Wills & Estates
Winter Term 2024

Lecture Notes – No. 12

XI. RECTIFICATION OF WILLS

I have asked you to review **Jack v. Wildcat, 2024 FC 1 (Fed. Ct.)**. The consideration of Wills made by Aboriginal people lies outside of the scope of this course as, in principle, the law respecting such Wills is based on conventional doctrine but where it is the Crown, through the Minister of Indigenous Services that makes decisions in administrative proceedings. The case deals with the fairness of the proceedings respecting an application to have a Will declared as void. The case highlights the uncertainties that arise in an administrative law process that does not follow the conventional procedures that Courts highlight as important in this area.

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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. 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.

Jurisdiction of the Court

Conner Estate v Worthing
2020 BCSC 150 (B.C.S.C.); cb, p.274
[appeal dismissed; 2021 BCCA 231]

In this case there were errors on the face of the Will. The Application Judge set out the nature of the errors as follows:

> [7] There are three errors on the face of the will. The first two errors are drafting errors and are set out below:
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> 3. I GIVE, DEVISE AND BEQUEATH all my property of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment to my said Trustee upon the following trusts, namely:

. . .

c. to liquidate my residence at 375 Woods Road, Kelowna, British Columbia and to pay the net proceeds therefrom as directed herein;

. . .

f. to transfer and deliver to my husband, Denis Worthing, for his own use absolutely:

i. one-half of the net proceeds of the liquidation of the my residence at 375 Woods Road, Kelowna, British Columbia;

ii. my stocks Firesteel Resources Inc. and Northern Tiger Resources;

iii. my Registered Retirement Savings Plan held at Prospera Credit Union;

iv. my Tax Free Savings Account, presently with TD Canada Trust;

v. the net proceeds of my Manulife Registered Retirement Savings Plan after payment of all taxes payable thereon;

vi. the rest and residue of my estate.

g. to transfer and deliver in equal shares to my granddaughter Krislynn Richelle Reimer, my grandson Kolby Robert Alexander Bisson and my granddaughter Shayna Rolene Bisson, for their own use absolutely 20% each of

i. the net proceeds of the liquidation of the my residence at 375 Woods Road, Kelowna, British Columbia;

. . .

m. to transfer and deliver in equal shares to my son, Faron Lee Alexander Black, and my daughter, Tracey Marcella Black, for their own use absolutely:

i. 20% each of the net proceeds of the liquidation of the my residence at 375 Woods Road, Kelowna, British Columbia;

ii. 20% each of the burial plot I own at Lakeview Cemetery;

iii. the proceeds of my Sun Life Insurance Policy Number 56682 through Kelowna Flightcraft;

iv. 20% each of the proceeds of my Transamerica Life Insurance policy;

v. the rest and residue of my estate.

[8] A review of the underlined portions above shows that Mr. Worthing was to receive one-half of the net proceeds from the house and that Ms. Conner's three grandchildren and two children all receive 20% each. As such, the will provides for distribution of 150% of the sale proceeds.

[9] A review of the italicized portions shows the second error: the residue has been given twice, once to Mr. Worthing and once jointly to her two children.

> [10] The third error on the face of the will is that there are words missing. After paragraph four are found the words, “discharge to my said Trustee notwithstanding that the parent or guardian may be one and the same person”. This is then followed by paragraph six. It is apparent that one or more lines of what was intended to be paragraph five have been omitted from the printed copy. According to Mr. Purvin-Good, who drafted the will, an unsigned draft that is presumably in his computer reveals three lines of text that permits the trustee to make payments to anyone under the age of 25 to a parent or guardian.
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> [11] While each of the errors might hypothetically create problems, giving 150% of the proceeds from the sale of the residence is the most significant from a practical perspective because the residence is the main asset.

Thereafter, the court set out the traditional distinction between the court’s jurisdiction in respecting of admitting a Will to probate, and, interpreting the terms of a Will after it has been admitted to probate:

> **The law – the Court's dual role**
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> [12] Historically, the court of probate was concerned with whether a will was valid, whereas the court of construction was responsible for interpreting the will once proven. Although the Supreme Court of British Columbia has the authority to sit as both a court of probate and a court of construction, the distinction between the two functions is significant because the rules of evidence differ between the two functions. An instructive summary of the court's dual roles is set out in Justice Dardi’s decision in *Ali Estate (Re)*, 2011 BCSC 537 at paras. 21-27:
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> > [21] **The Supreme Court has jurisdiction to sit both as a court of probate and as a court of construction. Notwithstanding that the single court is empowered with dual jurisdictions, historically the court has exercised its probate function and its interpretation or construction function in separate proceedings. In broad terms, when ruling upon the validity of a will, the court sits as a court of probate, and when interpreting a will, it sits as a court of construction.** The divided jurisdiction is significant because the powers available to the court depend on which jurisdiction it assumes: Law Reform Commission of British Columbia, *Report on Interpretation of Wills*, LRC 58 (Victoria, 1982) at 1.
> >
> > [22] **The jurisdiction exercised by a court of probate relates to whether the testamentary instrument submitted for probate represents the true last will and testament of a deceased and whether the named personal representative is entitled to administer the estate. In essence, a court of probate focuses on what constitutes the testamentary instrument of the testator and its validity. The inquiry pertaining to the validity of the testamentary document encompasses the issues of the capacity and the volition of the testator and whether the testator duly executed the testamentary document with knowledge and approval of its contents.**
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> > **[23] On the other hand, in exercising jurisdiction as a court of construction, the court is concerned with ascertaining the meaning**

of the testamentary documents that have been approved by the court in the exercise of its probate jurisdiction. It is axiomatic that court must interpret or construe a will in the form in which it has been admitted to probate.

[24] In probate hearings, the court, in determining whether or not the document before it is truly the testator's will, is permitted to consider extrinsic evidence, including direct evidence as to the testator's intentions. That evidence may include copies of earlier wills and codicils, prior drafts of the will, and the notes of the solicitor who prepared the will. In contrast, the scope of admissible evidence is generally more constrained in a construction hearing. In that instance, a court may only consider the words of the will and if, applying the subjective approach, the evidence of the surrounding circumstances known to the testator at the time the will was made. Except in very restricted circumstances (such as equivocation), the court is not permitted to review direct evidence of the testator's intentions on a construction application: British Columbia Law Institute, "Wills, Estates and Succession: A Modern Legal Framework," in B.C.L.I. Report No. 45 (B.C., 2006) at 37.

[25] It is in the context of these general principles that I next address the petitioner's application for rectification.

[26] At the outset, it is important to observe that the equitable remedy of rectification, as developed to permit a court to correct errors in contracts or other written documents, does not apply to wills: British Columbia Law Institute, "Wills, Estates and Succession: A Modern Legal Framework" at 36. I also note parenthetically that in British Columbia there is currently no legislation in force which confers powers on the court to rectify a will.

[27] However, the court, in exercising its probate jurisdiction, does have a limited power to rectify a mistake in a will where the language of the will fails to express the testator's actual intentions. A will is only valid to the extent a testator knew and approved of its contents. As a constituent element of establishing the validity of a will, the court must be satisfied that the testator knew and approved of its contents. It is well established on the authorities that before a will is admitted to probate, the court may, in the exercise of its probate jurisdiction, delete words from a will that have been included without the testator's requisite knowledge and approval: *Alexander Estate v. Adams* (1998), 1998 CanLII 2357 (BC SC), 51 B.C.L.R. (3d) 333, 20 E.T.R. (2d) 294 (S.C.) [*Alexander Estate*]; and *Clark v. Nash* (1987), 1989 CanLII 2923 (BC CA), 61 D.L.R. (4th) 409, 34 E.T.R. 174 (B.C.C.A.) [*Clark*].

[13] Historically, matters before the court of probate and those before the court of construction were heard at separate proceedings, and it is only because the Supreme Court of British Columbia has jurisdiction for both that the possibility of a combined hearing arises. Indeed, in *(Re) Ali*, Dardi J. only dealt with the court of

> probate matter in the decision I have cited above. Her decision on the interpretation of the will that had been proven is reported at 2014 BCSC 340.

Thereafter the court held that it could rectify the mistakes based on the drafting solicitor's notes that made it clear that the mistake was that of the lawyer in capturing his instructions in the Will, rather than a mistake on the part of the testator in how he sought to dispose of his Estate. The traditional rule that a probate court can delete but not add words was stretched on the application of a common sense principle that a testator does not make a Will to be ineffective intentionally. Whether this traditional approach makes sense any more seems questionable.

Rondel v Robinson Estate
2011 ONCA 493 (C.A.)

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.**
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> 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...
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> 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.

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.

McLaughlin Estate v. McLaughlin
2016 ONCA 899 (C.A.)

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

The matter was heard by Lemon J. who considered the evidence and held that that the testator could not have intended the consequences of the solicitor's errors and that she did not intend to die intestate. Lemon J. ordered the secondary will to be rectified; 2014 ONSC 3162. The matter then appeared before Price J. who held that a judge of probate has the obligation to ascertain the intention of the testator when there is a clear issue about the formal validity of the will. He noted that Lemon J. had been asked to address only the issue of rectification, not validity, so that the latter issue was not res judicata and must still be determined, specifically with respect to the question whether the testator had knowledge of and approved the contents of the 2010 Wills. Price J. held that he was bound by the findings of fact of Lemon J. and the parties agreed that he was not precluded from making a determination about the validity of the will. He expressed the opinion that the questions whether the secondary will should be rectified and whether it was valid are separate and distinct and since Lemon J. did not address the second question, he could do so. Lemon J. made a finding that the testator did not know or approve the contents of the secondary will and Price J. held that the validity of the secondary will must be based on that finding, so he held it to be invalid. Further, Price J. concluded that a trial was necessary to determine whether the primary will was valid; 2015 ONSC 3491.

The Court of Appeal held:

> [1] The issues on appeal concern the validity of a will. The testatrix, Elizabeth Anne McLaughlin, died on April 23, 2012. On June 16, 2010, she executed a primary and a secondary will for which she had provided instructions to her long-time solicitor who had prepared several previous wills for her. The secondary will was intended to deal with her house. The primary will was intended to deal with the balance of her estate.
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> [2] Unfortunately, as the result of clerical errors, the secondary will contained some mistakes. It included a revocation clause revoking all other wills, which included the primary will; it repeated specific bequests contained in the primary

will; and it did not contain a disposition of the residue of the estate such that an intestacy would be created.

[3] On July 8, 2014, Lemon J. made an order rectifying the secondary will *nunc pro tunc* such that the revocation clause was amended to exclude the primary will from its operation, the duplicated specific bequests were deleted and the intended residue clause was included: *McLauglin Estate v. McLaughlin,* 2014 ONSC 3162, 99 E.T.R. (3d) 71. Lemon J. made this order because he was satisfied that the testatrix had not read the secondary will when she signed it but that the rectified secondary will corresponded with her instructions to her solicitor, which she had entrusted him to carry out. His order was not appealed.

[4] On a subsequent application to remove an objection to the appointment of an estate trustee for the primary will, of his own initiative, the application judge embarked on an examination of the validity of the secondary will. Ultimately, he found that the secondary will was not valid based on Lemon J.'s finding that the testatrix did not read it or have knowledge of or approve of its contents.

[5] In our view, the judgment of the application judge cannot stand in this case. It was implicit in Lemon J.'s order for rectification of the secondary will, which was made *nunc pro tunc,* that he had determined that the secondary will is valid.

[6] The application judge's decision undermined that of Lemon J., ignored his own and Lemon J.'s findings of the testatrix's intentions and improperly created an intestacy in circumstances where the evidence resulted in an opposite conclusion.

[7] Indeed, the application judge's reasoning is circular. Lemon J.'s decision to rectify the secondary will was premised on his finding that the secondary will had not been read. That finding cannot then be used to find the secondary will as rectified invalid.

[8] The appeal is allowed and the judgment of the application judge holding the secondary will invalid is set aside. In its place, we substitute an order holding the secondary will valid.

Daradick v. McKeand Estate
2012 ONSC 5622 (S.C.J.); cb, p.279, note 7

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.

Wrong Instrument Executed

Re Brander
[1952] 4 DLR 688 (B.C.S.C.); cb, p.280

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.281, note 3,** 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.
>
> 4 Accordingly, I am ordering the will signed by George Stephen Malichen to be admitted to probate with the following changes…

I would suggest that the law remains somewhat unsettled with respect to the operation of the traditional limits on rectification in the context of errors in a Will.

Two recent cases on rectification arising from a lawyer drafting the Will in a manner which did not accurately capture the intentions of the testator:

Gorgi v. Ihnatowych
2023 ONSC 1803 (Ont. S.C.J.)

Sanfillipo J.:

> [1] John Ihnatowych died on May 2, 2020. He left a Last Will and Testament executed on May 12, 2009 (the "Will"). Through the Will, the Deceased appointed his children, the Applicant, Ulana Olha Gorgi, and the Respondent, Markian Alexander Ihnatowych, as the executors and trustees of his estate (the "Estate").
>
> [2] When Ulana and Markian applied for a Certificate of Appointment of Estate Trustee with a Will, the Respondent, Alexander Erik de Berner filed a Notice of Objection, also on behalf of his minor children, Parker de Berner and Darwin de Berner (collectively, the "de Berner Respondents"). Alexander claims that he has a residuary interest in the Estate because he is the Deceased's biological son and is thereby the Deceased's "issue" within the meaning of the "Residue Clause" contained in the Will. The de Berner Respondents claim that Parker and Darwin are the biological grandchildren of the Deceased and are thereby grandchildren of the Deceased within the meaning of the "Grandchildren Clause" in the Will.
>
> [3] Ulana claims that she did not know of Alexander until after her father's death, when Alexander claimed to be the biological son of the Deceased. Markian has renounced his appointment as Estate Trustee. Ulana, as the sole Estate Trustee, brought this Application to rectify the Will. The Children's Lawyer, as Litigation Guardian for the Applicant's minor children, supports the relief sought by the Applicant. The de Berner Respondents deny that the Will should be rectified or interpreted in the manner sought by the Applicant.
>
> [4] Ulana and Markian are John's biological children. Their mother was John's first wife. Alexander deposed that in the period from 1960 to 1965, John had an intimate relationship with Alexander's mother, Erika von Berner. Alexander deposed that his mother's relationship with John terminated shortly before Alexander was born in 1965.

> [5] Alexander deposed that for the first thirty years of his life, he understood from his mother that his father was his mother's husband, George de Berner, but that in 1995, his mother told him that John was his father. Alexander deposed that he had no contact with John until May 2006: at the age of 41. At that time, John declined Alexander's invitation to attend his wedding, but sent Alexander a wedding gift of $5,000, after which Alexander sent John a "thank you" note. Alexander testified that almost two years later, in January 2008, Alexander received from John a gift in the amount of $1,000, on the birth of Alexander's first child, Parker. Alexander deposed that shortly after January 2008, he called John by telephone and spoke to him for the first time. Alexander testified that although he would talk with John on occasion, Alexander would not meet John in person until some 4-5 years later, in May 2014.
>
> [6] In the meantime, in April 2009, John retained lawyer, Roman Zarowsky, to assist him with the preparation of his Will, a Power of Attorney for Property ("POAP") and a Power of Attorney for Personal Care ("POAPC"), and to provide him with advice relating to his then-common law spouse, Nina Chuma. Accepting Alexander's evidence on his contacts with John leading to April 2009, at the time that John retained Mr. Zarowsky, John had never met Alexander in person.
>
> [7] Mr. Zarowsky deposed that John did not mention Alexander when providing instructions regarding John's Will. Rather, Mr. Zarowsky deposed that John told him, both at their meetings and in his handwritten instructions, that he had two children: Ulana and Markian.

The Will provided a gift to "grandchildren". The Estate Trustee sought rectification to restate the gift as to "the children of Markian Alexander Ihnatowych and Ulana Olha Gorgi."

> [28] The Applicant's case for rectification rests on establishing that John's instructions were not carried out by Mr. Zarowsky. In support of her position, the Applicant relied on the Will and on the affidavit evidence of Mr. Zarowsky, sworn June 28, 2022 (the "Zarowsky Affidavit"), setting out surrounding circumstances to the preparation and execution of the Will.
>
> …
>
> [31] Mr. Zarowsky deposed that he met with John on April 21, 2009, for the purpose of acting for him in the preparation of a will and powers of attorney. Mr. Zarowsky swore that John brought to the meeting several documents that he had prepared to provide his instructions, including a handwritten document entitled: "My Last Will John Ihnatowych", dated June 17, 2008 (the "2008 Will Notes"). In the 2008 Will Notes, John wrote as follows:
>
> > (a) In paragraph 1: "My estate to be shared eaqualy (sic) between my children Ulana Olha Gorgi & Markian Alexander Ihnatowych".
> >
> > (b) In paragraph 2: "I designate both Ulana & Markian to be my Trustees".

(c) In paragraph 3: “Upon my death I transfer my Power of Attorneys over Nina Chuma to my daughter Ulana to be shared with my son Markian, both financial and personal care.”

(d) In paragraph 4: “Trustees – To be shared equaly (sic) between my children, Ulana & Markian”.

(e) In paragraph 5: “Cottage at Hoverla turned to Ulana & lot at Polawa turned to Markian to be assest (sic) & finantionaly (sic) divided equaly (sic).”

(f) In paragraph 6: “It is my wish upon my death 10% of my estate to be invested for my blood grandchildren. Investment to be shared by Ulana & Markian.”

(g) In paragraph 8: “Should Ulana or Markian divorse (sic), their inheritance from me plus interest should be transferred to my blood grandchildren and invested, spend on their education, or transferred to them at age 21. In Markian’s case at present no children, inheritance from me should be tranfered (sic) to him.”

[32] Mr. Zarowsky deposed that John also provided him with an undated and unexecuted Power of Attorney for Personal Care that he had prepared from a form (the “Client’s Draft POAPC”). The Client’s Draft POAPC appointed, in paragraph 5.1, “my child Ulana Gorgi of Toronto” as his attorney for personal care, and provided, in paragraph 5.2, as follows: “If my child Ulana Gorgi dies, or refuses or is unable to act or to continue to act, then I appoint my child Markian Ihnatowych of Toronto, Ontario to act as my Attorney for Personal Care.”

[33] Mr. Zarowsky deposed that John also provided him with an undated and unexecuted Will that he had prepared from a standard form (the “Client’s Draft Will”). The Client’s Draft Will appointed, in paragraph 4.1, “my child Ulana Gorgi” as John’s Trustee, and provided, in paragraph 4.2, as follows: “If my child Ulana Gorgi dies, or refuses or is unable to act or to continue to act … then I appoint my child Markian Ihnatowych to act as my Trustee.” The Client’s Draft Will divided the residue of John’s Estate into as many equal shares as he had children who survived him. It also contemplates a scheme to divide each predeceased child’s share into as many portions as that predeceased child had children surviving the Deceased.

[34] John also provided Mr. Zarowsky with a handwritten noted dated April 21, 2009. John wrote that he wanted to “ensure power of attorney upon my death is transferred to my children Ulana and Markian. Important” (the “April 2009 Note”).

[35] Mr. Zarowsky not only tendered into evidence these materials that were prepared by John and provided to Mr. Zarowsky at the April 21, 2009 meeting, but also produced the handwritten notes that Mr. Zarowsky made during the meeting. The handwritten notes record the following:

(a) John told Mr. Zarowsky that he was born in 1936, married in 1968, and had two children, Ulana, born in 1973, and Markian, born in 1975. John divorced in 1990.

(b) Ulana had two sons. Markian did not have any children.

(c) Regarding his attorneys for property and for personal care, John wanted to appoint his "2 kids", Markian and Ulana, as joint attorneys.

(d) Regarding his Will, John instructed:

i. His "children" were to be appointed as trustees, and personal effects to the "2 kids".
ii. 10% of the residue of his estate "to be divided between any grandchildren alive at the time of his death".
iii. The residue of his estate was to be "divided between 2 kids alive at the date of death, equal shares per stirpes."

[36] Mr. Zarowsky deposed that based on the materials provided to him by John, and based on John's instructions provided during the meeting of April 21, 2009, Mr. Zarowsky understood that John's instructions were that John wanted to leave his entire estate to Markian and Ulana and their children. Mr. Zarowsky set out to prepare a Will that was in accordance with these instructions.

[37] Mr. Zarowsky deposed that on May 12, 2009, he met with John to review the estate planning documents that he had drafted: specifically, the POAP, the POAPC and the Will. Mr. Zarowsky stated that the Will identifies Ulana and Markian by name when appointing them as trustees, and when gifting to them the testator's personal property, but in the Residue Clause referred to them as "issue". Further, Mr. Zarowsky admitted that he did not specify in the Grandchildren Clause that the grandchildren were children of Ulana and Markian.

[38] Mr. Zarowsky deposed that John did not mention Alexander, or his children, Parker and Darwin, to him at any time in their discussions. Mr. Zarowsky swore that John's clear instructions were that he consistently wanted only Ulana and Markian, and their children, to benefit from his Estate. Mr. Zarowsky admitted that the Will that he "drafted for the Deceased does not specifically limit the beneficiaries to Ulana and Markian, and their children, and therefore does not accurately reflect the Deceased's intentions and instructions."

[39] I accept Mr. Zarowsky's evidence as it is supported by Mr. Zarowsky's handwritten notes taken contemporaneously during his April 2019 meeting with John. This evidence is unchallenged by any conflicting evidence and unaffected by cross-examination. The de Berner Respondents emphasized that Mr. Zarowsky admitted in cross-examination that John did not tell him that he "wanted to exclude one of his children" and "some of his grandchildren". I do not place the same emphasis on this admission when qualified by Mr. Zarowsky's explanation of his instructions: "What he told me was that he wanted his estate to go to his children, Markian and Ulana."

[40] Further, I place considerable weight on John's 2008 Will Notes as a clear, purposeful and categorical handwritten statement of John's

instructions to Mr. Zarowsky: "My estate to be shared eaqualy (sic) between my children Ulana Olha Gorgi & Markian Alexander Ihnatowych." These handwritten instructions by John leave no reason for doubt when Mr. Zarowsky swears that John instructed him that only Ulana and Markian, and their children, were to benefit from his Estate. I find that Mr. Zarowsky's evidence is plausible when considered in the context of the documents written by John, and reliable as it was tendered against self-interest.

[41] The de Berner Respondents tendered the affidavit of Alexander, sworn August 15, 2022. I admitted those paragraphs of the affidavit that explained the surrounding circumstance of Alexander's contact with John in the period leading to John's execution of the Will on May 12, 2009 as it set out Alexander's evidence of his relationship with John. However, I have disregarded paragraphs 20-33 of Alexander's affidavit as it contains evidence of Alexander's contacts with John after John's execution of the Will, in the period from 2010-2019. This evidence is not only inadmissible as extrinsic evidence that goes beyond providing facts and circumstances surrounding the making of the Will, in accordance with Robinson Estate OCA at paras. 25-27, but it is irrelevant to my consideration of the surrounding circumstances of John's execution of the Will on May 12, 2009.

…

[**43] "The court's task in a rectification case is corrective, not speculative, and is utilized with abundant caution": Binkley Estate, at para. 14. I have concluded that the Will contains an unintended error in that the testator's instructions have not been carried out in two clauses, the Grandchildren Clause and the Residue Clause, which, as worded, could result in John's estate passing to persons other than Ulana and Markian and their children. I thereby conclude that the principles set out in Robinson Estate have been established and support an Order rectifying the Will's Grandchildren Clause and the Residue Clause.**

[44] I conclude, further, that the requirements set out in Lipson, at para. 42, for the deletion or insertion of words to correct an error in a Will have been satisfied. As Mr. Zarowsky explained, the Will does not accurately or completely express the Deceased's intentions when reading the Will as a whole, which consistently refers to Ulana and Markian as John's Children in the trustee appointment clause and the property clause, but not in the Residue Clause and, by extension, in the Grandchildren Clause. The Order sought by the Applicant for the deletion of words, and addition of words, as set out in the Notice of Application, will give rise to the testator's intention, as determined from a reading of the Will as a whole and in light of the surrounding circumstances, as I have found them.

Hofman v. Lougheed
2023 ONSC 3437 (Ont. S.C.J.)

The testator died leaving a primary and secondary Will with gifts to her three children. The gift to one child (Tenny) was in the form of a testamentary trust with the income to go to the child for life

with the remainder to be divided between her children with certain age attainment clauses. The child died in 2021 leaving two children; one was born of the child's marriage, the other in a cohabitational relationship. Another child (Nancy) had a child and later married the child's biological father, and, then had a second child but never married that child's biological father.

An issue arose with respect to the following provision in the Will:

> ANY REFERENCE in this Will or any Codicil to a person, other than a person specifically named, in terms of a relationship to another person determined by blood or marriage shall not include a person born outside marriage or a person who comes within the description traced through another person who was born outside marriage. However, any person who has been legally adopted or is in the course of being legally adopted shall be regarded as having been born in lawful wedlock to his or her adopting parent and any person who is born outside marriage and whose natural parents subsequently marry shall be regarded as having been born in lawful wedlock.

M.J. Valente J.:

[28] LeBrun prepared Shirley's estate's probate application naming Kimberly as a beneficiary along with Darren and Gillian who each received a gift of $5,000.

The Evidence of LeBrun

[29] LeBrun was cross examined as a non-party in support of the two applications.

[30] According to LeBrun's note of February 13, 1997, Shirley advised him that she had three children and seven grandchildren. The Agreed Statement of Facts stipulates that Shirley's seven grandchildren at the time were Tenny's two daughters, Carrie-Lee and Kimberly, Nancy's two children, Bailey and Alex, and Douglas' three children, Brian, Beth and Kellie.

[31] LeBrun testified that in late January 200, Shirley contacted him by telephone to provide him with will instructions. LeBrun's undated notes of that call were produced in evidence. Apart from instructing LeBrun to include her only great-grandchild, Darren, with her grandchildren to receive a $5,000 gift upon her passing, Shirley advised her lawyer that Tenny had two children, aged 24 and 21 years of age. Shirley also advised LeBrun that Tenny had a drinking problem, and she had no contact with her since Christmas. In late January 2001 Shirley also instructed LeBrun to gift Tenny $100,000 should her daughter survive her with no gift over to Tenny's children.

[32] On February 26, 2001, Shirley again contacted LeBrun with revised will instructions. Like LeBrun's January telephone conversation notes, the notes of his February 26, 2001 call with Shirley are in evidence. In the February conversation, Shirley advised LeBrun that she did "not want the stress among [Tenny's] children that would result if Tenny only was to have $100,000" with no gift over. In these circumstances, Shirley instructed LeBrun to set up the Trust, comprised of one-third of the residue of her estate. Shirley's instructions to her lawyer also provided

that Tenny was to receive income only from the Trust during her lifetime with discretion given to the trustees to encroach on the capital.

[33] On Tenny's death, Shirley's instructions to LeBrun were that Tenny's two daughters would receive the capital of the Trust in equal shares. Although LeBrun recommended that half of the capital of each daughter's share be received at age 25 with the balance at age 35, Shirley's instructions were that each of Tenny's daughters were to receive half of the capital due to them at age 30 with the balance at age 40.

[34] LeBrun testified that Shirley did not tell him why she wanted to defer the age at which Tenny's two daughters received the gift over of the Trust residue. On the other hand, Shirley did specifically advise him that Tenny "will not respect money", and for that reason, she did not want the Trust residue to go to Tenny's husband or their restaurant business.

[35] LeBrun confirmed that the Exclusion Clause is a standard clause in the wills he drafts.

[36] LeBrun also testified, however, that he was never informed that there were children in Shirley's line of descent born outside of marriage, and had he been told, he would not have included the Exclusion Clause in the wills he drafted for Shirley.

[37] LeBrun stated on his cross examination that he explained the significance of the Exclusion Clause to Shirley. Although based on the totality of his evidence, I am of the view that LeBrun has no specific recollection of explaining the Exclusion Clause to Shirley, I am prepared to accept LeBrun's position given the usual meticulous practice he described in reviewing a will with a client prior to signature.

Should the Will be rectified? Yes – the Will as drafted to not conform to the instructions of the testator.

[49] As I see them, the relevant surrounding circumstances that assist in determining the true intention of Shirley in the disposition of her property, include the following:

a) Firstly, I find that there is no evidence to suggest that that Shirley treated any of her children, grandchildren or great grandchildren born to unmarried parents differently from those born to married children. On the contrary, the evidence is that Shirley had a positive relationship with Kimberly as a child and there is nothing before me to cause me to conclude that the bond between Shirley and her granddaughter deteriorated over time.

b) In 1997 Shirley advised her lawyer she had three children and seven grandchildren. It does not escape me that in 1997, three of Shirley's children and grandchildren (Tenny, Kimberly and Bailey) were born to parents who were not married to each other at the time of their birth.

c) Shirley not only specifically provided for Bailey in the 1997 Will with the inclusion of a Henson Trust but in the 2001 General Will, she included a specific bequest in favour of her great grandson Darren. Darren was born to Carrie-Lee in August 1996 when she was not married.

d) Finally, the 2001 General Will and the General and Limited Wills are substantially identical subject to one exception: Shirley included her granddaughter Gillian, born in September 2001 to Nancy when Nancy was unmarried. The 2002 wills provide that should Nancy predecease Shirley, Nancy's share of the estate would pass equally to her three children, Bailey (subject to the Henson Trust), Alex and Gillian.

[50] In his cross examination, LeBrun acknowledged that had he known that Shirley had "illegitimate" children, grandchildren or great grandchildren, he would not have included the Exclusion Clause in the wills. Carrie-Lee submits that the lack of knowledge on the part of LeBrun and the inclusion of the Exclusion Clause is not the solicitor's a mistake but rather Shirley's misunderstanding of the legal effect of the clause. For this reason, Carrie-Lee urges this court to follow Justice Belobaba's decision in Robinson Estate SCJ and dismiss Kimberley's application.

[51] In my opinion, the facts considered by Justice Belobaba are distinguishable from the facts of this case. In Robinson Estate SCJ, the testator intended to revoke her prior Canadian will but misunderstood the far-reaching effect of the revocation. In the case before me there is no evidence that Shirley instructed LeBrun that children born out of wedlock were to be excluded as estate beneficiaries. Rather the Exclusion Clause was included at the discretion of LeBrun in accordance with his usual will drafting practice. Furthermore, there is no evidence to suggest that Shirley misunderstood the legal consequences of the Exclusion Clause.

[52] To my mind, the real issue is that the drafting of the General Will and the Limited Will did not conform with Shirley's instructions. Those instructions included a specific direction to establish a trust for Tenny equal to one-third of the estate residue from which Tenny was to receive income only with a gift over to Tenny's two daughters. Shirley also instructed LeBrun that each of Tenny's daughters were to receive half of their capital entitlement at age thirty and the balance at forty years of age. In 2001 when Shirley provided these instructions to LeBrun, Tenny's only two daughters were Carrie-Lee and Kimberly. It is obvious that Shirley intended to benefit Carrie-Lee and Kimberly equally on Tenny's passing.

[53] With those specific instructions, it was LeBrun's decision to refer to the beneficiaries of the Trust gift over by beneficiary class as opposed to by name. It was also the drafting lawyer's decision to include the Exclusion Clause. Specifically, the General Will and the Limited Will provide that upon Tenny's death, the capital of the trust "shall be divided into as many equal shares as there shall be children of Tenny alive" on the date of her death. LeBrun's gifting by class instead of naming the specific persons intended, together with his insertion of the Exclusion Clause, fail to carry out Shirley's instructions. In my opinion, this is a case of the drafting solicitor's mistake.

XII. 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.).

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.).