Wills & Estates
Winter Term 2019

Lecture Notes – No. 9

RECTIFICATION (GENERALLY)

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

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

> **A. General Principles and Operation of Rectification**
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> [12] If by mistake a legal instrument does not accord with the true agreement it was intended to record — because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement — a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions (Swan and Adamski, at §8.229).
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> [13] Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is "a potent remedy" (Snell's Equity (33rd ed. 2015), by J. McGhee, at pp. 417-18). It must, as this Court has repeatedly stated (Shafron v. KRG Insurance Brokers (Western) Inc., 2009 SCC 6 (CanLII), [2009] 1 S.C.R. 157, at para. 56, citing Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., 2002 SCC 19 (CanLII), [2002] 1 S.C.R. 678, at para. 31), be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts": Performance Industries, at para. 31. It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement (Swan and Adamski, at §8.229). It is not concerned with mistakes merely in the making of that antecedent agreement: E. Peel, The Law of Contract (14th ed. 2015), at para. 8-059; Mackenzie v. Coulson (1869), L.R. 8 Eq. 368, at p. 375 ("Courts of Equity do not rectify contracts; they may and do rectify instruments"). In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend

> not the instrument recording their agreement, but the agreement itself. More to the point of this appeal, and as this Court said in Performance Industries (at para. 31), "[t]he court's task in a rectification case is . . . to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other".
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> [14] Beyond these general guides, the nature of the mistake must be accounted for: Swan and Adamski, at §8.233. Two types of error may support a grant of rectification. The first arises when both parties subscribe to an instrument under a common mistake that it accurately records the terms of their antecedent agreement. In such a case, an order for rectification is predicated upon the applicant showing that the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement: Ship M. F. Whalen v. Pointe Anne Quarries Ltd. (1921), 1921 CanLII 57 (SCC), 63 S.C.R. 109, at p. 126; McInnes, at p. 820; Snell's Equity, at p. 424; Hanbury and Martin Modern Equity (20th ed. 2015), by J. Glister and J. Lee, at pp. 848-49; Hart v. Boutilier (1916), 1916 CanLII 631 (SCC), 56 D.L.R. 620 (S.C.C.), at p. 622.
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> [15] In Performance Industries (at para. 31) and again in Shafron (at para. 53), this Court affirmed that rectification is also available where the claimed mistake is unilateral — either because the instrument formalizes a unilateral act (such as the creation of a trust), or where (as in Performance Industries and Shafron) the instrument was intended to record an agreement between parties, but one party says that the instrument does not accurately do so, while the other party says it does. In Performance Industries (at para. 31), "certain demanding preconditions" were added to rectify a putative unilateral mistake: specifically, that the party resisting rectification knew or ought to have known about the mistake; and that permitting that party to take advantage of the mistake would amount to "fraud or the equivalent of fraud" (para. 38).

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

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

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

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

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

Latey J then said:

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

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

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

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

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

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

INTERPRETATION OF WILLS

Overview: A Practical Approach

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

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

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

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

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

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

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

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

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

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

> intention was in the mind of the testator. When an opinion has been formed as to that intention, the Court should strive to give effect to it and should do so unless there is some rule or principle of law that prohibits it from doing so.

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

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

The Jurisprudence

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

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

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

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

Solicitor's Notes and Privilege

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

> THIS COURT ORDERS that the Estate Trustee [or Estate Trustee During Litigation] be and is hereby entitled to compel production of all solicitor records, notes and files relating to [the deceased] from any solicitor or law firm in

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

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

Principles of Interpretation

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

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

***Some* General Principles of Construction**

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

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

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

Per Lord Simon LC:

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

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

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

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

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

Justice Gray held as follows:

> [1] In 1824 Burrough J. said the following about public policy: "it is a very unruly horse, and when once you get astride it you never know where it will carry you": see Richardson v. Mellish (1824), 2 Bing. 229, at p.252; 130 E.R. 294, at p.303.
>
> [2] The dictum of Burrough J. is just as valid today as it was in 1824. That is not to say that judges do not make policy choices – they must make policy choices all the time. However, those policy choices are

constrained by decisions of higher courts and, most importantly, by policy choices made by the legislature.

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

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

…

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

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

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

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

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

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

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

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

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

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

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

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

[71] He also stated:

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

[72] Notwithstanding these concerns, the bill was enacted with s.1(4) included, as it now reads. The prediction made by Mr. Roy has come true. While 39 years have elapsed rather than 50, it remains the case that

> wills made before the effective date of the Act are treated differently than those made after that date.
>
> [73] In my view, to give effect to the argument of Jesse's counsel would to be read s.1(4) out of the *Succession Law Reform Act*. Notwithstanding the clear intention of the legislature that the change in the presumption should apply only to wills made after March 31, 1978, the change in the presumption would apply to all wills, whether made before or after that date. I know of no principle of law that would allow me to read out of the Act a provision that has been duly enacted by the legislature.

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

USE OF EVIDENCE

Haidl v. Sacher
[1979] 2 Sask R 93 (C.A.), cb., p.480

The Will contained the following bequest:

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

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

> 6. The circumstances of this case and the issues addressed to us on appeal call for a consideration, at the outset, of this question:

> Does the law require the "ordinary meaning" rule of construction to be applied to subparagraph (h) without admitting and taking into account any surrounding circumstances at all and that the meaning so ascertained shall prevail unless it is found that such an application produces a meaning which is unclear and ambiguous in which event such surrounding circumstances may then be admitted and looked at (procedure "A")?
>
> Or, does the law require those surrounding circumstances to be admitted at the start and that the "ordinary meaning" rule of construction be applied in the light of those surrounding circumstances (procedure "B")?
>
> **7. Before proceeding to answer this question, I note two matters. First, there is no disagreement between the parties that the proper approach in construing the subparagraph under scrutiny here requires the application of the "ordinary meaning" rule of construction as the initial step and that it should so be done in the light of the contents of the whole will. The disagreement lies in the role that the surrounding circumstances should play, if any, in the application of that rule. The second matter is that the term "surrounding circumstances" as used in these reasons refers only to indirect extrinsic evidence. It has no reference whatever to direct extrinsic evidence of intent, the admission of which is governed by a different set of conditions. The former consists of such circumstances as the character and occupation of the testator; the amount, extent and condition of his property; the number, identity, and general relationship to the testator of the immediate family and other relatives; the persons who comprised his circle of friends, and any other natural objects of his bounty (see: Feeney, The Canadian Law of Wills: Construction p. 17). An example of the latter is the instructions which the testator gave to his solicitor for the preparation of the will. (As one finds, for instance, in Reishiska v. Cody (1968), 62 W.W.R. 581.)**
>
> 8. There is a distinct divergence in the authorities as to whether procedure "A" or procedure "B" as I have termed them is the correct approach in law. Procedure "A" has its origin in a literal, traditional, strict - constructionist stance or to use the expression Lord Denning used in his dissenting judgment in Re Rowland, [1963] Ch. 1 (C.A.), at page 9, in "the 19th century view"; procedure "B" on the other hand in a liberal, "subjective intention" stance.

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

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

Re Carrick
[1929] 3 D.L.R. 373 (Ont HCJ)

The Will contained the following distribution:

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

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

Wright J held:

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

> **principle of the decisions already referred to, I am of opinion that extrinsic evidence is admissible, and that the declarations of the intention of the testator, both before and after the dates of the wills, are admissible.**
>
> In addition, the Court has a right to consider the circumstances and the interest of the testator and his family in the Boys' Home, and the fact that so far as disclosed he had no connection with or interest in the other institution known as the Protestant Orphans' Home.
>
> Having regard to all the evidence, and particularly the declarations of the testator, it is reasonably clear that the legacy was intended for the Boys' Home. I so hold.

Rondel v Robinson Estate
2011 ONCA 493

In this case the testatrix was a naturalized Canadian who was born in Spain and moved to Canada as an adult. She owned property in the UK, Spain, and Canada. She was married; her husband developed dementia and was incapable. She later began a relationship with Rondel. In 2002, she made a will in Spain to deal with real property and personalty in Europe in favour of her sisters and Rondel. She made a second will in Canada that same year to deal with Canadian assets. In 2005, the incapable husband died. The testatrix instructed her solicitor to draft a new will which would not leave property to her sisters; she changed her instructions a day later to include one sister. The new will was drafted but the solicitor failed to inquire about other wills. The testatrix executed the new will which contained a revocation clause in respect of all other wills. The residuary clause disposed of 'all my property of every nature and kind and wheresoever situate'. She made a new will in 2006 (so as to add a $1 million gift to. Rondel) on the same terms. The addition of this specific bequest was the only change from the 2005 Will. After her death, a question arose in respect of the validity of the 2002 Spanish will. The issue on appeal was whether evidence of the testarix's intention to revoke or maintain the 2002 will was admissible. Held: Not admissible. The court held that the common law rule disallowing direct evidence of the testator's intention divorced from the interpretation of an ambiguity remains good law.

Per Juriansz J.A.:

> 23 **... [t]he general rule of the common law is that in construing a will, the court must determine the testator's intention from the words used in the will, and not from direct extrinsic evidence of intent.**
>
> 24 Of course, it is always possible that the testator's expression of her testamentary intentions may be imperfect. When a will takes effect and is being interpreted, the testator is no longer available to clarify her intentions. Extrinsic evidence is admissible to aid the construction of the will. The trend in Canadian jurisprudence is that extrinsic evidence of the testator's circumstances and those surrounding the making of the will may be considered, even if the language of the will appears clear and unambiguous

on first reading. Indeed, it may be that the existence of an ambiguity is only apparent in the light of the surrounding circumstances...

25 The extrinsic evidence tendered by the appellant and Mr. Silverman, however, goes beyond providing evidence of the facts and circumstances surrounding the making of the testator's 2006 Canadian Will...

26 This evidence goes beyond attempting to establish the facts and circumstances surrounding the testator's 2006 Canadian Will. Rather, it purports to directly address what she intended to include in her Will but did not include. The evidence is conclusory in nature...

27 The law properly regards the direct evidence of third parties about the testator's intentions to be inadmissible. There would be much uncertainty and estate litigation if disappointed beneficiaries like Dr. Rondel could challenge a will based on their belief that the testator had different intentions than those manifested in the will.

...

29 An exception to the general rule excluding direct extrinsic evidence of intent in a court of construction arises where there is an "equivocation" in the will. The principle is set out in Feeney, *The Canadian Law of Wills: Volume 2 Construction*, 2d ed. (Toronto: Butterworths, 1982), at p. 56:

> There is an equivocation only where the words of the will, either when read in the light of the whole will or, more usually, when construed in the light of the surrounding circumstances, apply equally well to two or more persons or things. In such a case, extrinsic evidence of the testator's actual intention may be admitted and will usually resolve the equivocation.

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

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

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

testator's Will in accordance with her instructions to deal with the "entire residue of my estate", and she reviewed and approved of the language in the Will before executing it.

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

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

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

> **The view that has prevailed in the Succession Law Reform Project, however, is that removing all restrictions on admission of extrinsic evidence of intent would allow excessive scope for attempts to secure an interpretation contradicting the actual terms of the will. Fabrications or fantasies of the "he really meant me" or "he always said I would get the house" variety could be advanced much more easily than they can be under the present law. The Testate Succession Subcommittee and Project Committee were not as confident as the Commission had been that litigation over the meaning of wills would not increase if evidence of testamentary intent were made admissible without restriction. They were not prepared to endorse the former Commission's recommendation to abrogate entirely the exclusionary rule regarding extrinsic evidence of intent.**

35 I agree...

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

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

have given for the distribution of their estates. The evidence of third parties, who cannot directly discern the mind of the testator, is logically incapable of directly proving the testator's intent.

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

PARTICULAR EXPRESSIONS USED IN THE WILL

(i) Plain and Ordinary Meaning of Words

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

(ii) Words Defined by the Testator

Re Helliwell
[1916] 2 Ch 580

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

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

Technique: Construing words in the context of the document.

Per Sargant J:

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

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

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

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

(iii) Terms of Art

Re Cook
[1948] Ch 212 (Ch)

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

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

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

Dice v. Dice Estate
2012 ONCA 468

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

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

Per Simmons J.A.:

> [36] **The parties agree on the proper approach to the interpretation of a will. First, and foremost, the court must determine the intention of the testator when he made his will. The golden rule in interpreting wills is to give effect to the testator's intention as ascertained from the language that was used**: National Trust Co. Ltd. v. Fleury, 1965 CanLII 18 (SCC), [1965] S.C.R. 817 at p. 829; Brown Estate (Re), 1934 CanLII 49 (SCC), [1934] S.C.R. 324, at p. 330; Singer v. Singer, 1931 CanLII 12 (SCC), [1932] S.C.R. 44, at p. 49. Underlying this approach is an attempt to ascertain the testator's intention, having regard to the will as a whole.
>
> [37] **Where the testator's intention cannot be ascertained from the plain meaning of the language that was used, the court may consider the surrounding circumstances known to the testator when he made his will – the so-called "armchair rule"**: Re Burke, [1960] O.R. 26 (C.A.), at p. 30; Re Shamas, [1967] 2 O.R. 275 (C.A.), at p.279, citing Perrin v. Morgan, [1943] A.C. 399 (U.K. H.L.), at pp. 420-21.
>
> [38] Under this rule, the court sits in the place of the testator, assumes the same knowledge the testator had of the extent of his assets, the size and makeup of his family, and his relationship to its members, so far as these things can be ascertained from the evidence presented. The purpose of this exercise is to put the court in, as close as possible to, the same position of the testator when make his last will and testament.
>
> ...
>
> [42] I am inclined to agree that the overall scheme of Mr. Dice's will does not provide much, if any, support for the conclusion that Mr. Dice intended Eddie and Marlene's share of the residue to go to their respective children if either of them predeceased their mother, the life tenant.
>
> [43] Although Mr. Dice's will treats his two children more or less equally, that tells us very little about his intentions in the event that one of his children should predecease his wife. For example, did he want the deceased's child's share to go to the deceased child's estate, which might imply a gift to the deceased child's spouse, or did he want the deceased child's share to go to the deceased's child's children? The fact that Mr. Dice treated his two children

relatively equally does not address this question. Moreover, while treating his two children relatively equally might suggest that Mr. Dice would not want a deceased's child's share to go to Mr. Dice's surviving child if the deceased child had a spouse or children, it is hardly conclusive of the issue.

...

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

....

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

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

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

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

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

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

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

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

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

[89] Viewed in this way, I do not agree that a gift to named children, per stirpes, necessarily creates a contradiction in terms. Rather, in the context of Mr. Dice's will, which provides no other indication of the

> **testator's intention, both aspects of this disposition can be viewed as an elaboration of his intention. That is, the disposition reflects both an intention to benefit each of the testator's children, as well as intention to benefit, at least, each child's children in the event that either or both of the named children fail to survive the life tenant.**
>
> [92] Despite my conclusion, I agree with Cullity J. that terms such as "per stirpes", if used at all, are best used in their traditional sense – otherwise, the testator runs the risk of having his or her words ignored.

See how fun the law of wills can be?

PARTIAL INTESTACIES

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

National Trust Co. v. Fleury
[1965] SCR 817

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

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

DRAFTING ERRORS

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

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

(i) Omissions

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

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

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

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

Re Freeman's Estate
(1975), 58 DLR (3d 541 (NSSCTD)

The testator in his Will provided as follows:

> THIRD: Devise of the entire estate to executors and trustees upon trust:
> (1) To pay debts, taxes, etc.;
> (2) To transfer personal and household effects to Mrs. Freeman;
> (3) To hold the testator's home and summer home for Mrs. Freeman during her lifetime provided that, with the consent of Mrs. Freeman the executors could dispose of either property. Upon the death of Mrs. Freeman, the "house fund" falls into and forms part of "the residue of my estate;"

> (4) and (5) To hold the balance of the estate in trust for Mrs. Freeman for her lifetime. She is to receive the income derived therefrom and the executors have the power to encroach on capital for her benefit;
> (6) On Mrs. Freeman's death to pay the remaining expenses of her last illness and burial out of the capital of the estate;
> (7) **Should my wife predecease me or die within thirty days of my death, I give and bequeath** to my sister, Miss Hazel Josephine Freeman, 102 Glenelg Street West, Lindsay, Ontario, the sum of Fifty Thousand Dollars ($ 50,000.00) and to divide the rest and residue of my estate into twenty- three shares to be distributed as follows... [and then set out the names of various legatees]

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

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

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

(ii) Surface Errors

Re Macdonnell
(1982), 35 OR (2d) 578 (C.A.)

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

> Clause 3(e):

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

The sub-clause following the various bequests read:

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

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

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

> That the intention of the testatrix was to dispose of all her property can be determined by reading the will as a whole. She uses the words "... declare this to be and contain my only last will and testament" and "I give, devise and bequeath all my estate both real and personal of whatsoever kind and wheresoever the same may be situate ..." upon certain trusts. Thereafter, in cl. 3(c), the testatrix directs her trustees that her share of the premises then owned as tenant in common with her sister "shall fall into and form part of the residue of my estate" if certain events happen. There are other references in the will to the residue. This shows an awareness of the residue on the part of the testatrix. The scheme of her will reveals an intention to dispose of all her property...
>
> ...
>
> In the case at Bar, I find no compelling reason to conclude that the testatrix, by cl. 3(f)(37) of the will, intended to dispose of the residue of the estate only in the event that her sister predeceased her. To reach this conclusion, one would have to find that the testatrix intended an intestacy as to the residue of her estate if her sister survived her. The clear intention of the testatrix was to provide her sister with a life interest in the residue, with no power to encroach on the capital except for personal loans of capital in the event of severe illness or incapacity. The interpretation of the will urged upon us by the respondent would mean that the testatrix intended, by means of an intestacy, to leave the residue of her estate to her sister as her sole surviving heir-at-law, an intention clearly inconsistent with the life interest in the residue and with her stated declaration to dispose of all her estate.

> I must therefore conclude that the insertion of the numeral 37 before the words "all the rest and residue of my estate ..." was a clerical error which should be deleted to give full effect to the intention of the testatrix. Clause 3(f) provided for 36 "special bequests" in the event that the testatrix's sister had predeceased her. I agree with the appellant that sub-cl. 37 is not a bequest but a disposition of residue which is inconsistent with the rest of the will unless the numeral 37 is deleted completely. A Court of construction is bound to eliminate a numeral which is inconsistent with the general scheme of the will and frustrates the intention of the testatrix. The learned author of Jarman on Wills (8th ed., 1951), makes it clear at p. 2071, para. XIX that words and limitations may be transposed, supplied or rejected, where warranted by the immediate context, or the general scheme of the will.

(iii) Errors in Description

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

Re Beauchamp
(1975), 8 OR (2d) 2 (H.C.J.)

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

> The principles upon which a Court should proceed in a case such as this are set out in Re Butchers [1970] 2 O.R. 589 (HC) and may be summarized as follows:
>
> 1. Courts of construction have always attempted, where reasonably possible, having regard to the actual wording of the will, to give effect to every devise or bequest mentioned in the will and, in fact, to give some meaning and effect to all of the words in a will. They have leaned against allowing any expression denoting a gift to be totally ineffective or to fail because of misdescription, error in wording, lack of clarity or for any similar reason.
>
> 2. A will must be in writing and the intention of the testator should therefore be gathered from the written words expressed in that particular document together with any codicil thereto. It necessarily follows that the consideration of extrinsic evidence to contradict or add to the plain meaning of words used in the will have always been denied by Courts of construction. Such practice would effectively destroy the sanctity and legal effect of the will and would lend itself to all sorts of abuses whereby various witnesses might attempt to give evidence to the testator's intentions apart from or in opposition to his last will as gathered from a whole reading of the whole will.

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

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

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

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

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

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

Daradick v. McKeand Estate
2012 ONSC 5622

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

the testatrix executed the will. Could the error be rectified through the admission of extrinsic evidence.

Matheson J.

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

evidence of the instructions (and the mistake) and the offending words may be struck out.

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

...

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

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

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

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

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

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

FINDINGS

[41] From the material filed and the cases cited, I am able to make the following findings. I am also mindful of the fact that there was no rebuttal evidence called by the respondents. The only documentation filed was some case law.

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

[43] I make the following findings:

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

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

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

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

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

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

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

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

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

[45] I find that the error of Mr. Beresh can and should be corrected. Not to do so would be tragic. If the will were not rectified then the only other course of action would be a lawsuit against the lawyer or the estate. This would be very costly.

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

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

VOID CONDITIONS

Two policies seemingly pull in opposite directions in property: the law seeks to maximize the right of the proprietor to give his or her property subject to whatever conditions are thought appropriate. At the same time, there is a broader interest in certainty of property rights to facilitate transactions. Hence we favour early and complete vesting of rights where possible.

The law has held that certain types of condition are void for public policy reasons, but not many – inciting crime, inducing separation and divorce, and preventing marriage unreasonably are a few examples. These are socially-constructed reasons that may change as social conditions change.

Re Goodwin
(1969), 3 DLR (3d) 281 (Alta SCTD)

The will included the following gift:

> I Give, Devise and Bequeath all my real and personal estate of which I may die possessed in the following manner, that is to say: One-half to my daughter, Ruth Elaine Claire Goodwin**, one-quarter to my daughter-in-law, Judeth Goodwin, provided she does not re-marry**, and one-quarter to my grandson, William Trent Goodwin.
>
> **If my daughter-in-law should re-marry then her one-quarter share shall go to my said grandson**, William Trent Goodwin.

Here the issue is whether the restraint is on marriage in an unjustified manner or whether the intention of the testator reflects a more principled approach to distributing his assets.

Per Riley J:

> 8. A distinction is of course drawn between a condition against marriage or requiring marriage with a particular person or a particular class of persons and a condition wherein the words used relating to marriage merely describe the interest to be taken by the donee. There is no prohibition to a gift to a donee so long as the donee remains unmarried for marriage may be the ground for which a gift is given or is revoked.
>
> ...
>
> 19. **The intention of the testator was only to provide for the daughter-in-law while she was in fact a widow and that upon her remarriage it was his intention to provide for his grandson on the basis that his daughter-in-law would then be provided for out of her subsequent remarriage.**
>
> **20. The will does not [attempt to] avoid the "in terrorem rule" and in no sense is a restraint against marriage.**

> 21. Even if Judith North (nee Goodwin) is entitled to the realty on the death of the deceased, it is divested upon the remarriage, and she is only entitled to the interest on the realty from the date of the death until the date of her remarriage meaning thereby from January 16, 1968, to July 27,1968. The maxim *de minimis non curat lex* would seem to apply: see Osbaldeston v. Bechthold, [1953] 2 S.C.R. 177.

Re Kent
[1982] 13 ETR 53 (BCSC)

A common type of condition that is sometimes employed is a forfeiture of gifts should the beneficiary dispute the Will. The testator seeks to protect the estate's assets against frivolous litigation. This is a difficult point as it seems to place restraints on the ability of a person to access the courts and is unnecessary given the procedural protections and the costs rules. However, is it necessary to strike the condition out on policy terms?

The will read in part:

> I HEREBY WILL AND DECLARE that **if any person who may be entitled to any benefit under this my Will shall institute or cause to be commenced any litigation in connection with any of the provisions of this my Will other than for any necessary judicial interpretation thereof or for the direction of the Court in the course of administration all benefits to which such person would have been entitled shall thereupon cease and I HEREBY REVOKE all said benefits** and I DIRECT that said benefits so revoked shall fall into and form part of the residue of my Estate to be distributed as directed in this my Will; PROVIDED that if such person whose benefits are so revoked would otherwise share in the residue of my Estate his or her benefits so revoked shall be divided equally among the remaining shares into which the residue of my Estate may be divided or as if such person had predeceased me and had left no issue surviving me.

In this case the Court employed a traditional approach looking to whether there was a substitute donee should the condition be breached; as there was, the traditional rules would save the gift. However, was the condition void on the general point of being contrary to policy?
Per Lander LJSC:

> The motive for the inclusion of para. 9 in the will was to carry forward his intent that his children's shares be limited. The creation of this clause was a disincentive for them to contest the will which would subvert his intentions.
>
> ...
>
> As to ground two, that is the challenge made that para. 9 is a clause in terrorem, such a condition attached to a legacy of personalty may be void if made in such a manner. **There are three criteria which must be met before the doctrine in terrorem is applicable:**

(i) The legacy must be of personal property or blended personal and real property. See Re Hamilton (1901), 1 O.L.R. 10; Re Schmidt, 57 Man. R. 316, [1949] 2 W.W.R. 513 (K.B.).

(ii) The condition must be either a restraint on marriage or one which forbids the donee to dispute the will.

(iii) The "threat" must be "idle"; that is the condition must be imposed solely to prevent the donee from undertaking that which the condition forbids. Therefore a provision which provides only for a bare forfeiture of the gift on breach of the condition is bad.

However, if the donor indicates that he intended not only to threaten the donee but also to make a different disposition of the property to fix a benefit on another in the event of a breach of the condition, the "threat" is not "idle" and the condition is valid: Feeney, Canadian Law of Wills (Construction), vol. 2, 2nd ed. (1982), pp. 200-201.

In this instance there is no doubt that the legacies in this case contain personalty and, further, there is no doubt that the "condition" enjoins the petitioners from disputing the will.

In this instance is such a "threat" idle? Ordinarily if a provision which contains such a condition is followed by a gift over in the event of a breach of that condition, the condition is held to be valid: Jarman on Wills, p. 1255. While certain authorities question whether a gift over is always necessary, I have concluded in this instance that para. 9 of the testator's will creates a gift over. The words, "I DIRECT that said benefits so revoked shall fall into and form part of the residue of my Estate" are sufficient to constitute a gift over for the purpose of meeting the in terrorem doctrine. Therefore the paragraph is valid and not subject to the doctrine, even if para. 9 does not completely deprive the court of jurisdiction. However, by depriving the petitioners of their right to apply for relief under the Wills Variation Act, para. 9 may be invalid as a provision which is contrary to public policy.
18 It is apparent that this "public policy" ground is not well known to the common law and indeed does not appear to have been argued in Canada, as indicated by the paucity of Canadian authorities...

...

20 It cannot be denied with respect that the intent of the legislature in creating the Wills Variation Act is to ensure adequate maintenance and support for specified individuals. It is a matter of public policy that support and maintenance be provided for those defined individuals and it would be contrary to such policy to allow a testator to circumvent the provisions of the Wills Variation Act by the creation of such as para. 9. It is important to the public as a whole that widows, widowers and children be at liberty to apply for adequate maintenance and support in the event that sufficient provision for them is not made in the will of their spouse or parent. I have concluded that the intent of para. 9 was to prevent any such application. It is not necessary for the

> **purposes of this decision to conjure up scenarios wherein inequitable and distressing results are created for a widow or children by being deprived of maintenance and support while an "undeserving" beneficiary takes under a will. Paragraph 9 therefore is void as against public policy.** The petitioners shall have their costs of this application from the estate.

Thus, in this case, access to justice was denied and the condition was void.

Re McBride
(1980), 6 ETR 181 (Ont HCJ)

The testator didn't like his daughter in law; if his son was married to her at the testator's death, the property would go to charity. If they were not married, the son would inherit. The will read in part:

> (e) Upon the death of my said wife, if my son Robert McBride is married to Geraldine Elizabeth Gibbons, who formerly resided at 14 Cavell Avenue, Mimico, to divide all that then remains of my estate in equal shares among:
>
> (i) The Ontario Heart Foundation
> (ii) The Canadian Cancer Society
> (iii) The Ontario Society for Crippled Children
>
> (f) **Upon the death of my said wife, if my son Robert McBride is not married to Geraldine Elizabeth Gibbons, to pay, transfer and convey all that remains of my estate unto my son, Robert McBride for his own use absolutely.**

Did the condition fail or did the gift fail? Only the condition. Per Henry J:

> 10 I have considered the language of paras. 3(e) and 3(f) of the will with care and find that on their face, the only reasonable view to take of the testator's intention is that he intended to promote the divorce of the spouses either as a result of one of them committing a matrimonial offence, or by collusion. The affidavit fortifies me in this conclusion and I find accordingly.
>
> 11 The condition is therefore void as being contrary to public policy. See Re Fairfoull (1974), 41 D.L.R. (3d) 152 , affirmed (sub nom. Can. Permanent Trust Co. v. Bullman), [1974] 6 W.W.R. 471, 18 R.F.L. 165 (B.C.) (further proceedings); and authorities therein cited.
>
> ...
>
> 13 ...[a]lthough, as I have found the condition is void as being contrary to public policy, the gift does not fail if the reason for invalidity is malum prohibitum and not malum in se. While the distinction between the two is somewhat obscure according to the scholars, I adopt the reasoning in Re Fairfoull , supra, where it was held that a testator's attempt to invade the

> sanctity of his son's marriage was malum prohibitum and that although the condition is void, the gift does not fail.
>
> ...
>
> 16 What then is the gift that is preserved? Reading paras. 3(e) and (f) together their combined effect reflects the testator's intention to disinherit his son if he is married to Geraldine but to pass the entire residue to him on the death of his mother if he is not. The object of the testator, as I see it, is to achieve dissolution of the marriage and not to deprive his son for any other reason or motive. He intends his son to inherit but seeks to terminate the marriage. When the condition fails the gift to Robert McBride is absolute; the charities were never intended to benefit except as a device to induce termination of the marriage.
> 17 In the result, therefore, Robert McBride will be entitled to the residue upon his mother's death, regardless of whether he is or is not then married to Geraldine.

Re Collier
(1966), 60 DLR (2d) 70 (Nfld SCTD)

A condition might be invalid as a matter of inconsistency with legal rules which must be upheld; for example, the types of property rights that might be recognized at law. If it violates any such rule it is void as ‘repugnant’. Here the will made a gift of property and attempted to restrict future alienation in a way long ago held to be unenforceable.

The will read in part:

> With regard to the Forest Road property now occupied by myself it is my will that this also be held and enjoyed by Alice Maud Cumming for her lifetime, together with the cottage situated thereon and now occupied by G. Piercey. And after her death I give and bequeath the whole to my nephew Eric Collier or his children, or son if having one, but if Forest House be occupied by Alice Cumming and her family at the time of her death, it is my wish, that the family may still continue to occupy the same for twelve months if they so wish to give them time to make other arrangements.
>
> ...
>
> **And further with regard to this property, as it has been in the family of my late mother for seven generations, it shall not be sold, mortgaged or exchanged, or conveyed in any way, from the descend — of said family for ever.**

Per Puddester J:

> 15 The test is one of repugnancy. **The original rule was that you cannot annex to a gift in fee simple a condition which is repugnant to that gift. It has long been recognized that the right of alienation is a necessary incident to the fee simple. Does the condition in effect destroy or take away that right?** As the Pearson and Macleay cases show, many years ago some exceptions were made to the original rule, but, as we have seen,

> they did not find too ready acceptance even in times close to their own. **In more modern times, the tendency of courts, while recognizing the existence if not the soundness of those cases, seems to me to be not to perpetuate, and certainly not to add to, those exceptions by extending in any degree the concept of the limited condition.** Indeed, the fundamental principle now adopted is "that a condition, the effect of which would be to destroy or take away the enjoyment of the fee simple given is repugnant to the rights conferred on the holder of the fee", to use the words of McRuer C.J.H.C. in the Malcolm case.
>
> 16 Frederick Collier's will gives to Eric Collier an absolute estate in the Forest Road property and then adds a condition which limits alienation of the property to a small class; a class which, at any given time, may be difficult to ascertain in any event, a class which, at any given time, for a variety of reasons, may not exist at all, but a class in which, nevertheless, must be found at any given time a person willing and financially able to enter into dealings about the property**. If that condition is good, then Eric Collier is to all intents and purposes deprived for his whole life of his right to alienate the property and thus of full enjoyment of the property. In my view, both on principle and on authority, such a condition is repugnant to the absolute estate given to Eric Collier and as such is invalid.**

Re Macdonald
[1971] 2 O.R. 577 (HCJ)

Here the question was in respect of a condition that was impossible to fulfil. Is the condition void?

The will read in part:

> To pay and transfer Ten Percent (10%) to the WINDSOR PUBLIC LIBRARY BOARD, Windsor, Ontario, provided the house known as the "BABY HOUSE" situate on Pitt Street West, in the City of Windsor, has not been moved from its original foundation and providing the City of Windsor gives to my Executors the necessary assurance that such house will not ever be moved from its original foundation, such bequest to be used in collecting historical objects for showing and preservation in such "Baby House". If, at the time of my wife's death, or at the time of my death if she should predecease me, the "Baby House" is still standing on its original foundation and location, then my Executors shall request the City of Windsor to give the necessary assurance that such House will not ever be moved and the City shall have one year from the date of the death of the survivor of my wife and myself to give such assurance to my Executors. If at the death of the survivor of my wife and myself the City of Windsor fails or will not give to my Executors the necessary assurance that such House will not ever be moved from its original foundation, then this bequest shall fail and fall into and form part of the residue of my Estate.

The City of Windsor could not give the assurance as they did not own the land and lacked jurisdiction to give such an assurance. Thus the condition failed but the gift remained. In essence it was regarded as a wish.

Per Lacourciere J:

> 10 The second objection can be disposed of on the basis of the following findings of fact and conclusions of law:
>
> 1. **The condition precedent attaching to the gift to the Windsor Public Library Board that the City of Windsor gives necessary assurances that Baby House will never be removed from its original foundation is impossible of performance.**
>
> 2. **The impossibility existed at the time the testator drew his will and has continued to exist to the present, and continues to exist.**
>
> 3. **The testator knew of the impossibility at the time he drew his will.**
>
> 11 There are several reasons for this impossibility. First and foremost, the City of Windsor does not own the land in question and therefore is in no position to give any assurance as to its use. The covenant of re-grant should the land cease to be used as a museum does not alter this. Further, it is doubtful whether the city can give the type of assurance requested, and also whether there can ever be an adequate assurance given as to the use of real property for ever.
>
> 12 Macdonald must have been aware of the first ground of impossibility as he was a party to an agreement reciting who was the owner of the land, which agreement antedates the execution of his will, and had been president of the association which owned the historic Baby property.
>
> **13 As the gift in question was given subject to a condition which was at the time of its creation and to the knowledge of the testator impossible of performance, the condition must fail and the gift remains free of the condition. On these facts, the Windsor Public Library Board is to receive the 10% without any assurance being given.**
>
> 14 The law in England is well settled on this point. It is summarized in Williams on Wills, 3rd ed. (1967), p. 270, and is as follows:
>
> A condition precedent obviously impossible or a condition becoming impossible by operation of law before the date of the will, is repugnant and void and the gift remains.
> This is a development from the civil law as the gift is one of personalty and has its roots deep in the common law. As early as 1759, this was held to be the proper construction: Lowther v. Cavendish (1758), 1 Eden 99, 28 E.R. 621; affirmed 3 Bro.P.C. 186, 1 E.R. 1260.
>
> ...

19 On the present facts the testator must have known of the impossibility when he drafted the condition. Yet he still made the grant. It would be absurd to impute to him an intent to draft a totally ineffective clause in a document as solemn and important as his will when he had full knowledge of its ineffectiveness. In the absence of anything to the contrary, it must be that the gift for the benefit of an institution which he actively supported was paramount to the testator and so the condition must fail. The only reasonable interpretation that can be given the condition to enable the clause to have any effect when written is that, if at the death of the life tenant it is possible for the city to give the assurances, then it must give the assurance as a condition precedent to gift taking effect.

Re Tuck's Settlement Trusts
[1978] Ch. 49; cb, p.744

An uncertain disposition is void but the construction of the words might be resolved by extrinsic evidence.