Wills & Estates
Winter Term 2019

Lecture Notes – No. 8

REVOCATION OF WILLS

The Succession Law Reform Act provides the basic rule:

> 15. A will or part of a will is revoked only by,
>
> (a) **marriage**, subject to section 16;
>
> (b) another will made in accordance with the provisions of this Part;
>
> (c) **a writing,**
>
> **(i) declaring an intention to revoke**, and
> (ii) made in accordance with the provisions of this Part governing making of a will; or
>
> (d) **burning, tearing or otherwise destroying it by the testator or by some person in his or her presence and by his or her direction with the intention of revoking it**.

Thus, revocation is either automatic (by operation of law) or by explicit or implicit act of the testator or testatrix.

s.15(a) Revocation by Operation of Law: Marriage

At one time, the common law and earlier statutes established grounds that would automatically revoke a Will in a variety of circumstances. The present law takes a less drastic attitude but still presumes revocation on marriage. Why? Marriage represents a fundamental change in one's life by which one acquires significant new rights and obligations based on social expectations which are recognized by law.

Please note:
Both Alberta and British Columbia have reformed the succession law in those provinces to eliminate this form of revocation.

Banton v Banton
(1998), 164 DLR (4th) 17 (Ont. Gen. Div.); cb, p. 334

Marriage is a contract, and is void if either of the parties is incapable of making that contract through mental incapacity. The test for testamentary capacity is different than capacity to marry. Notwithstanding that one might lack testamentary capacity but have the capacity to marry, marriage in such circumstances revokes an earlier will.

In this case, the elderly testator married a second wife in suspicious circumstances and then executed a new Will. Cullity J distinguished between capacity to marry and testamentary capacity:

> A finding of a lack of testamentary capacity does not necessarily determine whether an individual has the mental capacity to marry; nor is testamentary capacity at the time of marriage required before the marriage will revoke a will: *McElroy, Re* (1978), 22 O.R. (2d) 381 (Ont. Surr. Ct.); *Park Estate, Re*, [1953] 2 All E.R. 1411 (Eng. C.A.).
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> **It is well established that an individual will not have capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves. The burden of proof on this question is on those attacking the validity of the marriage and, in my judgment, it has not been discharged in this case. There is virtually nothing in the evidence to suggest that George Banton's mental deterioration had progressed to the extent that he was no longer able to pass this not particularly rigorous test. The medical evidence indicates his acceptance of the marriage and even in the last months of his life when he was at Village Park, he spoke of his wish to return to his wife -- albeit along with his then caregiver and companion, Ms. Yolanda Miranda.**
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> …
>
> **While I believe that it may well be the case that a person who is incapable both with respect to personal care and with respect to property may be incapable of contracting marriage, I do not believe that incapacity of the latter kind should, by itself, have this effect. Marriage does, of course, have an effect on property rights and obligations, but to treat the ability to manage property as essential to the relationship would, I believe, be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate.** Elderly married couples whose property is administered for them under a continuing power of attorney, or by a statutory guardian, may continue to live comfortably together. They may have capacity to make wills and give powers of attorney. I see no reason why this state of affairs should be confined to those who married before incapacity to manage property supervened.
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> George Banton was found by Dr. Chung to have capacity as far as personal care was concerned. Moreover, despite his physical problems, his weakened mental condition and his loss of memory, he was able to carry on more or less normal discourse on simple everyday matters. Strangers, like Carol Davis and Mr Allen, who met him briefly did not notice anything abnormal about his mental state. On the basis of a one-hour examination Dr. Silberfeld concluded that he had capacity to manage his property. Obviously he was still capable of presenting a brave face to the world. The more thorough examination by Dr. Chung revealed what those close to him already knew: that his judgment was severely impaired and his contact with reality tenuous. Despite these problems, I have no doubt that, with care and attention and avoidance of stress, **he was capable of coping with the**

> **more mundane problems of everyday living and I do not see why the right to marry should be withheld from persons in his position**.
>
> Accordingly… I find that, notwithstanding George Banton's incapacity to manage property on December 17, 1994, he had capacity to marry and that his marriage to Muna was valid. In consequence, his will of January 30, 1991, was revoked and, in view of my other findings, he died intestate.

Conflict of laws:

There is a very nice illustrative case that intersects with the law of revocation of wills.

In **Davies v. Collins, 2011 NSCA 79**, the testator entered into marriage on his death-bed in a foreign jurisdiction. He was domiciled in Nova Scotia but resident in the foreign jurisdiction. The law of Nova Scotia governed the admission to probate of his will and it was held, after scrutiny of the validity of the marriage and its consequences under foreign law, that the will was revoked. Per Bryson J.A.:

> 13 Under s. 17 of the Nova Scotia Wills Act, the marriage of a testator revokes his or her Will. The law of Trinidad and Tobago is to the same effect, except in the cases of marriages in extremis. Both the Wills Act and Probate Act, Laws Trinidad & Tobago, c. 9:03, s. 48 and the Marriage Act, Laws Trinidad & Tobago, c. 45:01, s. 42 provide that marriages in extremis do not revoke a prior Will.
>
> 14 In essence, the argument of Ms. Davies is that the status of Dr. Davies' last Will should be determined under the law of one jurisdiction - that of Trinidad. She points to the apparent contradiction between Nova Scotia recognizing a marriage in extremis — a form of marriage not known to our law — but then giving effect to s. 17 of the Wills Act, whereas in Trinidad marriages in extremis do not revoke a Will.
>
> 15 On appeal, Ms. Davies agreed that the judge was correct to recognize the validity of the marriage between Dr. Davies and Ms. Collins since it was a valid marriage in Trinidad, the lex loci celebrationis, (the law of the place of celebration). There was no challenge regarding Dr. Davies' capacity to marry. But Ms. Davies argues that the judge erred by not applying the matrimonial property consequences of such a marriage according to the law of Trinidad. For marriages in extremis, that means no revocation of Dr. Davies' Will.
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> ...
>
> [after reviewing the authorities on domicile]
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> 26 To summarize on this point: in each of these cases the relevant domicile is that of the testator at the time of marriage. Matrimonial domicile is not used in a sense independent of the testator's personal domicile, as Ms. Davies is arguing. Justice Rosinski made no error of law in declining to accept Ms. Davies' argument here. Once the appellant accepts — and the judge found — that Dr. Davies' place of domicile at the time of marriage

> was Nova Scotia, revocation of the Will fell to be determined under Nova Scotia law.

The interesting point here is that the form of the marriage in Trinidad would not have revoked the will if the testator was domiciled there, but given his domicile was in Nova Scotia, the consequence was to revoke the will given that Nova Scotia law governed the succession law aspects of the dispute.

s.16(a): Wills Made 'In Contemplation of Marriage' are Not Revoked

> 16. A will is revoked by the marriage of the testator except where…
>
> (a) there is a declaration in the will that it is made in contemplation of the marriage;

Re Coleman
[1976] Ch 1 (Ch); cb, p. 337

A will made in contemplation of marriage *to a particular person* is not automatically revoked upon the celebration of that marriage – the Will may feature a declaration (express or implied) that the Will is to survive.

Here the testator was a widower when he married his second wife. Two months before the marriage he made a new Will giving her (she was described as 'my fiancee' and her name) property including his home. He died a year later. The widow argued that the marriage revoked the Will and that the testator died intestate. His brother argued in favour of the Will. Megarry J found for the brother on the construction of the whole of the Will notwithstanding that the term 'fiancee' seemingly contemplates a change of circumstances in the circumstances of the testator:

> 'Fiancee' is a word which means a woman who is engaged to be married, or is betrothed, and 'my fiancee' must mean a woman engaged to be married to the speaker. When a man speaks of 'my fiancee' he is speaking of 'the woman to whom I am engaged to be married.' It seems to me that in ordinary parlance a contemplation of marriage is inherent in the very word 'fiancee.' The word 'wife' is a word which denotes an existing state of affairs, and one that will continue until death, or, these days, divorce: but I do not think that it could reasonably be said that there inheres in the word 'wife' any contemplation of, a change of that state of affairs, whether by death or divorce. 'Fiancee' seems to me to be quite different, in that it not only describes an existing state of affairs but also contemplates a change in that state of affairs.

MacLean Estate v Christiansen
2010 BCCA 374; cb., p.341, fn 11

The parties were cohabiting, decided to marry, the testator made a Will, they married, and he then died. Was the Will revoked? No.

The Will spoke of the cohabitational spouse then wife as 'my spouse'. The trial judge held this was insufficient to find that the Will was made in contemplation of marriage. Per Pitfield J:

> [17] With respect, the reference to "my spouse, Karen Christiansen", is not a declaration of intention to marry Ms. Christiansen. In common parlance, the testator and Ms. Christiansen were "common law spouses" when the will was executed. By the time they were legally married, the testator and Ms. Christiansen were also spouses for purposes of legislation such as the *Family Relations Act,* R.S.B.C. 1996, c. 128 and the *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.) as they had cohabited by that time for more than two years in a marriage-like relationship. The fact the parties could be described as spouses did not accord them the status of married persons.
>
> **[18] The *Wills Act* is not ambiguous. It speaks of the consequences associated with marriage. Marriage is the lawful union of one person with another. A common law relationship is not marriage. A will cannot survive the conversion of a common law relationship to one of lawful marriage absent the finding of a declaration within the will that it is made in anticipation of that marriage, and the conversion of that relationship to one of legal marriage. In this case, the only reference to the status of Ms. Christiansen, then and in the future, is the word "spouse" contained in clause 3.b., and that is not sufficient.**
>
> [19] It is obvious that the result dictated by the *Wills Act* is inappropriate in this case. If the testator had made his will when the parties were not legally married and the parties had remained in a common law relationship from and after June 22, 2007, the will would have been valid. What defeats the will is the conversion of a marriage-like relationship, which is accorded virtually all of the rights and obligations attached to a legal marriage, to one of legal marriage. Perhaps it is for that reason, among others, that Bill 28, introducing the *Wills, Estates and Succession Act* during the 2008 Provincial Legislative Session contains no provisions comparable to ss. 14 and 15 of the *Wills Act*.

On appeal, 2010 BCCA 374, the trial judge was reversed:

Per Kirkpatrick JA:

> [18] The appellant contends that the chambers judge erred in not finding that the use of the term "spouse" in conjunction with the creation of the spousal trust in favour of Ms. Christiansen, together with the extrinsic evidence before the court, was sufficient to establish that it was

Mr. MacLean's intention that the marriage to Ms. Christiansen would not revoke the will.

[19] Ms. Christiansen opposes the appeal on the basis that the law in this province is clear and well-settled – in the absence of a declaration that the marriage is contemplated, the marriage of a testator revokes any prior wills.

…

[28] The question then in the case at bar is, whether the words in the will "my spouse, KAREN CHRISTIANSEN", and the creation, by words, of a spousal trust in favour of Ms. Christiansen and the appointment of "Karen" as the trustee of the spousal trust fund amount to sufficient declaration that the will is made in contemplation of the subsequent marriage.

[29] The respondent submits that in accordance with the holding of the chambers judge, the words do not amount to sufficient declaration, absent which the Court may not consider extrinsic evidence.

…

[33] The *Shorter Oxford English Dictionary*, 6th ed. (Toronto: Oxford University Press, 2007), notes the origin of the word "spouse" from the Latin *sponsus* bridegroom, *sponsa* bride, and defines "spouse" as a "married person; a person's lawfully married husband or wife".

[34] Similarly, in *Taylor v. Rossu*, 1998 ABCA 193 (CanLII), 1998 ABCA 193, 161 D.L.R. (4th) 266 at para. 92, the court held that "The ordinary meaning of the word "spouse" is a person who is joined in lawful marriage to another person."

[35] On that basis, there is arguably no ambiguity and the term used in the will can be said to refer to Mr. MacLean's wife whom he was yet to marry, Ms. Christiansen.

[36] By contrast, the chambers judge found no ambiguity because, at the time in question, Mr. MacLean and Ms. Christiansen were living in a "common law" (or "spouse-like") relationship. There is authority to support that conclusion…

[37] If one accepts that the word "spouse" may refer to either a legally married person or a person living in a marriage-like relationship, then the use of the word in the circumstances at bar was ambiguous. Extrinsic evidence is thus admissible to determine the meaning in this case.

[38] The circumstances of the making of the will in this case were summarized in the appellant's factum:

(a) The Will was made after joint tax and estate planning with Ms. Christiansen.
(b) Both Mr. MacLean and Ms. Christiansen were sophisticated financial professionals.
(c) The Will was executed after the wedding date and arrangements had been set.
(d) The solicitor preparing the Will knew of the wedding; was invited to and attended the wedding reception and advised Mr. MacLean and Ms. Christiansen on honeymoon travel arrangements to Italy.
(e) [The Will] was prepared at a time when Mr. MacLean and Ms. Christiansen were living in a stable, long-term, common-law relationship.
(f) The Will provides for benefits to Ms. Christiansen under a spousal trust.
(g) The Will speaks of Ms. Christiansen as his spouse.
(h) The Will addresses and balances the needs of Ms. Christiansen and of Mr. MacLean's children.
(i) As their wedding date approached in May 2007, Mr. MacLean told Ms. Christiansen that he intended to have a Will and Power of Attorney in place before they were legally married.

[39] When one examines the terms of the will and the circumstances in which it was prepared, there can be no doubt that Mr. MacLean intended that the will would survive his marriage to Ms. Christiansen and provide for her for the remainder of her life. On her death, the one-half of the residue of the spousal trust then remaining would form part of the residue for the benefit of the testator's children. This was obviously a carefully constructed estate plan. The extrinsic evidence overwhelmingly supports the construction that "spouse" meant Mr. MacLean's legal spouse, to whom he was, at the date of making the will, not married but was clearly contemplating marrying.

[40] Further, the whole will was drafted in a manner in which it cannot be said that only the gift to Ms. Christiansen was contemplated. The spousal trust and the children's fund were planned as an integral part of a whole. In my opinion, the whole will was, when one examines the extrinsic evidence, expressed to be made in contemplation of the impending marriage to Ms. Christiansen.

[41] As the Supreme Court of Canada stated in *Marks v. Marks* 1908 CanLII 22 (S.C.C.), (1908), 40 S.C.R. 210 at 212:

> In other words, it is claimed that there cannot be any one who can answer to that description "my wife" except the one person who may in law be decided to be such.
>
> I do not think the law so binds us.

> Unless it does, I do not see why we should pervert the most obvious intention of this testator. I think we are bound to read his language in light of all the circumstances that surrounded, and were known to him when he used it and give effect to the intention it discloses when so read.

[42] This construction of the will further satisfies the legal presumption against an interpretation of a will that would create an intestacy. Thus, in *Re Harrison; Turner v. Hellard* (1885), 30 Ch. D. 390 at 393-394 (C.A.), Lord Esher, for the Court, held:

> ... when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce – that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule.

[43] It follows that I would find that the references to "spouse" in the will and the extrinsic evidence establish that Mr. MacLean's will was made in contemplation of his marriage to Ms. Christiansen. I would therefore order that the will be admitted to probate.

Thus, 'in contemplation of marriage' is a question of fact.

Re Ramalho Estate
2008 CanLII 35270 (Ont S.C.J.)

A Will made in contemplation of marriage remains valid if the marriage was never entered into, and the gift to the named spouse was not conditional on the marriage being entered into by the parties.

s.16(b): Spousal Election to Preserve the Will

> 16. A will is revoked by the marriage of the testator except where… (b) the spouse of the testator elects to take under the will, by an instrument in writing signed by the spouse and filed within one year after the testator's death in the office of the Estate Registrar for Ontario;

There are few cases on this provision which allows for the surviving spouse to preserve the will rather than take on the intestacy.

Re Browne and Dobrotinic
[1958] OWN 91 (HC); cb, p.343

The deceased was married. He separated from his first wife and then began to live with his second wife; they cohabited for many years, and were married after a divorce decree was issued in respect of the first marriage. The plaintiff made a Will in favour of the second wife during the period of cohabitation, and she later filed an election under the predecessor section to s.16(b) at the time of probate but in the wrong office. However,

notice was properly given to parties that might contest the Will and thus there were no grounds for revocation.

Per Moorhouse J:

> It should be observed that in England the Law of Property Act, 1925 (Imp.), c. 20, s. 177, provides that a will expressed to be made in contemplation of marriage is not revoked by solemnization of the marriage contemplated. Were this Court to adopt the argument of the applicant it would be a clear case of a strict and literal interpretation of the statute defeating the purpose of the statute.
>
> **Having regard to the intention of the Legislature as this Court understands it from a reading of the Wills Act, it must be held that the matter of filing was a directory matter and did not go to the substance of the legislation. In the instant case all those parties who would inherit in the event of an intestacy have been notified and have failed to appear. This Court must find that the election was properly made and that the will is a valid will and was not revoked by the failure to file the election so made in the proper office** and that, accordingly, a good title has been shown by the vendor.

s.16(c): Preservation of Powers of Appointment

A disposition in a Will made pursuant to a power of appointment and where the Will is revoked by marriage will still be effective where the property does not go to the testator's personal representative, heirs, or estate in default of the appointment.

The original section 18(2) of the Wills Act 1837 (UK) read:

> Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions

[It now reads: '(2) A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives.']

The Succession Law Reform Act reads:

> 16. A will is revoked by the marriage of the testator except where… (c) the will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he or she died intestate.

The meaning of this section (as is its counterpart under the Wills Act 1837, both in its original form and as amended) is confusing. Certainly it relates to powers of appointment – that is, where the donor gives a 'power' to donee, who may in his or her absolute discretion appoint (give to another) the donor's property to an appointee (a third party).

Suppose as follows:

1. In 2002, A is given property and a power of appointment whose terms say that s/he may appoint the property to any person that s/he wishes **but without any provision for the property's disposition if A fails to appoint the property**.

2. In 2003, A makes a will in which s/he exercises the power of appointment by directing his/her personal representative (executor) to give the property to C.

3. In 2004, A marries.

The effect of the marriage is to revoke the Will; thus, on A's death and there being no new Will, the property will fall into A's estate and will go to A's spouse on an intestacy.

4. Suppose instead, that A was given a power of attorney exercisable in A's will **but under its terms provided a gift in default of its exercise to the Canadian Red Cross**.

The effect of the marriage is to revoke the Will except in respect of the exercise of the power of appointment, because the property would 'in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he or she died intestate'.

Re Gilligan
[1950] P 32; cb, p.346

Here there was a trust settled by the testator in 1890 in contemplation of marriage. This meant that the property subject of the trust was to be held for the benefit of the testator and his wife for life, with a gift over to any children. If there were no children, then the testator could appoint one-half of the trust property in his Will, and, the other half of the trust property would go as on an intestacy as if the testator had not been married. If the testator did not in fact appoint one-half under his will, then that half would also go as on an intestacy as if the testator had not been married.

The wife died in 1902. The testator and his wife had no children on her death.

In 1910, the testator made a Will exercising the power of appointment under the trust in favour of his nephews and nieces except for £500 which went into his estate.

In 1912, the testator married and made a second marriage settlement – the second wife was given a life interest in the trust funds. In 1916, he died. There were no children of this marriage either. In 1946, the second wife died and thus her life interest terminated.

The issue then became whether the marriage in 1912 had revoked the 1910 will – or did the exercise of the power of appointment survive because there was a default provision in favour of the testator's nieces and nephews. As the widow had no interest as the property would be distributed on an intestacy as if the testator had never married, the clause survived the subsequent marriage.

Partial Revocation by Change In Circumstances; s.17(2) and Divorce

Please note the partial abolition of a common law rule in the statute:

> 17.(1) Subject to subsection (2), a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.
>
> *Exception on termination of marriage*
>
> (2) Except when a contrary intention appears by the will, where, after the testator makes a will, his or her marriage is terminated by a judgment absolute of divorce or is declared a nullity,
>
> (a) a devise or bequest of a beneficial interest in property to his or her former spouse;
>
> (b) an appointment of his or her former spouse as executor or trustee; and
>
> (c) the conferring of a general or special power of appointment on his or her former spouse,
>
> are revoked and the will shall be construed as if the former spouse had predeceased the testator.

The statute's terms require that the contrary intention be apparent on the face of the will rather than implied from the surrounding circumstances; see ***Re Billard Estate*** **(1986), 22 ETR 150 (Ont HC); cb, p.349.**

The provision, and similar provisions in other provinces, have been held to be of retrospective effect; *Page Estate v. Sachs* (1993), 12 0.R. (3d) 371 (C.A.); *Re Hayward Estate* 2011 NSCA 118.

Revocation by Act of Testator

15. A will or part of a will is revoked only by,

(c) a writing,

(i) declaring an intention to revoke, and
(ii) made in accordance with the provisions of this Part governing making of a will; or

(d) burning, tearing or otherwise destroying it by the testator or by some person in his or her presence and by his or her direction with the intention of revoking it.

Re Davies
[1928] Ch 24; cb, p. 353

The Will may be revoked by an express declaration of revocation in a subsequent testamentary instrument - the declaration must evidence the intention to revoke but need not be in any particular form of words. A declaration of complete or partial revocation can be implied in the wording of a later instrument. The entirety of the earlier Will need not be revoked in such circumstances.

In this case a farmer made a Will which gave 'all my farms and lands' in a certain parish in trust, and the residue of the estate in other trusts. He later bought additional land in the same parish and made a codicil to his will giving that land to his daughter for life, and then to his grandson – the codicil, however, didn't vest fee simple ownership in the land to anyone, merely established life interests. It was held that the provisions of the Will itself were not revoked, and that title went with the other lands into the established testamentary trust in respect of 'all my farms and lands' in the earlier instrument.

Leonard v Leonard
[1902] P 243; cb, p.357

The testator may evidence his intention to revoke the Will through a physical act of destruction of the Will itself. Like an express or implied revocation through a subsequent instrument, the revocation can be intended to be partial if the remaining part left un-destroyed is intelligible on its own.

Here the testator left a Will of 5 pages, but it was apparent that the first two pages were made after the last three pages (though attested to by the same witnesses) and included a general revocation of earlier instruments. Were the three pages of the earlier will revoked? Yes – the destruction of the first two pages was an act of revocation, notwithstanding that the last page still had a signature. Moreover, the three remaining pages were not intelligible on their own. Per Gorell Barnes J:

> This case is a remarkable illustration of the danger of testators meddling with their wills when once they have executed them properly.

…

Applying the principles to be gathered from those cases, I am of opinion, from an examination of the last three sheets of this document, that they are practically unintelligible and unworkable as a testamentary document in the absence of the original sheets 1 and 2, and that the destruction of sheets 1 and 2 must be taken as having had the effect of destroying the validity of the whole will. The testator must be taken to have intended what his act would necessarily lead one to conclude as to his intention: having destroyed the earlier portions - pages 1 and 2 - he must have intended to revoke also the remaining portions - pages 3, 4, and 5. He did not intend these last three pages to be his operative will without doing something more. He intended to put two other sheets on to them. Up to that point the will was, in my opinion, legally revoked.

…

It becomes, therefore, a question whether, at the time the deceased in the present case signed and caused the witnesses to put their signatures to these two pages (1 and 2), he did that as his will or part of his will, or simply to shew that they formed part of a will to which the signature at the end of the will was to give validity.

In my opinion those signatures were only put on the two pages in question to identify them, and to make them valid if the will was valid at the end. That was, unfortunately, an abortive act. The later sheets had no effect by themselves, and they had no effect to render the sheets 1 and 2 operative.

The result is that none of the sheets can be treated as a valid document of a testamentary character, and my judgment - unfortunate, I am afraid, for some of the parties - must be that this will must be pronounced against, and, if there is no other will, there will be an intestacy as to the whole of the deceased's estate.

Presumptive Revocation

DeLack v Newton
[1944] OWN 517 (Surr Ct); cb, p.361

Where a Will was made and can be proven to be in the possession of the testator during his life and which cannot be found on his death after a thorough search is made, it is presumed that the testator revoked the will; *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154 (Eng CA); *Allan v Morrison* [1900] AC 604; *Sorkos v Cowderoy* [2004] O.J. 4920 (S.C.J.). The presumption can be rebutted by evidence that the testator regarded the lost Will as valid or by other evidence that is consistent with the Will be regarded by the testator as still in existence and still operating; *Re Perry* (1924), 6 OLR 278 (CA).

Here the testatrix directed her sister to destroy her first Will, but not in her presence. She did so. The second Will was defective. The first will was proved by oral evidence buttressed by the presumption *omnia praesumuntur rite esse acta* ('all things are presumed to be done solemnly', also known as the presumption of regularity).

Sugden v. Lord St. Leonards
(1876), 1 P.D. 154 (Eng. C.A.)

Edward Sugen was an eminent lawyer. A successful advocate, he was appointed King's Counsel, served as Lord Chancellor of Ireland and later as Lord Chancellor of Great Britain. It was odd that on his death in 1875 his will could not be located. Stranger still, Lord St. Leonards, as he was at his death, was said to be was in the habit of reading his will every night, and that his daughter Charlotte had to listen to it so many times over the years that she had memorized most of it. *Was the will revoked?*

In the appellate stage of the probate proceedings, Cockburn C.J. said '[i]t seems to me utterly impossible to suppose that... such a man as Lord St. Leonards would voluntarily have destroyed this will, whether for the purpose of revoking it, or making another, or for any other purpose that could be conceived. My mind revolts from arriving at any such conclusion, and I feel bound to reject it.' Charlotte's written recollection of the will was admitted to probate.

In Canada, *Sugden v. Lord St. Leonards* is still accepted for the proposition that the presumption of revocation is ''more or less strong' according to circumstances such as the character of the testator and his relation to the beneficiaries, the contents of the instrument, and the possibility of its loss being accounted for otherwise than by intentional destruction;' *Lefebvre v Major* [1930] SCR 252, 257 per Anglin C.J.C.

Conditional Revocation

Like making the Will, revocation is an intentional act. Destruction premised on a mistaken belief that the Will is invalid does not result in revocation as the intent to revoke isn't present. Thus, in **Re Sorenson (1982), 10 ETR 282 (BCSC); cb, p. 367**, a codicil based on a mistake of fact (that certain legatees were dead who were actually alive) does not revoke the earlier provisions of the Will as the intent was not to revoke a valid disposition but make alternative dispositions given that the original disposition could not be carried out.

'Dependent Relative Revocation' is a term to describe conditional revocation of a Will on substitution by another Will. Thus, if the first Will is revoked on the condition that the second Will is effective, the first will remains effective if the second Will fails – however, this is a presumption that is rebuttable in respect of whether such a condition was in fact intended by the testator.

Thus, the testator must have considered the substitution of the second Will for the first will at the time of revocation (e.g. tearing up the first Will) – the act of destruction alone doesn't allow the presumption to operate.

Re Jones
[1976] 1 Ch 200 (Eng CA); cb, p.370

The testatrix made a Will leaving some land to her nieces. Before her death a few years later, she told her bank manager that she wanted to leave the land to her nephew's children. She went to the solicitor's office but he could not see her. She died the next day. After she died, the Will was found – it had been partially mutilated, including a portion that had been cut off that had most of the dispositions (including the land in question) which the testatrix had signed. It was held that the doctrine of conditional revocation did not apply. Per Buckley LJ:

> **The fact that at the time of the mutilation or destruction the testator intended or contemplated making a new will, is not, in my judgment, conclusive of the question as to whether his intention to revoke was dependent upon his subsequently making a new will.** A testator who has made a will in favour of A may become disenchanted with A and decide not to benefit him. He may well at the same time decide that in these circumstances he will benefit B instead of A. It does not by any means follow that his intention to disinherit A will be dependent on his benefiting B, or making a will under which B could take.
>
> If he were told that for some reason B could not or would not benefit under his new will, would the testator say, "In that case, I want my gift to A to stand," or would he say, "Well, even so, I do not wish A to benefit"? In the former case, his *animus revocandi* at the time of the destruction or mutilation of his will could properly be regarded as dependent on the execution of a new will, but not in the latter.
>
> **It is consequently necessary to pay attention to the circumstances surrounding the mutilation or destruction of the will to discover**

> **whether any intention that the testator then had of revoking the will was absolute or qualified, and if qualified, in what way it was qualified.**
>
> …
>
> There was no direct evidence of any belief by the testatrix that the destruction of her will was a necessary precondition of making an effective new will…

PROOF OF DEATH

At common law, *the fact* that someone has died and that there is no body available for the issuance of a Death Certificate can be resolved through proof before a court. The person seeking that judicial declaration can be aided through a rebuttable *presumption of death* where a person is missing and has not been heard of for seven years. The exact date of death may still require some form of proof even where the presumption applies and this is a question of fact for the court; **Re Miller (1978), 22 O.R. (2d) 111 (H.C.J.); cb, p.383.** Here the deceased was missing for many years and the court held that it had jurisdiction to fix the date of death (which might be important for a variety of reasons).

While a person remains missing, there is jurisdiction under the **Absentees Act, RSO 1990, c.A.3; cb, p.388,** to make a an order for administration of the absentee's assets and discharge of his or her obligations. Under the Rules of Civil Procedure, R.1.03(1), a person who is absent under that statute is a person 'under a disability' thus allowing the court to appoint a Litigation Guardian to litigate for that person.

As for declarations of death proper, the situation in Ontario (and elsewhere) has changed somewhat in the aftermath of 9/11. The **Declarations of Death Act 2002; cb., p.390,** aims to streamline the process of *declaring* a person dead where no remains can be located (the fact of death can still be pleaded and proved in an individual case). The Act allows a single application to be brought for a declaration that suits a wide variety of legal purposes.

> **Declarations of Death Act, 2002, S.O. 2002, c.14**
>
> *Definitions*
>
> 1. In this Act,
> "interested person" means any person who is or would be affected by an order declaring that an individual is dead, including,
> (a) a person named as executor or estate trustee in the individual's will,
> (b) a person who may be entitled to apply to be appointed administrator of the individual's estate on intestacy,
> (c) the individual's spouse,
> (d) the individual's next of kin,
> (e) the individual's guardian or attorney for personal care or property under the *Substitute Decisions Act, 1992*,
> (f) a person who is in possession of property owned by the individual,

(g) if there is a contract of life insurance or group insurance insuring the individual's life,
(i) the insurer, and
(ii) any potential claimant under the contract, and
(h) if the individual has been declared an absentee under the *Absentees Act*, the committee of his or her estate; ("personne intéressée")

Order re declaration of death

2. (1) An interested person may apply to the Superior Court of Justice, with notice to any other interested persons of whom the applicant is aware, for an order under subsection (3).

Notice

(2) Notice under subsection (1),
(a) if given by or to an insurer, shall be given at least 30 days before the application to court is made;
(b) if not given by or to an insurer, shall be given as provided by the rules of court.

Power of court

(3) The court may make an order declaring that an individual has died if the court is satisfied that either subsection (4) or (5) applies.

Disappearance in circumstances of peril

(**4) This subsection applies if,**
(a) the individual has disappeared in circumstances of peril;
(b) the applicant has not heard of or from the individual since the disappearance;
(c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual since the disappearance;
(d) the applicant has no reason to believe that the individual is alive; and
(e) there is sufficient evidence to find that the individual is dead.

Seven-year absence

(5) This subsection applies if,
(a) the individual has been absent for at least seven years;
(b) the applicant has not heard of or from the individual during the seven-year period;
(c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual during the seven-year period;

(d) the applicant has no reason to believe that the individual is alive; and
(e) there is sufficient evidence to find that the individual is dead.

Scope of order

(6) The declaration of death applies for all purposes unless the court,
(a) determines that it should apply only for certain purposes; and
(b) specifies those purposes in the order.

Same

(7) The declaration of death is not binding on an interested person who did not have notice of the application.

Date of death

(8) The order shall state the date of death, which shall be,
(a) the date upon which the evidence suggests the person died, if subsection (4) applies; or
(b) the date of the application, if subsection (5) applies.

Same

(9) The order may state a date of death other than that required by subsection (8) if the court is of the opinion that it would be just to do so in the circumstances and that it would not cause inconvenience or hardship to any of the interested persons.

PROOF OF LOST WILLS

A Will that was known to be in the possession of the testator or testatrix at death and cannot be found after the fullest inquires will invoke the '**presumption of revocation**.'

This is a presumption which can be rebutted on a balance of probabilities, and many cases can be found where the presumption is rebutted by evidence to show, for example: the testator considered the Will valid at death – *Re Perry* (1924), 56 OLR 278 (CA); or that the testator put the Will in what he regarded to be a safe and secure place which was interfered with by a third party; *Re Cole* [1994] NSJ No. 256 (CA).

The leading Canadian dicta is that of Anglin CJC in Lefebvre v Major [1930] SCR 252:

> **... the presumption of revocation arising from the will, traced to the possession of the testator, [and] not being forthcoming... is said by Cockburn C.J., in *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154, to be *presumptio juris*, but not *de jure*, 'more or less strong' according to circumstances such as the character of the testator and his relation to the beneficiaries, the contents of the instrument, and the possibility of its loss being accounted for otherwise than by intentional destruction on the part of the testator.**

Thus a lost Will – a Will is known to have existed in circumstances where its loss is not consistent with an act of revocation – can be proved by evidence of due execution, testamentary capacity and intent, and its contents. How? Solicitor's notes, copies of the Will, etc.

A Court of Appeal case has called into question the strict burden of proof (reasonable doubt) in respect of proving a lost Will (rather than rebutting the presumption of revocation) in older Ontario jurisprudence, and has favoured (in dicta) the more conventional test of 'reasonable probability' used elsewhere in Canada.

Sorkos v Cowderoy
(2006), 26 ETR (3d) 108 (Ont CA); cb, p.398

The testatrix was in a second relationship, but unmarried, of long standing (41 years) at the time of her death. She also had a son from a prior relationship. A Will had been made some 17 years before her death leaving her estate to her son. The common law spouse alleged that a new Will was executed 13 years later after the first Will (4 years before the testatrix's death) leaving the estate to him, but had been lost. The son opposed admitting the new Will to probate and instead sought to admit the old Will. Per LaForme JA:

> ***(i) Proving a lost will***
>
> **8 The test for proving a lost will requires that Mr. Sorkos demonstrate:**
>
> **(1) due execution of the Will;**
>
> **(2) particulars tracing possession of the Will to the date of death, and afterwards if the Will was lost after death;**
>
> **(3) rebuttal of the presumption that the Will was destroyed by the testator with the intention of revoking it; and**
>
> **(4) proof of the contents of the lost Will.**
>
> 9 The evidence clearly established the due execution of the Will, which the trial judge held to be identical to the one presented at trial. While Mr. Cowderoy points to inconsistencies in the evidence, it nevertheless remains uncontradicted that the testator executed the Will in the presence of two independent witnesses.
>
> 10 Assuming that the presumption of revocation, as outlined below, applies in this case, Mr. Sorkos -- on a balance of probabilities -- would have been required to rebut the presumption that, because the executed copy of the Will was lost, the testator intended to revoke the Will. This burden flows from the principle that: when a will is traced to the possession of the testator and cannot be found at the date of death, there is a presumption that it was destroyed by the testator with the intention of revoking it: *Lefebvre v. Major*, [1930] S.C.R. 252 (S.C.C.) at 257.

11 For two reasons it is doubtful that the presumption of revocation applies in this case. First, the trial judge found that the testator had -- apparently because of the progression of Parkinson's disease -- likely lost her capacity to revoke the Will by 1998, the date at which the Will went missing. Second, the testator entrusted Sorkos with the Will and assumed Sorkos had kept the Will for safekeeping. Consequently, the presumption of revocation would not apply since the originally executed Will was not in the testator's possession at the time it went missing.

12 Once again, assuming the presumption of revocation does apply, it was considered and rejected by the trial judge, and the evidence in this regard supported his findings and conclusion. It is true that the trial judge did incorrectly state that Mr. Sorkos' briefcase containing the Will was missing when in fact the evidence was that only the envelope containing the Will went missing. It appears to me that the trial judge merely misstated this evidence, which in my view is of no significance to his ultimate decision. I would not disturb his decision.

13 It is correct, as counsel for Mr. Cowderoy points out, that in Ontario it appears that Mr. Sorkos must prove that the contents of the will reflect the testamentary intentions of the testator beyond a reasonable doubt: Craig, Re , [1939] O.R. 175 (Ont. C.A.) at 179. However, other jurisdictions have held that the standard of proof required for the reconstruction of a lost will is that of reasonable probability: Wippermann, Re, [1953] 1 All E.R. 764 (Eng. P.D.A.), at 766; Squires v. Squires (1979), 24 Nfld. & P.E.I.R. 288 (Nfld. Dist. Ct.). It may be that the time has come for Ontario to reconsider this issue, however, I do not think that this is the appropriate case in which to do so. The evidence in this case overwhelmingly satisfies the standard of proof required in Ontario to prove the contents of the Will.

Procedure:
Re O'Reilly
2009 CanLII 60091 (Ont Sup Ct)

Per Brown J:

[1] This is an application under Rule 75.02 of the *Rules of Civil Procedure* to prove the validity and contents of a will, the original of which has been lost, and of which only a copy remains. In light of the evidence filed about the search for the original will conducted by the applicants, including their efforts to obtain the original from the solicitor who acted for their mother, and in view of the consents from all the potential beneficiaries, I grant the order sought.

[2] My only purpose in writing this brief endorsement is to deal with the form of the order. Since the *Rules of Civil Procedure* do not prescribe the form for an order made under Rule 75.02, judges see a wide range of

language submitted for proposed orders proving lost wills. **In order to bring some uniformity to this type of application, I would ask applicants to submit draft orders using the language recommended several years ago by (now retired) Justice Haley. The draft order should read:**

> **I declare that the Will of [insert name of deceased] dated [insert date of will] has been proved and that the copy of the Will adduced in evidence shall be admitted to probate as the last Will of [insert name of deceased] deceased, until such time as the original may be found.**
>
> **I direct that, subject to the filing of the appropriate documents with the Court, a Certificate of Appointment of Estate Trustee with a Will for the Will of [insert name of deceased] dated [insert date of will] be issued to the applicant(s).**

To this language should be added any other orders sought by the applicant, such as dispensing with service of the application, etc.

[3] Judges considering these applications are provided with a template endorsement using this language. Therefore, in order for an applicant to avoid the delays associated with submitting a draft with different language and then having to submit a revised order that tracks the language of the endorsement signed by the judge, the language I have set out above should be used in the draft order submitted with the application record.

CAPACITY OF BENEFICIARIES

'Capacity' refers to the legal ability of the beneficiary to accept / disclaim the gift. If the beneficiary is incapable of taking the gift it is void.

Illegitimacy and Adoption

The common law distinction between a child 'born outside marriage' and one who is 'legitimate' has been abolished in Ontario: a natural or adopted child of the deceased have equal rights; *Children's Law Reform Act*, ss. 1, 2; *Succession Law Reform Act*, s.1; *Child and Family Services Act*, s.58.

Homicide

Gifts under Wills can be held to be unenforceable as a matter of public policy, much as trusts or contracts can be held void on the same terms. The law of succession at common law carried the matter a step farther in respect of homicide on the general principle that a wrongdoer ought not to profit from his or her wrong. Thus a person who kills another unlawfully forfeits any share in the deceased's estate.

At common law, the forfeiture rule has an uncertain scope – did it cover accessories to suicide in addition to murder or manslaughter [see *Dunbar v Plant* [1998] Ch 412]. What of statutory offences like dangerous driving or torts? As one judge has said (in a different context), '[t]he statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case;' *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 268 (HL), per Lord Griffiths).

Re Gore
[1972] 1 OR 550 (HCJ); cb, p.422

The forfeiture rule doesn't apply where a husband murdered his wife and children and then committed suicide. Her estate could rightfully receive proceeds from a policy of insurance on the husband's life.

Per Osler JA:

> While there is little authority in our jurisdiction, there have been a number of discussions of this problem in the Courts of the United States of America and the conclusion seems there to have been reached that the rule prohibiting a person from profiting from his own wrong has no application in such a case.
>
> To say that the object of the murder was to accomplish what could be accomplished by the mere scratch of a pen carries its own refutation and leads to the conclusion that profit via the policy was not the object of the crime. The reason for the application of the rule failing, the rule cannot be invoked; *Union Central Life Ins. Co. v. Elizabeth Trust Co. et al.*, 183 Atlantic Rep. 181 at p. 185, per Berry, V.-C.
>
> **… Joseph Hector Gore could have divested his late wife, the named beneficiary, of her contingent right to the proceeds of the policies "by the mere scratch of a pen" and hence, it cannot be assumed that he murdered her for that purpose. A proper case for the application of the rule does not arise, the rule being based on the axiom that nothing should be done to encourage murder.**

Brissette Estate v. Westbury Life Insurance Co.
[1992] 3 S.C.R. 87; cb, p.426, fn. 121

Here the insurer sought to avoid payment under a policy of life insurance where a husband murdered his wife, was the designated beneficiary to the proceeds of a policy of life insurance on her life, renounced his claim in favour of her estate, and then sought to have the proceeds paid into the estate which he would inherit. The issue was whether the policy of insurance should be enforced, and, if so, whether a constructive trust might arise against the murderer who would take on the intestacy.

For the majority of the Court, Justice Sopinka denied the claim on both bases. The contract of insurance contemplated that the husband would inherit, but that he could not do so on the traditional rule that one who murders the insured cannot claim insurance

proceeds on the victim's life. The dissenters, Gonthier and Cory JJ., would not allow the murder to inherit but held that the contract should be enforced narrowly in favour of innocent heirs; in other words, that the insurer would seem to gain inappropriately otherwise.

Sopinka J held:

> 7 In order to determine whether, as a matter of public policy, the Court should resort to the device of a constructive trust, it is appropriate to consider whether the application of public policy which denies payment to the felonious beneficiary would work an injustice if recovery is denied to the appellants. After all, it is this policy that prevents the contract from taking effect in accordance with its terms. If denial of recovery by the estate is not inconsistent with this policy, then there is no misuse of public policy which would warrant a conclusion that its application is unjust.
>
> ...
>
> 9 The rationale of the policy which denies recovery to the felonious beneficiary is that a person should not profit from his or her own criminal act…
>
> ...
>
> 13 But, even if I had concluded that the denial of recovery to the estate was inconsistent with public policy, in my opinion it would be contrary to established principles of equity to employ a constructive trust in this case. **A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her own wrongful conduct. For example, in Schobelt v. Barber, [1967] 1 O.R. 349 (H.C.), the court imposed a constructive trust on property which passed to a joint tenant who had murdered his co-tenant. By virtue of the instrument creating the joint tenancy the surviving tenant acceded to the whole property. In order to prevent the wrongdoer from being unjustly enriched, the whole property was impressed with a constructive trust with the estate of the deceased joint tenant as beneficiary of one-half of the property.**
>
> **14 The requirement of unjust enrichment is fundamental to the use of a constructive trust…**
>
> …
>
> 16 **In this case, no claim of unjust enrichment has been made out… It cannot be said that but for Gerald's act, Mary's estate would have recovered the money. The wrongdoer does not benefit from his own wrong, nor is the insurer in breach of its duty to Mary. It is simply complying with the express terms of the contract. Moreover, there is no property in the hands of the wrongdoer upon which a trust can be fastened. By virtue of public policy the provision for payment in the insurance policy is unenforceable and no money is payable to the wrongdoer. The effect of a constructive trust would be to first require payment to the wrongdoer and then impress the money with a trust in favour of the estate…**

Oldfield v Transamerica Life Co. of Canada
2002 SCC 22; cb, p.428, note 17

Here the insured died while committing an illegal act that was a cause of death (smuggling cocaine-filled condoms in his stomach which burst). The insurer sought to avoid paying the proceeds under the contract of insurance on the insured's life. In considering the extent of the forfeiture principle as set out in *Brissette*, the Court held the principle does not extend so far as to prevent the proceeds being paid to an innocent beneficiary where the insured does not intend the insured loss. That is, innocent beneficiaries are not affected by the public policy that a person ought not to be able to insure against his or her own criminal act and thus allow profit from a wrong. Per Major J:

> 23 In *Brissette*, *supra*, Sopinka J. held that it is consistent with public policy "that a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds" (p. 94). Applied literally, it would prevent insurance proceeds from being paid to any innocent beneficiary named in an insurance policy so long as the insured event was occasioned while the insured committed a criminal act. In this case, it would prevent Maria Oldfield's claim.
>
> 24 **Feldman J.A. recognized at the Court of Appeal that Sopinka J. did not hold that insurance contracts contain an implied term that criminal acts committed by the insured automatically exclude coverage even where the act is not committed with the intention of causing the insured loss. Likewise, he did not hold that there is a public policy rule that forbids payment to all beneficiaries, innocent or not, whenever the insured commits a criminal act. In *Brissette*, the insurance contract named the surviving spouse as beneficiary. The husband who murdered his wife committed a deliberate act intended to cause the insured event. There was no question that the husband was barred from receiving the proceeds; the Court had to decide whether the contract could be interpreted so as to vest the proceeds in the estate of the wife, or failing that, whether the device of a constructive trust could achieve the same result. The Court answered both of these questions in the negative. In contrast to *Brissette*, the insured in the present appeal did not intend to cause the loss. Nor does Maria Oldfield, who was expressly designated as beneficiary under the contract, need to resort to trust principles in order to receive the proceeds.**
>
> 25 **In total, Sopinka J.'s decision in *Brissette* demonstrated that he did not intend to displace the principle that innocent beneficiaries who do not take through the criminal's estate should not be affected by public policy. In *Brissette*, Sopinka J. held that "[t]here is nothing unjust in refusing to pay the proceeds of insurance to a beneficiary <u>not designated by the insurance contract</u> when to do so would allow the insured to insure against his own criminal act" (p. 95 (emphasis added)).** Sopinka J. reinforced this statement during his consideration of

Cleaver, *supra*, in which the insured took out an insurance policy on his own life with his wife as beneficiary. The wife-beneficiary then murdered the husband-insured. By statute, the proceeds were declared payable to the estate of the insured, to be held in trust for the beneficiary. Public policy prevented any payment from being made to the felonious wife-beneficiary but, in Sopinka J.'s words, "[p]ublic policy was not allowed to abrogate a right that the estate had by virtue of the statute" (p. 95). Applying this case to the facts in *Brissette*, Sopinka J. held that "the result in *Cleaver* cannot be achieved in the absence of a provision, statutory or in the contract, providing for payment to the estate of the wife" (pp. 95-96 (emphasis added)). Because these passages appear after Sopinka J.'s earlier statement that "a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds" (p. 94), it is clear that the earlier statement was not intended to be an open-ended change to the traditional public policy rule.

26 A universal rule that "a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds" would have serious repercussions for *bona fide* creditors who provide value to obtain an interest in life insurance. Creditors in numerous instances such as a mortgage and other debt instruments will insist on obtaining an assignment of an insurance policy or being the named beneficiary sufficient to discharge the debt to protect their interest in the event of the debtor dying insolvent.

27 If Sopinka J.'s statement was given the broad interpretation that Transamerica seeks, *bona fide* creditors would be unable to obtain insurance proceeds where an insured died while committing a criminal act. To do so would run contrary to a long-standing principle that there is "no illegality in a stipulation that, if the policy should afterwards be assigned bona fide for a valuable consideration, or a lien upon it should afterwards be acquired bona fide for valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned . . . ." (*Moore v. Woolsey* (1854), 4 El. & Bl. 241, 119 E.R. 93 (K.B.), at p. 98); see also *Beresford* (H.L.), *supra*, at pp. 607-8, *per* Lord Atkin, and at p. 611, *per* Lord Macmillan; *Stats*, *supra*, at p. 240; *Hardy*, *supra*, at p. 760, *per* Lord Denning M.R., and at p. 768, *per* Diplock L.J. ("an assignee for value before the occurrence of the event would not be prevented from enforcing the contract notwithstanding that the event was caused by the anti-social act of the original assured"). The exception was not mentioned or considered in Sopinka J.'s decision.

28 In *Brissette*, Sopinka J. did not intend to eliminate long-established exceptions to the public policy rule. *Brissette* does not bar a claim by an innocent beneficiary where the insured does not intend the insured loss.

Dhingra v. Dhingra
2012 ONCA 261

per Rosenberg J.A.:

> [1] **This appeal concerns the rule of public policy that a person who kills another cannot share in the deceased's estate. The principal issue in this appeal is whether that rule applies where the beneficiary, in this case of an insurance policy, was found not criminally responsible on account of mental disorder in the death of the deceased**. A second issue is the role played by the Civil Remedies Act, 2001, S.O. 2001, c. 28. The application judge Pollak J. held that the public policy rule applied.
>
> [2] For the following reasons, I would allow the appeal.
>
> ...

[After reviewing *Brissette* and *Oldfield*]

> [22] In my view, the public policy rule is as set out in Nordstrom and Re Dreger and the person who is not guilty by reason of insanity, now termed not criminally responsible on account of mental disorder, is not prevented from taking under an insurance policy. The only question, then, is whether the rule of public policy can be said to have been varied because of the intervention by the legislature through the Civil Remedies Act. I will deal with that particular issue later. At this point, I simply state my view that I can see no reason not to apply Nordstrom and Re Dreger. To the contrary, developments since 1976 have only strengthened the policy basis for making an exception for persons found not criminally responsible.
>
> ...
>
> [24] **It seems to me that if a person found not criminally responsible on account of mental disorder is not "morally responsible" for his or her act, there is no rationale for applying the rule of public policy. That rule is founded in the theory that people should not profit from their crimes or, more broadly, by their own wrongs.** Section 16 and Part XX.1 of the Criminal Code deny that the NCR accused has committed a crime or can be held legally responsible for any wrongdoing. It was an error for the application judge to describe the appellant as having "committed second degree murder". Further in Winko, at para. 42, McLachlin J. makes the point that the NCR accused is not to be punished; rather, "Parliament has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation."
>
> [25] The approach in other common law countries is generally to exempt persons with a mental disorder that would give rise to an insanity defence from the effect of the public policy rule. For example, in the United States, those states that have adopted § 2-803 of the Uniform Probate Code would exempt persons who are not "criminally accountable for the felonious and intentional killing of the decedent". Most so-called "slayer statutes" similarly exempt the insane beneficiary from operation of the public policy rule: see Laurel Sevier, "Kooky Collects: How the Conflict Between Law and

Psychiatry Grants Inheritance Rights to California's Mentally Ill Slayers" (2007) 47 Santa Clara L. Rev. 379; and Gary Schuman, "Life Insurance and the Homicidal Beneficiary: The Insurer's Responsibilities Under State Slayer Laws and Statutes" (2001) 51 Fed'n Def. & Corp. Counsel Q. 197.

[26] This same approach is generally followed in other common law jurisdictions such as Australia and New Zealand. In the United Kingdom, the common law would seem to exempt from forfeiture someone who was not guilty of "deliberate, intentional and unlawful violence, or threats of violence": see R. v. National Insurance Commissioner, ex parte Connor, [1981] 1 All E.R. 769 (Div. Ct.), at p. 774. Thus, a person found not guilty by reason of insanity would not be subject to the forfeiture rule: see Chris Triggs, "Against Policy: Homicide and Succession to Property" (2005) 68 Sask. L. Rev. 117, at p. 126. In any event, even if the forfeiture rule did apply to an insane accused, the common law has been varied to give the court discretion not to apply the forfeiture rule where "the justice of the case requires the effect of the rule to be so modified"; the court is to consider "the conduct of the offender and of the deceased and ... such other circumstances as appear to the court to be material": see the Forfeiture Act 1982 (U.K.), 1982, c. 34, s. 2(2).

[27] To conclude, it is my view that the public policy rule does not prevent the appellant from receiving the proceeds of the insurance policy.

...

[31] **I accept that the Civil Remedies Act is an indication that public policy in Ontario favours preventing persons from profiting from their crimes and that, given the provisions of s. 17, the policy extends to persons found not criminally responsible by reason of mental disorder. In my view, however, the Act does not supplant the common law rule of public policy that does not prevent an NCR accused from taking under an insurance policy or a will. At its highest, the Act indicates that the rule ought not to be applied automatically. The common law rule and the Act serve different functions. The common law rule simply prevents the wrongdoer, however defined, from receiving the proceeds of the insurance policy or the will. In many cases, that would mean that the funds would be available either to a secondary beneficiary in the case of an insurance policy, if one is named, or to other beneficiaries, in the case of a will.**

[32] A forfeiture order made under the Act, however, deprives everyone, including other beneficiaries, of the proceeds because the proceeds are forfeited to the Crown. A more compelling expression of public policy would be for the legislature to reverse the effect of the public policy that permits the NCR accused to take under a will or insurance policy by deeming the accused to have predeceased the victim. Such a provision would result in the proceeds usually ending up in the estate of the victim for the benefit of beneficiaries other than the accused.

> **[33] Thus, there are competing public policies. On the one hand, the common law, reinforced by the policy as explained in Winko, is that an NCR accused is neither morally nor legally responsible for the death and therefore should be entitled to take under an insurance policy in which he or she is a beneficiary. On the other hand, there is the reflection of the public policy in the Act favouring the view that proceeds of crime in the hands of an NCR accused may be forfeited to the Crown.**
>
> **[34] In my view, the way to reconcile these competing policies is to allow the common law and the Act to each operate in their own spheres. That the legislature has so recently turned its mind to the question of criminals profiting from their crimes and not sought to wholly abrogate the common law rule suggests to me that the legislature intended to leave the common law rule intact. The legislature has expressed public policy in the province but limited forfeiture to applications made by the Attorney General.**
>
> [35] The common law rule does not prevent the appellant from receiving the proceeds of the insurance policy. However, it is open to the Attorney General to bring an application under s. 3 of the Act. I note that s. 4 gives the Attorney General the right to apply for any number of interlocutory orders to safeguard any "property" pending an application under s. 3. If such an application were brought, the court would determine whether it would clearly not be in the interests of justice to forfeit the proceeds to the Crown.

[The Crown did bring such an application; *Ontario (Attorney General) v. $51,000 in Canadian Currency (In Rem)*, 2012 ONSC 4958. The accused was ultimately absolutely discharged; 2015 CarswellOnt 445 (Ont. Rev. Bd.)]

WITNESSES AS LEGATEE / DEVISEE

Section 12 of the SLRA preserves the basic common law position voiding a gift to the witness developed under the Statute of Frauds 1677 in respect of competent witnesses and which later evolved through the Wills Act 1752 into section 15 of the Wills Act 1837 and is now modified in our own statute (which allows for a relaxing of the rule in some cases).

The Succession Law Reform Act provides:

> *Bequests to witness void*
>
> 12.--(1) Where a will is attested by a person to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for payment of debts, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns,
>
> (a) the person so attesting;

(b) the spouse; or

(c) a person claiming under either of them,

but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.

Where will signed for testator by another person

(2) Where a will is signed for the testator by another person in accordance with section 4, to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for payment of debts, is thereby given or made, the devise, bequest, or other disposition is void so far only as it concerns,

(a) the person so signing;

(b) the spouse; or

(c) a person claiming under either of them,

but the will is not invalid for that reason.

Where no undue influence

(3) Despite anything in this section, where the Superior Court of Justice is satisfied that neither the person so attesting or signing for the testator nor the spouse exercised any improper or undue influence upon the testator, the devise, bequest or other disposition or appointment is not void.

Exception

(4) Where a will is attested by at least two persons who are not within subsection (1) or where no attestation is necessary, the devise, bequest or other disposition or appointment is not void under that subsection.

Re Trotter
[1899] 1 Ch 764; cb, p.431

There are a number of exceptions to the general rule. For example, if the witness was not in the prohibited class when he or she attested, the gift is valid. Also, if the Will is incorporated into a subsequent testamentary instrument which is not witnessed by a person in the prohibited class, the gift to the attesting witness under the original Will is valid. **Per Byrne J: '… the legatee must be able to point to an instrument giving him his legacy not attested to by himself before he can establish his right to his legacy.'**

Re Ray's Will Trusts
[1936] Ch 520; cb, p.433

A nun left her estate to the Abbess of her abbey at her death; an attesting witness who was not the Abbess at the execution of the will was the Abbess when the testatrix died. As the gift was not left to her in her personal capacity, it was valid.