Wills & Estates
Winter Term 2024

Lecture Notes – No. 13

XII. INTERPRETATION OF WILLS (continued)

GENERAL 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.482** 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: The words in question are to be construed in the context of the whole will.
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.

Rule: Effect is to be given to all words.
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.

Rule: 'ejusdem generis'
'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.

Rule: 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.

Particular Words

(i) The Plain and Ordinary Meaning

Perrin v Morgan
[1943] 1 AC 399 (H.L.)

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.**

(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.

Per Stirpes:
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 died 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.**

THE USE OF EVIDENCE

Hicklin Estate v. Hicklin
2019 ABCA 136 (C.A.)

The Court held:

> ***A. There Are Four Fundamental Principles that Govern the Interpretation of Wills***
>
> 47 There are four fundamental principles that govern the interpretation of a will.
>
> 48 First, a will must be interpreted to give effect to the intention of the testator. No other principle is more important than this one.
>
> 49 Second, a court must read the entire will, just the same way an adjudicator interpreting a contract or a statute must read the whole contract or statute.

50 Third, a court must assume that the testator intended the words in the will to have their ordinary meaning in the absence of a compelling reason not to do so.

51 Fourth, a court may canvas extrinsic evidence to ascertain the testator's intention.

52 We discuss each of these principles below.

1. A Will Must Be Given a Meaning Consistent with the Intention of the Testator

53 Section 26 of the *Wills and Succession Act* declares that "[a] will must be interpreted in a manner that gives effect to the intent of the testator".

54 This is because a will, unlike a contract, is a unilateral act. It is solely the product of the testator's intentions. No one else's approval is required to give it legal effect.

55 This statutory direction to Alberta courts is consistent with the understanding of courts in Canada, England, Australia, New Zealand and the United States that it is their task "to ascertain a testator's wishes and to give effect to them".

56 This is a subjective - and not an objective - undertaking.

57 Otherwise the principles governing the interpretation of legal texts apply to wills.

2. A Court Must Read the Entire Will

58 The first step in the will-interpretation process obliges a court to read the entire document.

…

3. A Court Must Assume that the Testator Intended To Give Words in the Will Their Ordinary Meaning in the Absence of a Compelling Reason Not To Do So

62 The Supreme Court of Canada in *Smith v. Home of the Friendless* declared that "[e]very word is to be given its natural and ordinary meaning ... unless from a construction of the whole will it is evident that the testator intended otherwise".

63 There is a sound theoretical basis for the assumption that the testator selected the words he or she did because the words conveyed the meaning he or she wished to communicate to the estate trustee, the beneficiaries and any court reviewing the will, and that the testator expected all readers to accord to the words their plain and ordinary meaning, just as he or she did. "This assumption is made because our experience reveals that most people in a community will express themselves in language to which others in the community attach the same sense as the speaker". This is why language is usually an effective means of

communication.

64 If a court concludes that the testator intended the words in the will to bear their ordinary meaning, it must be mindful of the related principle "[w]ords must not be given meanings they cannot possibly bear".

65 If the text discloses more than one plausible meaning, the court must select the one that best promotes the testator's intention.

4. A Court May Canvas Extrinsic Evidence that Will Assist It To Ascertain the Testator's Intention

66 Section 26 of the *Wills and Succession Act* states that a court may admit "evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will," "evidence as to the meaning of the provisions of the will in the context of the testator's circumstances at the time of the making of the will" and "evidence of the testator's intent with regard to the matters referred to in the will".

67 When should a court admit and rely on extrinsic material?

68 Some judges believe that a court may not admit and review extrinsic evidence unless they have concluded that the text supports more than one plausible meaning or introduces an ambiguity.

…

75 Others are unwilling to impose any onerous preconditions to the admissibility of extrinsic evidence. They rely on extrinsic evidence if it assists in ascertaining the meaning a testator attached to a word used in the will. They understand that context may influence the meaning a testator attributes to a word:

> **A second school of thought is willing to explore extraneous material without demanding that an initial assessment of the clarity of the words of the will be undertaken. It encourages a court to review proferred extrinsic evidence ....**
>
> **Supporters of this school believe that the meaning of words a testator has used may not be accurately divined without a grasp of the context in which they were expressed and an understanding that the same words may bear different meanings in different contexts.**

76 The latter approach is correct - extrinsic evidence of the kind described in s. 26 of the *Wills and Succession Act* is admissible. Its admissibility is not dependent on a finding that a word is capable of more than one meaning or that an ambiguity exists. This approach is theoretically sound and inherently practical and it best promotes the object of s. 26 of the *Wills and Succession Act*.

> **77 It is theoretically sound because it promotes an accurate assessment of the testator's wishes:**
>
> > **It is the court's role to give effect to the testator's intention. This is an indispensable function the exercise of which perfects the transferal process the testator commenced when she signed her will.**
> >
> > **To be faithful to the testator's will, a court must identify the meaning the testator wished to convey by her choice of words. This can only be done, in many cases, if the court has access to relevant evidence which records information, in existence at the time the testator signed her will, about the testator's family and the nature of various family relationships, close friends, interests and many other facts which might influence the testator when engaged in the will-making process. A court, aware of important information about the testator, must carefully read the entire will, giving the words she selected or approved their ordinary meaning.**
>
> **78 The correct approach is practical because the admissibility standard it introduces is not onerous and there will be few contests as to whether proferred extrinsic evidence is admissible.**
>
> …
>
> 89 There is only one hard and fast rule on this topic - a court may rely on extrinsic evidence if it provides assistance in the ascertainment of the testator's intention when the testator made his or her will.
>
> [Footnotes omitted.]

The approach approved by the Alberta Court of Appeal is on par with the approach taken in Ontario as set out in is *Robinson Estate v. Robinson, above.*

Re Carrick
[1929] 3 D.L.R. 373 (Ont. H.C.J.)

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.

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.