 at para. 166. See also Poyser, footnote 110, *supra*, at pp. 306ff, 326ff, 489.

114 See, *e.g.*, *Re Craig* (1970), [1971] Ch. 95; *Re Crompton; Crompton v. Williams*, [1938] 4 D.L.R. 237 (Ont. H.C.); *Goguen v. Goguen* (1988), 31 E.T.R. 149 (N.B.Q.B.); and especially *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353. See also *Dmyterko Estate v. Kulikowsky* (1992), 47 E.T.R. 66 (Ont. Gen. Div.); *Streisfield v. Goodman* (2001), 40 E.T.R. (2d) 98 (Ont. S.C.J.), affirmed (2004), 8 E.T.R. (3d) 130 (Ont. C.A.), leave to appeal refused (2005), 204 O.A.C. 396n (S.C.C.).

115 See, *e.g.*, *Wills, Estates and Succession Act*, footnote 4, *supra*, s. 52, which casts the onus on the propounder of the will to prove that a testamentary gift was not made in consequence of undue influence by a person who was in a position to exercise it.

116 Footnote 29, *supra*.

117 *Ibid*., §13-5.

118 Footnote 113, *supra*.

119 (1857), 6 H.L. Cas. 2.

120 *Allen v. M'Pherson* (1847), 1 H.L.C. 191 at 210 (unrelated references not reproduced).

> A court will not admit a will to probate if its execution is shown to have been procured by actual undue influence. It is necessary to prove that the propounder of the will so overbore the testator's will as to induce him to make a will where he would not otherwise have done so. It is not enough to infer that the propounder of the will may have made appeals to the testator to make provision for her; the distinction is between legitimate persuasion and illegitimate coercion. . . .

The text then goes on to discuss some of the cases mentioned above.[122]

However, an old case suggests that ecclesiastical law is part of the common law. *Mackonochie v. Lord Penzance*[123] involved a clergyman in the Church of England. The Rev. Alexander H. Mackonochie was accused in the Arches Court, an ecclesiastical court, of unlawful practices in the performance of divine service. He was admonished and suspended from office, but he failed to comply with the admonition.[124] In further proceedings, Lord Penzance, who served as Dean of the Arches Court at that point, found the allegations of disobedience proved and suspended the clergyman from his office and benefice for three years. The clergyman obtained an order for prohibition from the Queen's Bench Division, but the Court of Appeal reversed. The clergyman then appealed to the House of Lords, which upheld the judgment of the Court of Appeal.

In his speech, Lord Blackburn made the following observations:[125]

> The ecclesiastical law of *England* is not a foreign law. It is a part of the general law of *England* —of the common law—in that wider sense which embraces all the ancient and approved customs of *England* which form law, including not only that law administered in the Courts of Queen's Bench, Common Pleas, and Exchequer, to which the term Common Law is sometimes in a narrower sense confined, but also that law administered in Chancery and commonly called Equity, and also that law administered in the Courts Ecclesiastical, that last law consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm—and form, as is laid down in *Caudre's Case*,[126] the King's ecclesiastical law. All these laws may be, and are, altered by statutes. When the question arises what is the English ecclesiastical law, it is not ascertained by calling witnesses to prove it, as if it were a foreign law, but

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121 *Williams, Mortimer and Sunnucks*, footnote 29, *supra*, at §13-52.

122 See footnote 112, *supra*.

123 (1880-81), L.R. 6 App. Cas. 424 (H.L.).

124 The ecclesiastical term used in the case is "monition," which sounds quaint to modern ears.

125 Footnote 123, *supra*, at 446.

126 *Caudrey's Case*, (1591) 5 Co. Rep. 1a, 77 E.R. 1 (the spelling of name varies).

> taking judicial notice of what the law is, it is ascertained, by argument founded on legal principles and authorities, what the law is on the particular point. Such was the course pursued by the Court of King's Bench, when Lord *Hardwicke* was Chief Justice, in *Middleton v. Crofts*.[127] It was expressly approved of in this House, to cite no other authorities, in *The Queen v. Millis*[128] and *Bishop of Exeter v. Marshall*.[129]

With respect, this case adds little to the meaning of the term "common law." In using that term, Lord Blackburn was saying no more than that ecclesiastical law (and by inference, probate law) is part of the law of the land. With respect to probate law that is as true of England as it is of the Canadian provinces and territories. But that does not make probate law "common law" as that term is generally understood. Moreover, the case is also distinguishable. While Canadian courts of probate inherited the law of probate from the English ecclesiastical courts,[130] we have never had ecclesiastical courts in Canada. In any event, the ecclesiastical courts of England had lost their jurisdiction over matters testamentary in 1857[131] and their remaining jurisdiction–some of which was addressed in *Mackonochie*–is pure ecclesiastical law and thus irrelevant in Canada.

But there is more. When the Canadian provinces and territories established superior courts, they assigned them the jurisdiction that courts of common law and equity exercised in England at the time English law was received in the provinces and territories as is evident from s. 11(2) of the *Courts of Justice Act*, reproduced above.[132] Since our provinces and territories never had ecclesiastical courts, it must surely follow that the reference to courts of common law in s. 11(2) is only to King's Bench, Common Pleas and Exchequer.

5. Case Law

5.1 Introduction

I shall now consider a select number of cases to discover how they treat the law of probate. Most of the cases are concerned with the right of a court of probate to "rectify" a will and in particular

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127 (1736), 2 Atk. 650, 26 E.R. 788.

128 (1843-44), 10 Cl. & Fin. 534, 8 E.R. 844.

129 (1868), L.R. 3 H. L. 17.

130 See text at footnote 31, *supra*.

131 See text at footnote 21, *supra*.

132 Text, at footnote 76, *supra*.

whether it has the right to add words to a will or to substitute words in the will. Consequently, most of the discussion will focus on that jurisdiction until I discuss the more recent cases.

It is regrettable that many cases do not make clear that the court is exercising its probate jurisdiction and leave the reader guessing. The problem is exacerbated by the fact that the courts often refer promiscuously to both probate and construction "rectification" cases.

I shall consider the material under the headings of different jurisdictions. My reason for doing so is that English and British Columbia cases have usually got the law right, whereas Ontario cases have, until quite recently, often got it wrong. I shall leave a discussion of more recent cases to the last.

5.2 England

One of the functions of a court of probate is to ascertain that the testator knew and approved of the contents of his will. The process of taking instructions for a will and inscripturating them in the document is an imperfect one: words are sometimes inserted that the testator did not intend. If that is alleged, evidence will need to be adduced to prove the allegation. This typically takes the form of written instructions given to the drafter and the drafter's notes, as well as copies of former wills. It may also include other hearsay evidence.

The English courts of probate took the view that such evidence was admissible in order to ensure that the testator's intentions were honoured. Before the *Wills Act*[133] the courts could delete words inserted in a will by mistake and also add words that were omitted by mistake.[134] However, after the Act they concluded that the court could only delete words added incorrectly. Save in a couple of early cases that are no longer followed, they held that the court cannot add words that would convey what the testator did intend.[135] The reasons for this restriction were: (1) the court had no

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133 Footnote 65, *supra*.

134 *Guardhouse v. Blackburn*, footnote 61, supra, at 114.

135 In *In the Goods of Schott*, [1901] P. 190 at 192, Jeune P. mentions two decisions of Sir Charles Butt who had held that the court could insert words into a will. Sir James Hannen, the President of the court at the time and a very able judge, directed that the following note be written in the margin of the report of the first case: "By the President's direction this is not to be followed. Note of order of judge may be put in margin of probate." The registrar informed Jeune P. that Sir James would not allow the order made by Sir Charles to be carried into practice. Decision by fiat! If only that could still be done on occasion!

reliable guide to what the testator intended; and (2) inserting words would entail making a will for the testator and that would conflict with the provisions of the Act.[136] Deleting words from the will that were included by mistake did not conflict with the Act, since they were not intended to form part of the will.

This limited power to "rectify" wills is *sui generis* and derives entirely from the probate court's jurisdiction. The courts made clear that the equitable remedy of rectification, which can be used by the superior court to correct errors in deeds and contracts, did not apply to wills.[137] After all, the probate courts were not courts of equity. To be fair, the ecclesiastical courts and the courts of probate seem to have reached this conclusion based on an excessively strict interpretation of what the *Wills Act*[138] allowed them to do. For this reason, Lord Neuberger stated in *dictum* in *Marley v. Rawlings*[139] that, although it was not necessary for him to decide the point, in his view it would have been open to a judge to rectify a will in the same way as any other document. It will be observed, however, that in jurisdictions that have enacted a statutory power to rectify wills,[140] the remedy is not the equitable remedy either; it is entirely statutory. Indeed, it has been held that, absent a compelling reason, it would be wrong for a court in a jurisdiction with a statutory power to rectify to hold that it has an inherent power that is wider than the power conferred by the legislature.[141]

Guardhouse v. Blackburn[142] concerned the validity of a codicil to a will. The testator had charged legacies on her real estate, but later she wished to give an additional legacy that was to be charged on her personal estate. Her solicitor prepared the codicil correctly and read the draft to her. However, in the final copy that was also read to her and that she signed, the words "therein and" had been inserted by mistake. The effect was that the legacies in the will and the

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136 BCLRC Report, footnote 70, *supra*, p. 40; British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (No. 45) (Vancouver: The Institute, 2006), p. 37 ("BCLI Report").

137 BCLI Report, *ibid*., p. 36, citing *Harter v. Harter* (1873), L.R. 3 P & D. 11; *Alexander v. Adams* (1998), 51 B.C.L.R. (3d) 333

138 Footnote 65, *supra*.

139 [2014] UKSC 2 at para. 28.

140 To be discussed in §6, *infra*.

141 *Marley v. Rawlings*, footnote 139, *supra*, para. 30.

142 Footnote 61, *supra*.

codicil were all charged on the personal estate. The issue was whether the solicitor's evidence of what happened was admissible to correct the error. The court held that it was not, because the fact that the codicil was read to the testator before she signed it should be treated as conclusive evidence that she knew and approved its contents.

The court's holding is based on one of six rules laid down by Sir J.P. Wilde. I shall discuss its subsequent history below. It reads:[143]

> Fifthly, . . . the fact the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof.

The case did not hold that probate courts do not have the power to strike words from a will that were inserted by mistake and it is apparent from many later probate cases that they do indeed have that power.[144]

Is this rule still valid? Not long after the decision in *Guardhouse* the House of Lords held in *Fulton v. Andrew*[145] that there is no unyielding rule of law that the court cannot inquire into a mistake once it is proved that a will was read over to a competent testator, who then signed it.

In *Re Morris*[146] Latey J. explored the continuing relevance of the *Guardhouse* rules and concluded that the fifth rule is no longer binding on the court when the drafter made a clerical error that was not consciously drawn to the testator's attention. By clause 3 of her will the testator had bequeathed personal property to an employee and by clause 7(iv) she left her a legacy as well. Later she wanted to change the gifts to the employee and instructed her solicitor to change clauses 3 and 7(iv). The codicil as drafted by the solicitor purported to revoke clause 3 and all of clause 7. The testator read and executed the codicil. The solicitor admitted his error and the court held that it could delete the number 7 from the codicil, but it could not add the number (iv) to it. Thus, the clause in the codicil as probated read: "I revoke clauses 3 and [ ] of

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143 *Ibid*, at 116.

144 See, *e.g.*, *Re Boehm*, [1891] P. 247 *In the Goods of Schott*, footnote 135, *supra*; *Re Swords*, [1952], 2 All E.R. 281; *Re Morris*, footnote 82, *supra*; *Re Phelan*, [1972] Fam. 33, [1971] 3 All E.R. 1256; *Re Reynette-James*, [1976] 1 W.L.R. 161

145 (1875), L.R. 7 H.L. 448.

146 Footnote 144, *supra*.

my said will." It would then be up to the court of construction to give the codicil as probated such meaning as it could.

Nonetheless, the power exercised by the court in *Morris* is a limited one, as Latey J. explained in his lengthy judgment. It applies only to words inserted by inadvertence. Thus, for example, if the testator consciously approved the words in question, they cannot be deleted. Nor can they be deleted if they were deliberately chosen by the drafter.[147]

Re Reynette-James[148] was similar to *Re Morris*. The testator wanted to divide the income from the residue of her estate equally between her sister and a friend. When either of them died, her share would be paid to the testator's son. The capital was to be paid to the son after the sister and the friend had both died. The testator's solicitor prepared a draft and sent it to her. She approved it with some changes. In typing the engrossment, the secretary accidentally omitted 33 words from the residuary clause. The effect of the omission was that the son would receive the capital only if the life tenants predeceased the testator, which they did not do. A clerk read the will as engrossed to the testator, but neither noticed the omission. The will was duly executed. The court omitted all the gifts in the residuary clause except for the two life interests, in order to give effect to the testator's intention as much as possible.

This was the unsatisfactory state of affairs in England until it enacted rectification legislation, which I shall discuss below.[149]

5.3 British Columbia

In general it can be said that the courts in British Columbia and indeed in the other western provinces understood and correctly applied the law of probate as developed in England. There are some exceptions. Thus, for example, in all the western provinces courts have mistakenly held that when a husband and wife make mirror wills in which they leave their property to each other, but he signs her will and she signs his, the court can correct their error by replacing the incorrect

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147 See *Taylor v. Kershaw*, [1939] P. 198 at 216. And see generally *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*, 20th ed., footnote 29, *supra*.

148 Footnote 144, *supra*.

149 In §6, *infra*.

words with the correct words.[150] Moreover, in *Re Rapp Estate*[151] the court held that a probate court can delete and substitute. However, that case was decided *per incuriam*, since the British Columbia Court of Appeal case, *Clark v. Nash*,[152] which held that the court cannot insert words, was not cited or referred to. Other cases have consistently followed the latter case.[153]

Re Ali Estate[154] is particularly helpful because of its accurate description of the jurisdiction of courts of probate and construction, both before and after the "merger" of the courts. The testator bequeathed 70 percent of his interest in a corporation, which was his single largest asset, to his brother so that the brother could operate the business. He left the other 30 percent to his nephews and the residue of his estate to his daughter. Part of the residue included shareholder loans and promissory notes. The brother and the daughter were the executors and they applied for a grant of probate. However, before probate was granted, the brother brought an application for an order rectifying the will to include the shareholder loans and the promissory notes in the bequest of the testator's interest in the corporation. The court dismissed the application on the ground that the court of probate does not have power to add words to a will.

On the issue of jurisdiction Madam Justice Dardi said:

> 21 The Supreme Court has jurisdiction to sit both as a court of probate and as a court of construction. Notwithstanding that the single court is empowered with dual jurisdictions, historically the court has exercised its probate function and its interpretation or construction function in separate proceedings. In broad terms, when ruling upon the validity of a will, the court sits as a court of probate, and when interpreting a will, it sits as a court of construction. The divided jurisdiction is significant because the powers available to the court depend on which jurisdiction it assumes.[155]
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> 22 The jurisdiction exercised by a court of probate relates to whether the testamentary instrument submitted for probate represents the true last will and testament of a deceased

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150 See *Re Brander*, [1952] 4 D.L.R. 688, 6 W.W.R. (N.S.) 702 (B.C.S.C.); *Re Thorleifson* (1954), 13 W.W.R. (N.S.) 515 (Man. Surr. Ct.); *Re Knott* (1959), 27 W.W.R. 382 (Alta. Dist. Ct.); *Re Bohachewski* (1967), 60 W.W.R. 635 (Sask. Surr. Ct.).

151 (1991), 58 B.C.L.R. (2d) 93, 42 E.T.R. 222 (S.C.). And see the critical comment on this case by T.G. Youdan (1991), 42 E.T.R. 229.

152 [1987] BCJ No. 304 (B.C.C.A.). The court distinguished *Re Brander* and *Re Bohachewski*, footnote 150, *supra*.

153 See, *e.g.*, *Alexander Estate v. Adams* (1998), 51 B.C.L.R. (3d) 333, 20 E.T.R. (2d) 294 (S.C.); *Re Ali Estate*, 2011 BCSC 537; *Re Verity*, 2012 BCSC 650.

154 Re *Ali Estate*, *ibid*.

155 BCLR Report, footnote 70, *supra*, at 1.

> and whether the named personal representative is entitled to administer the estate. In essence, a court of probate focuses on what constitutes the testamentary instrument of the testator and its validity. The inquiry pertaining to the validity of the testamentary document encompasses the issues of the capacity and the volition of the testator and whether the testator duly executed the testamentary document with knowledge and approval of its contents.
>
> 23 On the other hand, in exercising jurisdiction as a court of construction, the court is concerned with ascertaining the meaning of the testamentary documents that have been approved by the court in the exercise of its probate jurisdiction. It is axiomatic that court must interpret or construe a will in the form in which it has been admitted to probate.
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> 24 In probate hearings, the court, in determining whether or not the document before it is truly the testator's will, is permitted to consider extrinsic evidence, including direct evidence as to the testator's intentions. That evidence may include copies of earlier wills and codicils, prior drafts of the will, and the notes of the solicitor who prepared the will. In contrast, the scope of admissible evidence is generally more constrained in a construction hearing. In that instance, a court may only consider the words of the will and if, applying the subjective approach, the evidence of the surrounding circumstances known to the testator at the time the will was made. Except in very restricted circumstances (such as equivocation), the court is not permitted to review direct evidence of the testator's intentions on a construction application.[156]

Although the issues discussed in *Ali* have lost some their significance because of more recent law reform in British Columbia, a matter I shall discuss below,[157] many do retain their importance.

5.4 Ontario

Some Ontario cases correctly state that a court of probate lacks power to insert words in a will that have been omitted in error.[158] However, many are unsatisfactory because they fail to make clear whether the court is sitting as a court of probate or as a court of construction and therefore it is impossible to determine whether the court admitted evidence properly. In addition, the courts often cite probate and construction cases indiscriminately, without appreciating the differences.

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156 BCLI Report, footnote 136, *supra*, at 40.

157 In §6, *infra*.

158 See, *e.g.*, *Barylak v. Figol* (1995), 9 E.T.R. (2d) 305, a decision of Greer J.

Binkley Estate v. Lang[159] is an example. The testator had a prior will that contained legacies for certain relatives. Later she asked her trustees to make some minor changes to the will. As a result, the legacies were increased substantially. The estate trustee argued that the increase was the result of a typographical error and sought to have the error corrected. The case does not say whether probate had been granted, although it seems that it had not. The court considered the British Columbia case, *Alexander Estate v. Adams*[160] as authority for the proposition that a court of probate may omit words from a will, but it did not mention that the case also said that the court lacks the power to add words. The court said: "Rectification is an equitable remedy" and proceeded to substitute the intended amounts for the incorrect amounts. Thus, it appears that the court was acting as a court of construction. As we have seen[161] the equitable doctrine of rectification does not apply to wills. Moreover, the case is irregular if probate had not been granted, for a court of construction should not normally proceed to interpret a will before probate.[162]

Lipson v. Lipson[163] is a similar case. The court stated that it has long been established in Ontario that the court has power to delete as well as to add. It rectified a will that contained drafting errors. This case seems to have been a construction case, since it cites and applies such cases.

Another example is *Daradick v. McKeand*.[164] Again the case does not make clear whether the court was sitting as a court of probate or construction and cites authorities from both jurisdictions. The court states that the law of rectification seems to be changing and holds that it can correct a solicitor's error in inscripturating the testator's intentions. The court seems to be applying the law of "rectification" that pertains to courts of construction.

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159 (2009), 50 E.T.R. (3d) 44.

160 Footnote 153, *supra*.

161 See §5.2, *supra*.

162 Although it may happen in exceptional circumstances that a court deals with both probate and construction at the same time. See *Prouse v. Scheuerman*, 2001 BCCA 100, 37 E.T.R. (2d) 313, as explained in *Re Ali Estate*, footnote 153, *supra*, at paras. 33-35.

163 (2009), 52 E.T.R. (3d) 44 (ONSC).

164 2012 ONSC 5622.

Other cases are also defective because they fail to make clear whether the court is sitting as a court of probate or of construction and cite cases from both jurisdictions. Usually these cases correct errors in the will.

There are other cases that are problematic for different reasons. Some of these are discussed below.[165]

5.5 Construction Cases

There are also many cases that are or appear to be true construction cases, although some of them also cite cases from the probate side. As we have seen, a court exercising its interpretive function does have a limited jurisdiction to "rectify" wills and to that end can disregard words, as well as read words into a will.

These cases are usually very fact specific, but some betray a reluctance to rectify a will, [166] whereas others appear to be quite ready to read words into the document to correct omissions and to delete obvious errors.[167]

Some cases are quite unsatisfactory, because they discuss both probate and construction cases without clearly distinguishing between them. *Milwarde-Yates v. Sipila*[168] is an example. The will had not yet been admitted to probate, but a beneficiary brought an application for construction of the will and the court granted the application. In my opinion this is irregular. The document should have been probated first and the court, in the exercise of its probate function might have been able to resolve the problem. If it was not resolved, the matter could then have been brought back to the court, sitting as a court of construction. Moreover, the court discussed probate cases as well as construction cases.

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165 In §5.7, *infra*.

166 See, *e.g.*, *Maclean v. Henning* (1903), 33 S.C.R. 305; *Re Follett*, [1955] 2 All E.R. 630 Ch. Div.); *Re Rowland*, [1962] 2 All E.R. 837 (C.A.); *Re Craig*, footnote 71, *supra*; *Re Stork Estate* (1990), 72 O.R. (2d) 625, 38 E.T.R. 290 (H.C.); *Howell v. Howell*, 1999 BCCA 371, 28 E.T.R. (2d) 168.

167 See, *e.g.*, *Crook v. Hill* (1871), L.R. 7 Ch. App. 311; *May v. Logie* (1896), 23 App. Rep. (Ont. App. Div.); *Re Brown* (1922), 52 O.L.R. 103; *Re Whittrick*, footnote 71, *supra*; *Kilby v. Myers*, [1965] S.C.R. 24, *sub nom*. *Re Harmer*, 46 D.L.R. (2d) 521; *Myhill Estate v. Office of the Children's Lawyer* (2001), 39 E.T.R. (2d) 90; *Lipson v. Lipson*, 2009 ONSC 66904; *Re Kaptyn Estate*, footnote 67, *supra*.

168 2009 BCSC 277, 47 E.T.R. (3d) 270.

5.6 Can the Court Exercise Probate and Construction Jurisdictions Concurrently?

Can the court, after it has admitted a will to probate and construction is necessary, immediately proceed to construe the will? In other words, can the presiding judge change hats midstream and switch from the court's probate function to its construction function?

I suggest that this is inadvisable in most situations. Justice Dardi considered this question in *Re Ali Estate*,[169] which I have already discussed in connection with the question whether a court of probate has power to add words to a will.[170]

Having held that the court lacks that power, Justice Dardi went on to consider whether she could immediately proceed with interpreting the will after it had been probated, in a one-step procedure. On this point she said:

> 43 Madam Justice Southin's observation at para. 3 in *Moiny Estate*[171] that "ordinarily a question of construction is not properly addressed on an application for a grant" is instructive here.
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> 44 Although the two applications being heard together is attractive for reasons of expediency of the litigation, in my view a distinction should be maintained between the court's probate and construction jurisdiction. The practice and procedure on a probate application is different than on a construction application. Ordinarily an application brought as a probate application should be limited to probate matters and, ordinarily a will should be admitted to probate before it is presented to the court for interpretation.
>
> 45 As referred to above, the evidence which is admissible on a rectification application is different than that which is admissible on an interpretation. Before proceeding with the construction application, the court should have before it the affidavits with only that evidence which is properly admissible on a construction application. Otherwise it falls to the court to parse out that evidence which is properly admissible from that which is not. I cannot endorse such an approach. This two-step procedure also provides the parties with an appropriate opportunity to make submissions on the admissibility of any controversial evidence.
>
> 46 I am not persuaded on any principled basis that the circumstances of this case mandate that the Court should depart from the ordinary procedure and decide the construction application before the Will has been admitted to probate. There may well be exceptional cases where it is appropriate for the court to hear a construction application without a will

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169 Footnote 153, *supra*.

170 In §5.3, *supra*.

171 *I.e.*, *Prouse v. Scheuerman*, footnote 162, *supra*.

> having been probated or to hear both a probate application and a construction application at the same time, however this is not one of them.
>
> 47 In the result, after the grant of probate issues, the petitioner is to reset the hearing of the construction application with the affidavits containing only that evidence which is properly admissible on a construction application. This should be set before me, and counsel can contact Supreme Court Scheduling to arrange the hearing.

Similarly, in his comment on the *Robinson*[172] case, Maurice Cullity said:[173]

> If the existing distinctions [between probate and construction] are to be retained, confusion is inevitable if they are blurred when, as in *Robinson*, it may now fall to the same judge on the same occasion to exercise both the probate jurisdiction and that of a court of construction. Where, in cases such as *Robinson*, as well as *Morris* . . .[174] and *Reynette-James* . . . ,[175] rectification under the probate jurisdiction is likely to leave questions of interpretation to be decided, it seems incongruous that a judge who has heard and given effect to direct evidence of the testator's intentions should be expected to close her mind to such evidence when construing the will in order to ascertain the expressed intentions. The problem was avoided in England when the jurisdiction of the Court of Probate was transferred to the High Court as the probate and interpretation jurisdictions were assigned to different divisions of the court and would be exercised by different judges.

Both of these sets of remarks are wise counsel that should be followed in jurisdictions that have not given identical powers of rectification and access to identical evidence to the court exercising its probate and construction functions.

Sun Life Assurance Co. of Canada v. Woitte[176] is an unsatisfactory case that illustrates the difficulties encountered when the court addresses both issues at the same time. The case involved an application for a grant of letters probate and for construction of a will and Master Bishop dealt with both.

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172 Footnote 50, *supra*.

173 *Ibid*., at pp. 141-42 (some internal citations omitted).

174 Footnote 144, *supra*.

175 Footnote 144, *supra*.

176 [1992] B.C.J. 1105.

5.7 Recent Cases

I shall now consider a number of recent cases, both those that have got the law right and those that have got it wrong in my opinion.

The first case is ***Balaz Estate v. Balaz***.[177] It concerned a secondary will in which the drafter had inadvertently inserted language, without the testator's knowledge and approval, that could have the effect of tainting a spousal trust and thus prevent a deferral of income tax. The court, apparently sitting as a court of construction, rectified the will to resolve the problem. I have no quarrel with the court's order. However, in the course of his reasons, the learned judge engaged in a disquisition about the distinction between courts of probate and courts of construction and made the following statement:[178]

> Whatever lingering distinction may exist in other provinces between courts of probate and superior courts of record, the distinction between a "court of probate" and a "court of interpretation" lacks any practical meaning in Ontario.

He went on to say, "In any event, any such distinction now stands only as a matter of historical interest" because surrogate courts were abolished in Ontario in 1989.[179] Then in the next paragraph he stated that he need not consider whether it is still the case that a wider range of evidence is admissible on probate than on construction, but also recognized that direct evidence of the testator's intention is admissible on probate.[180]

What is one to make of this? With great respect to Justice D.M. Brown, these statements were not necessary to his decision and cannot be supported as a matter of principle. I hope and believe that they have not survived the judgment of the Court of Appeal in *Neuberger v. York*.[181] I discuss the latter case below.

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177 [2009] O.J. No. 1573 (S.C.J.)

178 *Ibid*., para. 8.

179 *Ibid*., para. 9.

180 *Ibid.*, para. 10.

181 Footnote 97, *supra*.

The second case is ***Robinson Estate v. Robinson***.[182] I shall not say much about it, since Maurice Cullity's excellent critical comment on this case, referred to above,[183] has discussed the problems it poses in great detail. However, it is worthwhile to focus briefly on two points.

First, Belobaba J., at first instance, correctly treated the case as a matter of probate, although he refers to the power of such a court to rectify a will as an equitable power which, as I have pointed out,[184] it is not. The issue was whether the court could delete the revocation clause in the testator's Canadian will so that her Spanish will was not revoked. Her Canadian solicitor had inserted the clause as a matter of course and was not informed of her earlier Spanish will. Case authority does support Justice Belobaba's decision that a court of probate cannot delete words from a will when it is drafted in accordance with her instructions, and the language in the will is reviewed with and approved by her. However, although Belobaba J. mentioned a number of cases on point, he does not discuss most of them. One of those cases is *Re Morris*.[185] *Morris* makes it clear that the testator is bound only when she has read the will or had it read to her and she thereby consciously becomes aware of a possible problem. The case law also holds that knowledge and approval is imputed to the testator if she entrusts her solicitor to draft it and the solicitor deliberately chose the words that constitute an error.[186] It could, I think, have been argued that the solicitor did not deliberately choose to insert the revocation clause. He inserted it because it is normally inserted in most wills.

Second, the case, especially at the appellate level, highlights the confusion we have observed in many other cases in which the courts failed to understand whether they were dealing with a matter at the probate level or at the construction level. In the *Robinson* case counsel presented a comprehensive argument on the appeal that cited both probate and construction cases, but distinguished clearly between them. Cullity demonstrated that this was a probate case–after all, one of the parties sought to have the grant of probate revoked. However, the Court of Appeal took the view that the application judge was exercising his construction function. With great

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182 Footnote 11, *supra*.

183 Footnote 50, *supra*.

184 §5.2, *supra*.

185 Footnote 144, *supra*, referred to in *Robinson* by its "sub-title," *Lloyd's Bank Ltd. v. Peake*.

186 See text at footnote 147, *supra*.

respect, the Court of Appeal erred in treating it as a construction case.[187] If it had been a construction case there was certainly case law to support the court's conclusion that the will could not be rectified, although there was also case law that might have supported rectification.[188]

The third case I wish to address is ***Neuberger v. York***.[189] In 2010 the testator made a primary and secondary will by which he left his considerable estate to his two daughters and their families. He appointed the two daughters, Myra and Edie, as his estate trustees. The two sisters did not get along. In earlier wills the testator had divided his assets equally between the two families. However, Edie alleged that in consequence of an estate freeze in 2010 the intended equality was not maintained, with the result that Myra's family would get some $13 million more than Edie's family. Edie took some basic steps in the administration of the estate, such as paying taxes. However, probate had not been obtained. Edie brought a will challenge, alleging, among other things, that the testator lacked capacity when he made the 2010 wills. Her son, Adam, brought a separate application challenging the wills. Myra moved for an order dismissing the will challenges.

Greer J. granted Myra's motion.[190] She had previously held in *Leibel v. Leibel*[191] that estoppel by representation and by convention can be raised in will challenge cases. She applied that ruling in *Neuberger* and held that: (1) Edie, having purposefully acted under the authority of her father's will, was estopped from challenging the validity of the wills; and (2) consequently, Adam, who was his mother's "straw man," was also prohibited from challenging the will. With great respect, the application judge failed to show that Adam was only a "straw man" and the facts were otherwise. Further, she applied non-wills cases in support of her estoppel holding,

The decision of the Court of Appeal in *Neuberger* corrects many of the incorrect opinions and observations made by other Ontario courts. I have already mentioned a couple of aspects from

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187 Footnote 11, *supra*, para. 22 (C.A.)

188 See text at footnotes 166, and 167, *supra*.

189 Footnote 97, *supra*.

190 *Neuberger v. York*, 2014 ONSC 6706, 6 E.T.R. (4th) 218.

191 2014 ONSC 4516, 2 E.T.R. (4th) 268.

the excellent reasons for judgment of Gillese J.A.[192] I shall now consider these reasons in greater detail.

As mentioned above, in paragraph 67 of her reasons Justice Gillese agreed with Justice Cullity's conclusion in *Otis v. Otis*[193] that despite the transfer of probate jurisdiction to the Superior Court of Justice and the replacement of the *Surrogate Court Rules*[194] with Rules 74 and 75 of the *Rules of Civil Procedure*,[195] the nature of the court's probate jurisdiction has not changed in any material respect.

In paragraph 68 of her reasons Justice Gillese also agreed with Justice Cullity's description of the court's jurisdiction in probate as inquisitorial.

These two conclusions are a complete answer to the confusion that has persisted in many cases about the court's probate jurisdiction, which I outlined above. It also implicitly responds to and refutes the remarks of D.M. Brown J. in *Balaz Estate v. Balaz*.[196]

One issue that was raised in the *Neuberger* appeal was whether an interested person is entitled under the new Rules to have a will proved in solemn form before probate in common form has issued. A significant number of cases held that such a right existed under the former practice. However, Justice Gillese concluded that this is no longer the case under the new Rules. The language of Rule 75.01 makes it clear, in her view, that an interested person may make an application under Rule 75.06 to have a will proved in such manner as the court directs. Further, Rule 75.06(3) provides that the court *may* give directions about the matter. Thus, the court has a discretion to order proof of a will. In addition, the person who seeks to have a will proved in solemn form must adduce some minimum evidence of the need for proof before the court will grant the request.[197] This is not necessarily a bad departure from previous practice, but it is a significant one. Moreover, it introduces a new step in the procedure for determining the validity of wills and that will inevitably increase costs.

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192 Text at footnotes 98 to 100, *supra*.

193 Footnote 51, *supra*.

194 Footnote 12, *supra*.

195 Footnote 12, *supra*.

196 Footnote 177, *supra*.

197 *Neuberger v. York* (C.A.) footnote 97, *supra*, paras. 81-98.

Justice Gillese also agreed with Edie that the motion judge erred in applying the "arguable case" and "delay" tests in denying her right to challenge the wills. Those tests are relevant only under Rules 75.04 and 75.05, which apply when probate has already been granted and an application is made to revoke probate, or to have probate returned.[198]

Very significantly, Justice Gillese held that the motion judge erred for two reasons in holding that the parties were estopped from bringing the will challenges. First, there is no jurisprudential basis for the application of the doctrine of estoppel in will challenge cases; and second, as mentioned above,[199] some legal and equitable doctrines, such as estoppel, cannot be applied by a court exercising its probate jurisdiction, because they are "antithetical to the policy considerations which govern probate."[200] Her reasons might have been clearer and more to the point if she had said that the previous law was not affected by the transfer of probate jurisdiction to the Superior Court and that equitable rules continue to have no relevance in a court of probate.

Justice Gillese also held that there was no factual basis for finding that Adam was but a straw man and the motion judge made a number of errors in her factual findings in respect of Adam

This case is also required reading for all who practice estate litigation.

The fourth case I wish to consider is ***Spence v. BMO Trust Co***.[201] The testator made a will in which he left part of his estate to his younger daughter, Donna, and her children, who lived in England and with whom he had had virtually no contact. He expressly stated in the will that he left nothing to his older daughter, Verolin, because she had no communication with him for several years and showed no interest in him as a father. A certificate of appointment of estate trustee was issued to the named estate trustee. Verolin and her son then made an application under Rule 75.06 of the *Rules of Civil Procedure*[202] in which they sought a declaration that the will was void because contrary to public policy, and for leave to commence a dependants' support application. Verolin submitted affidavits in support of her applications showing that she

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198 *Ibid.*, paras. 99-102.

199 Text at footnote 100, *supra*.

200 *Ibid.*, paras. 103-122.

201 2015 ONSC 615, reversed 2016 ONCA 196, application for leave to appeal to SCC dismissed 2016 CarswellOnt 9351 (9 June 2016).

202 Footnote 12, *supra*.

lived with her father for many years and was close to him, but that her father cut off all communication with her when she told him that she was pregnant and that the father was white. The testator was black and declared that he would not allow a white man's child into his house. Thus, Verolin argued that the will was void for public policy, because it was racially motivated. The application judge admitted the evidence and set aside the will. The estate trustee appealed. The Court of Appeal reversed and the reasons for judgment of Cronk J.A., as well as the shorter concurring reasons of Lauwers J.A., are outstanding in endorsing the principle of testamentary freedom and defining the limits of public policy in the law of wills.

The court emphasized that the principle of testamentary freedom can only be interfered with when the law requires it. Two such occasions are: (1) by statutory provisions such as dependants' support legislation; and (2) by public policy considerations. The first was not relevant, since the Ontario legislation does not obligate a testator to provide for an adult, independent child. In the court's opinion, the second also did not apply. The will did not: (a) contain any discriminatory conditions that require a beneficiary to act contrary to law or public policy in order to inherit under the will; or (b) obligate the executors or trustees to act contrary to law or public policy in order to implement the testator's will, as they would have to do, for example, under a discriminatory charitable trust. The court distinguished *McCorkill v. McCorkill Estate*.[203] In that case the residuary beneficiary was an "unworthy heir," because its objects were to promote hatred and discrimination against specific groups in society, objects that are crimes in Canada and conflict with Canadian human rights legislation and international commitments.

However, Justice Cronk went further and asked the hypothetical question: What if the will did offend public policy on its face? In other words, could the testator have said in the will that he was not leaving anything to Verolin because she had a child by a white man? Her answer was that "the bequest would nonetheless be valid as reflecting a testator's intentional, private disposition of his property–the core aspect of testamentary freedom." In those circumstances, neither the *Ontario Human Rights Code*,[204] nor the *Charter of Rights and Freedoms* would apply to allow the court to strike down the testator's intentions. The former guarantees equal treatment

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[203] 2014 NBQB 148, aff'd 2015 NBCA 50, application for leave to appeal to SCC dismissed *sub nom*. *Canadian Assn. for Free Expression v. McCorkill Estate*, 2016 CarswellNB 224 (9 June 2016).

[204] R.S.O. 1990, c. H.19.

to services, goods, and facilities; the latter pertains to state action. Thus, neither applies to testamentary dispositions of a private nature.[205] Although this part of the judgment is *dictum*, it is a very important statement about the limits of public policy in a wills context.

It followed that the application judge erred in admitting the extrinsic evidence. It is in this respect that I raise a question about the reasons of Cronk J.A. She emphasized rightly that *Spence* was a probate case, not a construction case.[206] As we have seen, the function of a court of probate is to determine that the will was properly executed by a capable testator, who appeared to know and approve its contents and was not subjected to undue influence or fraud. We also saw that for this purpose the court of probate can consider extrinsic evidence, including direct evidence of the testator's intention and even hearsay evidence. Justice Cronk did rely on the decision of Belobaba J. in *Robinson*[207] that evidence of the testator's intention is inadmissible at probate, unless there appears to have been a drafting error. However, then she went on to consider the reasons of the Court of Appeal in *Robinson*, which treated the case as a construction case, as well as other construction cases. Those reasons are really irrelevant in a probate case.

As a matter of law and principle the court need only have said: The will was clear and unexceptional on its face; it was properly executed; and there is no suggestion that the testator did not know or approve its contents, or was subjected to undue influence. Nor was there any suggestion that there was a drafting error. Therefore, the court of first instance, exercising its probate function, is not entitled to consider any extrinsic evidence. Perhaps this is quibbling, but such a holding would have clarified the different roles of courts of probate and construction.

I hasten to add that, in my opinion, a court of probate can refuse to give its imprimatur to a will, or a gift in a will that clearly offends public policy because the will contains discriminatory conditions that require a beneficiary to act contrary to law or public policy in order to inherit under the will; or obligates the executors or trustees to act contrary to law or public policy in order to implement the testator's will, as they would have to do, for example, under a

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[205] *Re Spence Estate* (C.A.), footnote 201, *supra*, paras. 73, 74, *per* Cronk J.A., and 127-129, *per* Lauwers J.A.

[206] *Ibid*., paras. 52, 94.

[207] Footnote 50 (S.C.J.) *supra*.

discriminatory charitable trust A court of probate is obliged, just as much as a court of construction, to apply principles of public policy when that is warranted in such circumstances.

Finally, I wish to address the litigation in ***McLaughlin Estate v. McLaughlin***.[208] The testator made her will in 2010. It consisted of a primary will that disposed of all her assets except her home and a secondary will that disposed of her home. She was a widow and was survived by five children She was estranged from her two oldest children, Thomas and Judith, had no contact with them for a number of years, and had excluded them from her wills since 1994. Her immediately preceding will of 2002 gave bequests to surviving grandchildren and other family members and the residue equally to her three youngest children. The testator made the 2010 duplicate wills as a tax-saving measure on the recommendation of her solicitor. She named her son Daniel her estate trustee. The primary will left bequests to named grandchildren and other family members, which were similar to the bequests in the 2002 will. It left to the residue equally to testator's three youngest children. However, the solicitor inadvertently repeated the bequests contained in the primary will in the secondary will and omitted the residue clause in the secondary will. Further, he included the same revocation clause in both wills. That clause had the effect of revoking the primary, but not the secondary will. All this meant that the specific beneficiaries would unintentionally benefit under both wills and the residue under the secondary will would go out on intestacy and benefit all five children. The solicitor admitted the drafting errors in the secondary will. Daniel applied to have the secondary will rectified. Thomas and Judith opposed the application.

The matter was heard by Lemon J. He repeated the error of Belobaba J. in *Robinson* that the probate court's power to rectify is the equitable power of rectification. As we have seen it is not, but a *sui generis* power unique to the court of probate.[209] He also refers indiscriminately to cases of probate and construction. However, he held that he had power to rectify the will. He found that the errors were not brought to the testator's attention and that she did not read the secondary will before she signed it. He concluded, in light of all the other evidence presented, that the testator could not have intended the consequences of the solicitor's errors and that she did not

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208 2014 ONSC 3162 (Lemon J.); 2015 ONSC 3491 (interim order, Price J.); 2015 ONSC 4230 (reasons for judgment, Price J.). See also John E.S. Poyser, "Case Comment: McLauglin Estate v. McLaughlin (2015), 10 E.T.R. (4th) 42. The case is under appeal.

209 See §5.2, *supra*.

intend to die intestate. Thus, it was clear that a mistake occurred because of the solicitor's clerical error. Hence, Lemon J. ordered the secondary will to be rectified.

Price J. then became seized of the matter. In an interim order he stated that a judge of probate has the obligation to ascertain the intention of the testator when there is a clear issue about the formal validity of the will. He noted that Lemon J. had been asked to address only the issue of rectification, not validity, so that the latter issue was not *res judicata* and must still be determined, specifically with respect to the question whether the testator had knowledge of and approved the contents of the 2010 wills.[210]

In his judgment, Price J. held that he was bound by the findings of fact of Lemon J. and the parties agreed that he was not precluded from making a determination about the validity of the will.[211] He expressed the opinion that the questions whether the secondary will should be rectified and whether it was valid are separate and distinct and since Lemon J. did not address the second question, he could do so.[212] Lemon J. made a finding that the testator did not know or approve the contents of the secondary will and Price J. held that the validity of the secondary will must be based on that finding, so he held it to be invalid. Further, Price J. concluded that a trial was necessary to determine whether the primary will was valid.[213]

While there is much good law in both the order and judgment of Price J., with great respect they are problematic for two reasons. First, I believe that Price J. erred on the matter of knowledge and approval. The current edition of *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* states:[214]

> Affirmative proof of knowledge and approval may take any form, provided it is strong enough to satisfy the court. The fact that the deceased gave instructions for his will, or that it was read over to him or by him is, no doubt, the most satisfactory, but not the only satisfactory form of proof. . . . The court will naturally look for such evidence. It may be impossible to establish a will without it, but the court does not require it in every case and has in numerous cases been satisfied as to the knowledge and approval of the testator

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210 *Ibid*., interim order, paras. 47, 50; judgment, para. 67.

211 *Ibid.*, judgment, paras. 6, 35

212 *Ibid*., paras. 38-39.

213 *Ibid*., paras. 67, 86.

214 Footnote 29, *supra*, para. 13.25, internal citations omitted.

> without such evidence, provided that other evidence and the circumstances of the case warrant such a conclusion.

And the authors state further[215]

> The principles set out above apply equally to a portion of a will as to the whole. If, therefore, it can be proved that any word or clause in the will has been introduced without the testator's knowledge and approval, such word or clause may be rejected and the remainder of the will admitted to probate.

So also in the well-known case, *Barry v. Butlin*,[216] Baron Parke stated:

> Nor can it be necessary that *in all such cases*[217] . . . the precise species of evidence of the deceased's knowledge of the Will, is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the *most* satisfactory, but they are not the *only* satisfactory description of proof, by which the cognizance of the contents of the Will, may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a Will without it, but it has no right in every case to require it.

It is quite clear from the facts that the testator gave specific instructions to her solicitor and that these were not followed because of a clerical error. The giving of such instructions is described by the above authorities as "the most satisfactory" proof that she knew and approved of the contents, or did not, as the case may be. But these authorities also make clear that the court can conclude from other evidence that she knew and approved of the contents, except for words that were introduced in error. Therefore, with great respect, I submit that Price J. ought to have found that the testator knew and approved the contents of her secondary will other than what was introduced through clerical error.

Second, and again with great respect, I believe that Price J, erred in concluding that he could determine whether the secondary will was valid after Lemon J. had rectified it. It is true that rectification and ascertaining knowledge and approval are two separate things. But I believe that the court can only rectify a will that is otherwise valid. To illustrate: if the testator had lacked capacity, the will would have been invalid and the court could not resolve the problem by

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[215] *Ibid*., para. 13.27, internal citations omitted.

[216] (1838), 2 Moo. P.C. 480 at 493, 12 E.R. 1289.

[217] *I.e.*, of suspicious circumstances.

rectifying it. The facts show clearly that the will was properly executed and the testator had capacity. Moreover, there were no serious issues of suspicious circumstances or undue influence. Thus, the will was valid and the decision of Lemon J. to rectify it was based solely on the fact that the testator knew and approved of its contents except the clauses inserted as a result of the solicitor's error. In other words, by implication if not by actual finding, Lemon J. found the will to be valid.[218]

6. Law Reform

The difficulties faced by courts of probate in rectifying wills and by courts of construction in admitting certain types of evidence and rectifying wills often lead to regrettable results and defeat the quite obvious intentions of testators.

England enacted legislation in 1982 to address these issues. Section 20(1) of the *Administration of Justice Act 1982*[219] provides that a court may rectify a will if satisfied that it fails to carry out the testator's intentions because: "(a) of a clerical error; or (b) of a failure to carry out his instructions."[220] Section 21 provides that, in interpreting a will, a court may admit extrinsic evidence, including evidence of the testator's intention when interpreting a will if: (a) any part of the will is meaningless; (b) the language of any part of the will is ambiguous on the face of it; or (c) evidence, other than evidence of the testator's intention, shows that the language of any part of the will is ambiguous in light of surrounding circumstances.

Other jurisdictions have enacted, or are considering similar legislation.[221]

In Canada two jurisdictions have followed this trend and have adopted legislation similar to the 1982 English provisions. With respect to interpretation, Alberta's legislation[222] provides:

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218 In passing, I take note of the large number of cases involving multiple wills, some of which are described above, in which solicitors have inadvertently caused wills to be revoked. The device of multiple wills does save taxes, but it is also productive of much litigation. And one suspects that if litigation ensues, the cost to the estate is often much higher than the tax liability would have been.

219 C. 53.

220 On the rectification power see *Williams on Wills*, 10th ed. by Francis Barlow, Richard Wallington, Susannah L. Meadway, and James MacDougald (London: LexisNexis 2014), ch. 6.

221 See BCLI Report, footnote 136, *supra*, p. 37; BCLRC Report, footnote 70, *supra*, pp20ff.

222 *Wills and Succession Act*, S.A. 2010, c. W-12.2.

> **26.** A will must be interpreted in a manner that gives effect to the intent of the testator, and in determining the testator's intent the Court may admit the following evidence:
>
> (a) evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will,
>
> (b) evidence as to the meaning of the provisions of the will in the context of the testator's circumstances at the time of the making of the will, and
>
> (c) evidence of the testator's intent with regard to the matters referred to in the will.

The British Columbia legislation is similar, but allows consideration of the evidence of the testator's intent only if the provision of the will is meaningless, or if it is ambiguous on its face or in light of evidence, other than evidence of the testator's intent, demonstrating that the language used in the will is ambiguous having regard to surrounding circumstances.[223] The British Columbia Law Institute concluded that allowing reference to the testator's intent in all circumstances would open the floodgates to litigation in which the meaning of wills is contested on fabricated or fanciful grounds.[224]

With respect to rectification, the British Columbia Act provides:

> **59** (1) On application for rectification of a will, the court, sitting as a court of construction or as a court of probate, may order that the will be rectified if the court determines that the will fails to carry out the will-maker's intentions because of
>
> (a) an error arising from an accidental slip or omission,
>
> (b) a misunderstanding of the will-maker's instructions, or
>
> (c) a failure to carry out the will-maker's instructions.
>
> (2) Extrinsic evidence, including evidence of the will-maker's intent, is admissible to prove the existence of a circumstance described in subsection (1).

The Alberta legislation[225] is similar but provides that the court my only act if satisfied "on clear and convincing evidence, that the will does not reflect the testator's intentions because of those reasons. It is perhaps quibbling to query the phrase "on clear and convincing evidence." It suggests the introduction of a higher standard than the usual civil standard of the balance of probabilities. If that was the intention, in my opinion it is undesirable and contrary to the trend in

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223 *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, s. 4(2).

224 BCLI Report, footnote 136, *supra*, p. 41.

225 Footnote 222, *supra*, s. 39(1).

jurisprudence. The Supreme Court of Canada has held that the balance of probabilities is the only standard of proof in civil proceedings, unless a statute says otherwise.[226]

It is noteworthy that the former Law Reform Commission of British Columbia recommended that the court should be able to rectify a will if satisfied that it failed to carry out the testator's intentions because of: "(i) an error arising from an accidental slip or omission; (ii) a misunderstanding of the testator's instructions; (iii) a failure to carry out the testator's instructions; or (iv) a failure by the testator to appreciate the effect of the words used."[227] However, the British Columbia Law Institute revisited that recommendation and concluded that the fourth part of the previous recommendation—which the Commission had included to address cases of incorrect use of legal language by testators writing their own wills—went too far and would mean that the court would have to engage in an "overly subjective exercise of guessing what the testator's understanding had been."[228]

One objection to the fourth reason of the British Columbia Law Reform Commission's recommendation, if it extended not only to the language used by the testator, but also the language used by the drafter, might be that it would give the state's imprimatur to the negligence or ignorance of the drafter. Be that as it may, there are simply too many cases in which a will or a gift in it has failed for this reason and it seems to me that inclusion of this ground would be desirable. If it were adopted, the number of "ghosts of dissatisfied testators who, according to a late Chancery judge, wait on the other bank of the Styx, to receive the judicial personages who have misconstrued their wills, may be considerably diminished."[229] Indeed, it would seem, if not flagitious,[230] at least improper and wrong that unintended heirs receive the testator's bounty in these circumstances.

In my opinion the other Canadian common law jurisdictions should adopt similar legislation as quickly as possible. It would resolve a lot of the problems that have bedevilled Canadian estate

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226 See, *e.g.*, *C. (R.) v. McDougall* (2008), [2008] 3 S.C.R. 41 (S.C.C.).

227 BCLRC Report, footnote 70, *supra*, p. 50.

228 BCLI Report, footnote 136, *supra*, p. 38.

229 *Perrin v. Morgan*, footnote 67, at A.C. 415, *per* Lord Atkin.

230 A term used by Lord Atkin in this context in *Perrin v. Morgan*, *loc. cit*. It means: extremely wicked, criminal, or villainous.

litigation for far too many years. Legislation of this kind will not be a panacea, for it will not always allow a court to ascertain what the testator intended. The evidence may simply be inadequate or nonexistent.

7. Summary of Points

The following is a summary of the points made in the paper. I have provided it for the convenience of the reader.

1. Historically, there were two sets of courts that had jurisdiction over testamentary matters: the courts of probate and the superior court. The function of the former was to prove wills; that of the latter was to construe them.
2. The surrogate courts were abolished and their jurisdiction was transferred to the superior courts in all Canadian common law jurisdictions, except New Brunswick and Nova Scotia, a quarter century ago.
3. Technically we should now speak of the superior court exercising its probate function or its construction function. But it is easier and more convenient to continue to speak of courts of probate and courts of construction.
4. Lawyers and courts, especially in Ontario, have often taken the view that the distinct jurisdiction of the surrogate courts disappeared when the courts were "merged." It did not.
5. The law of probate was developed in the ecclesiastical courts in England as a distinct body of law and practice. This law and practice was inherited by the Canadian surrogate courts.
6. The law of probate is thus *sui generis*. This means, *e.g.*, that the law of testamentary capacity is distinct from the law of capacity in other contexts. Similarly, the law of undue influence in wills contexts differs from the equitable doctrine of undue influence that applies to *inter vivos* gifts.
7. A court of probate determines that a person has died and whether the document produced constitutes his will. As an administrative matter, it will grant probate in common form if the document looks unexceptional on its face. But if compliance with formalities, capacity, and knowledge and approval are called into question, or if an issue of undue influence is raised, the court will hold a trial. If the issues are resolved in favour of the will, the court will grant probate in solemn form.

8. The court's jurisdiction is primarily inquisitorial, rather than adversarial. The court has a real obligation to the testator to ensure that her testamentary wishes are honoured. But it also has an obligation to society, which is concerned that only valid wills receive the court's imprimatur.
9. The court therefore does not simply adjudicate a dispute between the parties and its judgment does not merely bind the parties. Its judgment operates *in rem* and can, therefore, affect the rights of other persons and be relied on by all the world.
10. Because of their unique jurisdiction, courts of probate apply special rules governing admissibility of evidence. They can admit evidence of surrounding circumstances and direct evidence of the testator's intention, including hearsay evidence.
11. If a question arises about the meaning of a will, the superior court takes the will as probated and construes it.
12. Older practice restricted the court of construction in carrying out its function. However, under modern practice, the court of construction considers both the will itself and evidence of surrounding circumstances at the time the will was made together when it construes the will. Thus, it "sits in the testator's armchair" right away.
13. The court of construction is more limited than a court of probate in admitting evidence. It cannot admit direct evidence of the testator's intent, except in a couple of unusual situations, such as equivocation and except in jurisdictions that permit the admission of such evidence as a result of law reform.
14. However, the court of construction does have a limited power to "correct" a will by correcting errors and omissions by implication if it can ascertain what the testator intended. For that purpose it can admit extrinsic evidence, such as the notes and recollections of the drafting solicitor.
15. The abolition of the surrogate courts did not abolish the unique jurisdiction of courts of probate. That jurisdiction was transferred to the superior court.
16. There has been a certain degree of "merger" of the two systems of law in procedural aspects, *e.g.*, in the power to grant summary judgment in a probate matter and, subject to important qualifications, in applying the general costs rules to estate litigation.
17. But the substantive law of probate cannot be fused with the law administered by courts of courts of common law and equity, because that would interfere with the special policy

considerations that underlie the function of a court of probate. For that reason, for example, equitable doctrines cannot be applied by a court exercising its probate jurisdiction.

18. The limited power of a court of probate to "rectify" a will is not the equitable remedy of rectification, but is a *sui generis* power.
19. A court of probate can delete words from a will, but it cannot add words to it. Canadian cases that hold otherwise are heterodox.
20. After the "merger," courts have often failed to make clear whether they are exercising their probate or construction function. This is exacerbated by their practice of citing cases indiscriminately from both jurisdictions.
21. Since the unified court may now have to decide both whether a will is valid and what its meaning is, the question arises whether the same judge can decide both issues successively in one proceeding. She should not do so, because of the different rules about admissibility of evidence.
22. The Ontario Court of Appeal has recently made clear that the probate function remains a distinct function of the superior court and that this function is separate and distinct from the court's interpretive function. Thereby it has refuted many of the erroneous statements made about the matter.
23. In another case the Ontario Court of Appeal has also clarified the principle of public policy and its limits in the wills context.
24. Recent Alberta and British Columbia legislation empowers the court to admit a broader range of evidence when construing a will. The legislation also permits the court to "rectify" a will at both the probate and construction stages. These provisions have resolved many of the problems that have bedevilled this area of the law for many years. The power to rectify a will is not the equitable remedy of rectification. It is entirely statutory.
25. We need similar legislation in Ontario and the other Canadian common law jurisdictions. Indeed, we badly need to reform our law of estates and trusts by updating the current statutes that govern this area of the law.
26. Multiple wills are productive of many drafting errors. If you are going to use them, triple-check them to make sure that you have not inadvertently revoked one or other of the wills, repeated clauses from one will to the next that you ought not to have repeated, and so on.
27. Stop calling an *attorney* a *power of attorney*. It is an egregious solecism.

28. Do call a person who is entitled to an interest in property after a preceding life estate a *remainderer*.

8 Conclusion

My conclusion can be brief. Fortunately, it is now clear that it is necessary to continue to distinguish between the court's probate and construction functions. In most respects the law and practice in this area cannot be fused. But this means that counsel must frame their arguments accordingly and not cite case law from the other function when it is not relevant. Courts must similarly exercise restraint. It would be very helpful if the court would make clear at the outset what function they are exercising in a particular case.

The problems that have plagued this area of law in the past can only be resolved by law reform. It is desperately needed. In my opinion, we need to work together to convince our legislatures that reform in this area should be an important social and legislative priority.