

**Wills & Estates**  
**Winter Term 2026**

**Lecture Notes – No. 10**

**X. CAPACITY OF BENEFICIARIES**

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

**A. Illegitimacy and Adoption**

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

**B. Homicide**

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

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

**Re Gore**

**[1972] 1 O.R. 550 (H.C.J.); cb, p.461**

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

Per Osler JA:

While there is little authority in our jurisdiction, there have been a number of discussions of this problem in the Courts of the United States of America and the conclusion seems there to have been reached that the rule prohibiting a person from profiting from his own wrong has no application in such a case.

To say that the object of the murder was to accomplish what could be accomplished by the mere scratch of a pen carries its own refutation and leads to the conclusion that profit via the policy was not the object of the crime. The reason for the application of the rule failing, the rule cannot be invoked; *Union Central Life Ins. Co. v. Elizabeth Trust Co. et al.*, 183 Atlantic Rep. 181 at p. 185, per Berry, V.-C.

**... Joseph Hector Gore could have divested his late wife, the named beneficiary, of her contingent right to the proceeds of the policies "by the mere scratch of a pen" and hence, it cannot be assumed that he murdered her for that purpose. A proper case for the application of the rule does not arise, the rule being based on the axiom that nothing should be done to encourage murder.**

**Brissette Estate v. Westbury Life Insurance Co.  
[1992] 3 S.C.R. 87**

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

For the majority of the Court, Justice Sopinka denied the claim on both bases. The contract of insurance contemplated that the husband would inherit, but that he could not do so on the traditional rule that one who murders the insured cannot claim insurance proceeds on the victim's life. The dissenters, Gonthier and Cory JJ., would not allow the murderer to inherit but held that the contract should be enforced narrowly in favour of innocent heirs; in other words, that the insurer would seem to gain inappropriately otherwise.

Sopinka J held:

7 In order to determine whether, as a matter of public policy, the Court should resort to the device of a constructive trust, it is appropriate to consider whether the application of public policy which denies payment to the felonious beneficiary would work an injustice if recovery is denied to the appellants. After all, it is this policy that prevents the contract from taking effect in accordance with its terms. If denial of recovery by the estate is not inconsistent with this policy, then there is no misuse of public policy which would warrant a conclusion that its application is unjust.

...

9 The rationale of the policy which denies recovery to the felonious beneficiary is that a person should not profit from his or her own criminal act...

...

13 But, even if I had concluded that the denial of recovery to the estate was inconsistent with public policy, in my opinion it would be contrary to established principles of equity to employ a constructive trust in this case. **A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her own**

wrongful conduct. For example, in *Schobelt v. Barber*, [1967] 1 O.R. 349 (H.C.), the court imposed a constructive trust on property which passed to a joint tenant who had murdered his co-tenant. By virtue of the instrument creating the joint tenancy the surviving tenant acceded to the whole property. In order to prevent the wrongdoer from being unjustly enriched, the whole property was impressed with a constructive trust with the estate of the deceased joint tenant as beneficiary of one-half of the property.

14 The requirement of unjust enrichment is fundamental to the use of a constructive trust...

...

16 In this case, no claim of unjust enrichment has been made out... It cannot be said that but for Gerald's act, Mary's estate would have recovered the money. The wrongdoer does not benefit from his own wrong, nor is the insurer in breach of its duty to Mary. It is simply complying with the express terms of the contract. Moreover, there is no property in the hands of the wrongdoer upon which a trust can be fastened. By virtue of public policy the provision for payment in the insurance policy is unenforceable and no money is payable to the wrongdoer. The effect of a constructive trust would be to first require payment to the wrongdoer and then impress the money with a trust in favour of the estate...

**Oldfield v Transamerica Life Co. of Canada**  
2002 SCC 22; cb, p. 468, note 17

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

23 In *Brisette*, *supra*, Sopinka J. held that it is consistent with public policy "that a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds" (p. 94). Applied literally, it would prevent insurance proceeds from being paid to any innocent beneficiary named in an insurance policy so long as the insured event was occasioned while the insured committed a criminal act. In this case, it would prevent Maria Oldfield's claim.

24 Feldman J.A. recognized at the Court of Appeal that Sopinka J. did not hold that insurance contracts contain an implied term that criminal acts committed by the insured automatically exclude coverage even where the act is not committed with the intention of causing the insured loss. Likewise, he did not hold that there is a public policy rule that forbids payment to all beneficiaries, innocent or not, whenever the insured commits a criminal act. In *Brisette*, the insurance contract named the surviving spouse as

beneficiary. The husband who murdered his wife committed a deliberate act intended to cause the insured event. There was no question that the husband was barred from receiving the proceeds; the Court had to decide whether the contract could be interpreted so as to vest the proceeds in the estate of the wife, or failing that, whether the device of a constructive trust could achieve the same result. The Court answered both of these questions in the negative. In contrast to *Brissette*, the insured in the present appeal did not intend to cause the loss. Nor does Maria Oldfield, who was expressly designated as beneficiary under the contract, need to resort to trust principles in order to receive the proceeds.

25 In total, Sopinka J.'s decision in *Brissette* demonstrated that he did not intend to displace the principle that innocent beneficiaries who do not take through the criminal's estate should not be affected by public policy. In *Brissette*, Sopinka J. held that "[t]here is nothing unjust in refusing to pay the proceeds of insurance to a beneficiary not designated by the insurance contract when to do so would allow the insured to insure against his own criminal act" (p. 95 (emphasis added)). Sopinka J. reinforced this statement during his consideration of *Cleaver*, *supra*, in which the insured took out an insurance policy on his own life with his wife as beneficiary. The wife-beneficiary then murdered the husband-insured. By statute, the proceeds were declared payable to the estate of the insured, to be held in trust for the beneficiary. Public policy prevented any payment from being made to the felonious wife-beneficiary but, in Sopinka J.'s words, "[p]ublic policy was not allowed to abrogate a right that the estate had by virtue of the statute" (p. 95). Applying this case to the facts in *Brissette*, Sopinka J. held that "the result in *Cleaver* cannot be achieved in the absence of a provision, statutory or in the contract, providing for payment to the estate of the wife" (pp. 95-96 (emphasis added)). Because these passages appear after Sopinka J.'s earlier statement that "a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds" (p. 94), it is clear that the earlier statement was not intended to be an open-ended change to the traditional public policy rule.

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

27 If Sopinka J.'s statement was given the broad interpretation that Transamerica seeks, *bona fide* creditors would be unable to obtain insurance proceeds where an insured died while committing a criminal act. To do so would run contrary to a long-standing principle that there is "no illegality in a stipulation that, if the policy should afterwards be assigned bona fide for a valuable consideration, or a lien upon it should afterwards be acquired bona fide for valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned . . . ." (*Moore v.*

*Woolsey* (1854), 4 El. & Bl. 241, 119 E.R. 93 (K.B.), at p. 98); see also *Beresford* (H.L.), *supra*, at pp. 607-8, *per* Lord Atkin, and at p. 611, *per* Lord Macmillan; *Stats, supra*, at p. 240; *Hardy, supra*, at p. 760, *per* Lord Denning M.R., and at p. 768, *per* Diplock L.J. (“an assignee for value before the occurrence of the event would not be prevented from enforcing the contract notwithstanding that the event was caused by the anti-social act of the original assured”). The exception was not mentioned or considered in Sopinka J.’s decision.

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

**Dhingra v. Dhingra**  
**2012 ONCA 261 (Ont. C.A.); cb, p. 468, note 18**

per Rosenberg J.A.:

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

[2] For the following reasons, I would allow the appeal.

...

[After reviewing *Brissette* and *Oldfield*]

[22] In my view, the public policy rule is as set out in *Nordstrom* and *Re Dreger* and the person who is not guilty by reason of insanity, now termed not criminally responsible on account of mental disorder, is not prevented from taking under an insurance policy. The only question, then, is whether the rule of public policy can be said to have been varied because of the intervention by the legislature through the Civil Remedies Act. I will deal with that particular issue later. At this point, I simply state my view that I can see no reason not to apply *Nordstrom* and *Re Dreger*. To the contrary, developments since 1976 have only strengthened the policy basis for making an exception for persons found not criminally responsible.

...

[24] It seems to me that if a person found not criminally responsible on account of mental disorder is not “morally responsible” for his or her act, there is no rationale for applying the rule of public policy. That rule is founded in the theory that people should not profit from their crimes or, more broadly, by their own wrongs. Section 16 and Part XX.1 of the Criminal Code deny that the NCR accused has committed a crime or can be held legally responsible for any wrongdoing. It was an error for the application judge to describe the appellant as having “committed second degree murder”. Further in *Winko*, at para. 42, McLachlin J. makes the point that the NCR accused is not to be punished; rather, “Parliament

has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation.”

[25] The approach in other common law countries is generally to exempt persons with a mental disorder that would give rise to an insanity defence from the effect of the public policy rule. For example, in the United States, those states that have adopted § 2-803 of the Uniform Probate Code would exempt persons who are not “criminally accountable for the felonious and intentional killing of the decedent”. Most so-called “slayer statutes” similarly exempt the insane beneficiary from operation of the public policy rule: see Laurel Sevier, “Kooky Collects: How the Conflict Between Law and Psychiatry Grants Inheritance Rights to California’s Mentally Ill Slayers” (2007) 47 Santa Clara L. Rev. 379; and Gary Schuman, “Life Insurance and the Homicidal Beneficiary: The Insurer’s Responsibilities Under State Slayer Laws and Statutes” (2001) 51 Fed’n Def. & Corp. Counsel Q. 197.

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

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

...

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

**[32] A forfeiture order made under the Act, however, deprives everyone, including other beneficiaries, of the proceeds because the proceeds are forfeited to the Crown. A more compelling expression of public policy would be for the legislature to reverse the effect of the public policy that permits the**

**NCR accused to take under a will or insurance policy by deeming the accused to have predeceased the victim. Such a provision would result in the proceeds usually ending up in the estate of the victim for the benefit of beneficiaries other than the accused.**

**[33] Thus, there are competing public policies. On the one hand, the common law, reinforced by the policy as explained in *Winko*, is that an NCR accused is neither morally nor legally responsible for the death and therefore should be entitled to take under an insurance policy in which he or she is a beneficiary. On the other hand, there is the reflection of the public policy in the Act favouring the view that proceeds of crime in the hands of an NCR accused may be forfeited to the Crown.**

**[34] In my view, the way to reconcile these competing policies is to allow the common law and the Act to each operate in their own spheres. That the legislature has so recently turned its mind to the question of criminals profiting from their crimes and not sought to wholly abrogate the common law rule suggests to me that the legislature intended to leave the common law rule intact. The legislature has expressed public policy in the province but limited forfeiture to applications made by the Attorney General.**

**[35] The common law rule does not prevent the appellant from receiving the proceeds of the insurance policy. However, it is open to the Attorney General to bring an application under s. 3 of the Act. I note that s. 4 gives the Attorney General the right to apply for any number of interlocutory orders to safeguard any “property” pending an application under s. 3. If such an application were brought, the court would determine whether it would clearly not be in the interests of justice to forfeit the proceeds to the Crown.**

The accused was ultimately absolutely discharged by the Ontario Review Board; 2015 CarswellOnt 445 (Ont. Rev. Bd.)

Subsequently, the Crown did bring a forfeiture application; *Ontario (Attorney General) v. \$51,000 in Canadian Currency (In Rem)*, 2012 ONSC 4958. It was dismissed on the merits by Stewart J., 2013 ONSC 1321:

**34 It is argued on Dhingra’s behalf that his case falls within the “interests of justice” exception provided for in s. 3(1) of the Act. Would the granting of the forfeiture order sought be clearly not in the interests of justice?**

**35 It is common ground that the purpose of the Act is to assist in compensating individuals, municipal corporations and prescribed public bodies who suffer losses as a result of unlawful activities, preventing people who engage in unlawful activities and others from keeping property that was acquired as a result of those activities, preventing property from being used to engage in unlawful activities, and preventing injury to the public that may result from conspiracies to engage in unlawful activities.**

**36 In essence, the Act creates a property-based authority to seize money and other things shown, on a balance of probabilities to be tainted by crime**

and thereafter to allocate the proceeds to compensating victims of and remedying the societal effects of criminality. The practical and intended effect is also to take the profit out of crime and to deter its present and would-be perpetrators (see *Ontario (Attorney General) v. Chatterjee*, [2009] S.C.J. No. 19 (S.C.C.)).

...

40 In considering whether forfeiture would be clearly not in the interests of justice, the Court of Appeal for Ontario has held that **forfeiture should not be granted where the party seeking relief from forfeiture has established that forfeiture would be “manifestly harsh” or “draconian”**. **The onus in that regard rests on the respondent**. In order to determine whether the forfeiture would meet this test, among the factors to be considered are the role of the respondent in the unlawful activity, the disparity between the amount of the proceeds and the amount sought to be forfeited, and whether forfeiture would be consistent with the purposes of the Act (see: *Ontario (Attorney General) v. McDougall*, [2011] O.J. No. 2122 (Ont. C.A.)).

41 It is important to note that this list of factors is not exhaustive. The appropriate factors to be considered in each case must be determined and weighed on a case-by-case basis. However, the relief available under s. 3(1) will be the exception, not the rule, and granted sparingly (see: *Ontario (Attorney General) v. McDougall* (in rem), 2011 ONCA 363 (Ont. C.A.)).

...

42 The British Columbia courts have cited several helpful additional factors that may be taken into account in determining whether, under the counterpart statute of that province, forfeiture would be “clearly not in the interests of justice”. Among the factors considered appropriate to the determination of that issue are proportionality, fairness, the degree of culpability and/or complicity, knowledge, acquiescence, or negligence of the individual involved, the extent of the problem in the community of the sort of unlawful activity in question, the need to remove profit motive, the need for disgorgement of wrongfully obtained profits as well as, the need for compensation, prevention of future harm and general deterrence (see: *British Columbia (Director of Civil Forfeiture) v. Rai*, 2011 BCSC 186 (B.C. S.C.)).

**43 All of the authorities agree that punishment is not a factor in the determination.**

**44 Would forfeiture in this case be consistent with the purposes of the Act? Would the granting of the order sought here take the profit out of crime and deter its present and would-be perpetrators?**

**45 There is no doubt but that Dhingra killed Kamlesh and that he was the sole instrument of her death. The forfeiture of the entire amount of the policy proceeds paid into court by Scotia Life is being sought by the Crown. Although the Crown did not move immediately to seek forfeiture, its delay is explained by the civil proceedings which ensued upon payment of the policy proceeds into court.**

**46 This is not a case in which the insurance proceeds were the instrument of the crime, or payment directly received for committing the unlawful act, or the motive for the conduct.**

**47 Dhingra purchased the insurance policy on his own life some 8 years before Kamlesh's death. Presumably this was to provide her with some financial assistance in the event of his death. It was only at the suggestion of an insurance broker that Kamlesh was added to the policy as an insured. This policy of insurance was kept in force by Dhingra over the years through payment of premiums. Payment to Dhingra of the policy proceeds upon Kamlesh's death is a matter of contractual entitlement which, as the Court of Appeal has determined, is not prohibited by any rule of public policy.**

48 Dhingra was found not criminally responsible for Kamlesh's death on the basis of extensive psychiatric evidence. There is no suggestion whatsoever that he was capable at the time of forming an intent to kill his wife, and certainly no evidence that the possible availability of the life insurance proceeds played any role in these events or his conduct. I fail to see how the granting of the order would serve to deter others in any general sense from doing what Dhingra did. The very essence of having been found not criminally responsible for the offence denotes an absence of awareness or understanding of its meaning or consequences. Any person who might replicate Dhingra's actions would, by definition and by reason of mental disorder, be impervious to any caution a forfeiture order in this instance could provide.

...

**52 Dhingra is now an elderly psychiatric patient living alone in inexpensive rental accommodation in Toronto on very modest income from pension and old age security payments. He has no exigible property of any appreciable value. Legal representation was provided to him for the criminal and ensuing proceedings by Legal Aid or by amicus curiae appointed for that purpose. He is not named as a beneficiary under Kamlesh's will which leaves whatever is in her estate to their two children. Although need is not a consideration for the purposes of applying the exemption under the Act, I am of the view that Dhingra's personal circumstances may be taken into account when determining the factors of proportionality and fairness which comprise part of the exercise of deciding what the interests of justice require in any individual instance.**

**53 In interpreting and applying the exemption provided for in the Act, and with due regard to the exceptional nature of the relief sought, I am of the opinion that it would be manifestly harsh and therefore clearly not in the interests of justice to order the forfeiture to the Crown of the insurance proceeds which form the subject matter of this application.**

**The Bank of Nova Scotia Trust Company v. Rogers  
2021 ONSC 1747 (Ont. S.C.J.)**

Should the administration of a victim's estate be delayed until the death of the murderer-beneficiary dies to allow any children of the murderer-beneficiary to accept his gift on the doctrine

of lapse? No, but the Court may disallow the murderer-beneficiary inheriting based on policy but allow the alternate beneficiaries to take the gift to preserve the Testator's intention.

Labrosse J.:

### **Public Policy**

[21] It is well accepted that public policy precludes a person from benefiting from his or her own crime. The criminal forfeiture rule or the "slayer rule" was most recently reaffirmed by the Supreme Court of Canada in *Oldfield v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 22, [2002] 1 S.C.R. 742, at para. 11. Justice Major stated:

*The public policy rule at issue is that a criminal should not be permitted to profit from crime. Unless modified by statute, public policy operates independently of the rules of contract. For example, courts will not permit a husband who kills his spouse to obtain her life insurance proceeds, regardless of the manner in which the life insurance contract was worded.*

[22] There are some exceptions that apply to this rule such as where a person is found not criminally responsible on account of mental disorder: *Dhingra v. Dhingra Estate*, 2012 ONCA 261, 109 O.R. (3d) 641, at para. 22.

[23] **Courts in Canada have identified three different approaches to dealing with situations where the criminal forfeiture rule applies: (1) the deemed death approach, (2) the literal reading of the will approach, and (3) the implied intention approach: see *Bowlen Estate (Re)*, 2001 ABQB 1014, 304 A.R. 100, at paras. 39-50.**

[24] The courts have generally been consistent in setting out that the overall objective is to see that the wishes of the deceased, as expressed in their wills, are carried out.

### **Deemed Death Approach**

[25] In *Dhaliwall v. Dhaliwall* (1986), 1986 CanLII 969 (BC SC), 30 D.L.R. (4th) 420 (B.C. S.C.), the will provided that all of the testator's property would pass to the testator's husband (the murderer) and in the event he predeceased her, to their children. The court deemed the husband to have predeceased the testator so the three children could take under the gift over provisions in the will: at p. 425. This approach avoided the need to deal with the failed gift provision of the Wills Act, R.S.B.C. 1979, c. 434, as the solution was found within the will itself. In so doing, the court declined to follow the literal interpretation. As noted in *Bowlen Estate*, at para. 42, the court in *Dhaliwall* made no reference to *Re Dreger* (1976), 1976 CanLII 713 (ON SC), 12 O.R. (2d) 371 (H.C.), and the literal reading of the will approach.

### **A Literal Reading of the Will Approach**

[26] In *Re Dreger*, the will provided that all of the testator's property was to pass to the testator's husband, the murderer in a murder-suicide. In

the event he predeceased her, there was a gift over provision in favour of alternative beneficiaries. As the husband had not predeceased her, the antecedent event necessary for the gift over to operate had not occurred: at p. 382. As a result, an intestacy followed.

[27] The husband and wife had almost identical wills. As the husband survived the wife but was disentitled by public policy, her estate was distributed as an intestacy. As for the husband's estate, the wife predeceased him and thus his estate was distributed according to the gift over provisions of his will.

[28] The theory behind the literal approach is that the testator's will only provides for a gift over to the alternative beneficiary in the event that the primary beneficiary actually predeceases the testator, but not in cases where the primary beneficiary is disentitled or barred from taking due to public policy. In such a case, the result is an intestacy.

#### Implied Intention Approach

[29] In *Brissette Estate v. Brissette*, [1991] O.J. No. 1308, 42 E.T.R. 173 (Gen. Div.), the wife left the residue of her estate to her husband (the murderer), and if he predeceased her or did not survive her for thirty days, the residue went to various persons named in the will. If the result was an intestacy, the estate would go to the testatrix's mother.

[30] The court held that the residue could not go to the murderer but found against an intestacy. In attempting to ascertain the testatrix's intentions, the court found that there was an implied condition that the husband had to be a legal beneficiary. As the husband was disentitled by public policy, the intention was that if the husband could not receive the residue, it should go to the alternative beneficiaries named in the will.

...

#### Analysis

[35] I begin with the general principle that the courts will seek to avoid an interpretation of a will that will result in intestacy. However, that is not to say that this objective is to be maintained at all costs. This approach was supported by the Court of Appeal for Ontario in *Re MacDonnell* (1982), 1982 CanLII 1844 (ON CA), 35 O.R. (2d) 578 (C.A.):

*This is not to say that the above rule of construction is one of universal application; one should not strive to avoid an intestacy at all costs. The language of the will may sometimes be such as to lead to the inference that the testator intended to leave part of his property undisposed of. I adopt the words of Ritchie J. in Kilby et al. v. Myers et al., 1964 CanLII 19 (SCC), [1965] S.C.R. 24 at 28-29, sub nom. Re Harmer 46 D.L.R. (2d) 521:*

*The inclination of courts to lean against a construction which will result in intestacy is far from being a rule of universal application and is not to be*

*followed if the circumstances of the case and the language of the will are such as to clearly indicate the testator's intention to leave his property or some part of it undisposed of upon the happening of certain events.*

*It appears to me, however, that when an individual has purported to make final disposition of all his "property both real and personal of every nature and kind and wheresoever situate", he is not to be taken to have intended to leave all that property undisposed of on the happening of certain events, unless there are some very exceptional and compelling reasons for so holding. As was said by Lord Shaw in *Lightfoot v. Maybery*, [[1914] A.C. 782] at p. 802, a construction resulting in an intestacy "is a dernier ressort in the construction of wills".*

[36] Thus, an intestacy should be avoided absent some exceptional and compelling reasons.

[37] The analysis then turns to a determination of the testators' actual or subjective intention. As stated in *Trezzi v. Trezzi*, 2019 ONCA 978, 150 O.R. (3d) 663, the court's task in interpreting a will is to determine the testator's actual or subjective intention as to how he intended to dispose of his property. This involves construing the will in light of all the surrounding circumstances to determine the testator's true intention and the court placing itself in the position of the testator at the time that the will was made: *Trezzi*, at para. 13.

[38] In *Bowlen Estate*, at para. 51, the three approaches where the criminal forfeiture rule applies were succinctly summarized as follows:

*In Dahliwall, deeming a death creates a fiction as an antecedent step to a particular result (benefit the children and avoid an intestacy). Brissette simply ignores the antecedent condition of survival and implies an additional condition to achieve a desired result (benefit the children and avoid an intestacy) rather than adopting the strict literal interpretation of the particular provision as was done in *Re Dreger* which resulted in an intestacy. [Emphasis in original.]*

[39] In the present circumstances, the clear subjective intention of both David and Merrill was:

- i. To leave everything to each other;
- ii. If their spouse could not receive their estate, that their estate would pass on in the form of a life interest to their son Cameron;
- iii. If Cameron could not receive his life interest should he predecease them, that their estate would pass on to Cameron's then living children;
- iv. If Cameron could not receive his life interest should he predecease them with Cameron leaving no then living issue, that their estate would pass on to Merrill's three brothers, subject to the annuity provisions; and
- v. If the annuity provisions were not completed, the remainder would go to Autism Canada and another organization.

**[40]** The subjective intentions of both David and Merrill are clear. If their spouse, Cameron or Cameron's then living issue cannot receive their estate, the estate is to go to Merrill's three brothers subject to the annuities. Thus, there are four levels of beneficiaries starting with each spouse, which look to maintain the demonstrated intent to keep the estates in the family. However, there is also an intention to have their grandchildren benefit from their estates.

**[41]** I agree with the conclusion in *Jollimore Estates*, at para. 33, that to interpret the condition precedent "if he (my son Cameron) predeceased me, and if there are no issue of my son then living" as resulting in an intestacy would be to ignore an important element of the testator's intentions. Thus, I do not believe that a literal reading of the wills would properly reflect the true intentions of David and Merrill.

**[42]** In *Bowlen Estates*, at para. 61, the court concluded that the practical effect of the deemed death approach and the implied intention approach lead to the same conclusion: the court simply gives effect to any "gifts over" which may have been frustrated by the fact that the murderer outlived the testator. Thus, practically, there are two approaches. The first is the strict literal interpretation which leads to an intestacy as the murderer does not outlive the testator. The second approach focuses on the intentions of the testator to benefit those who are subject to the "gifts over".

**[43]** I prefer the latter approach in the context of the implied intention approach for the following reasons:

- a. Regardless of which approach is adopted – deemed death or implied intention – those approaches keep the analysis within the confines of the will and allow the contingencies contained therein to play out;
- b. The rule of avoiding an intestacy, where possible, is maintained;
- c. The implied intention approach is the least intrusive because it reflects more precisely what has actually happened and focusses on the intention of the testator by allowing alternate bequests to be followed. Cameron is no longer a legal beneficiary by application of the criminal forfeiture rule and there is no need to deem Cameron to have predeceased his parents. His bequest of a life interest fails and the focus shifts on the remainder of the testators' intentions. This conclusion is supported by the fact that the will did not include any wording which would contemplate that Cameron's entitlement would continue even if he was disentitled. The implied interpretation that he be a legal beneficiary failing which the balance of the will is followed. This is more consistent with the form of a will which includes "gifts over".
- d. As a result of no longer being a legal beneficiary, Cameron has lost his entitlement. However, to leave the will at this point and find an intestacy does not respect the subjective intentions of the testators which were to create four contingent levels of beneficiaries and maintain control through the use of the "gifts over". Their intention was clearly not to leave it to chance as part of an intestacy.

### C. Witnesses As Legatee / Devisee

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

The Succession Law Reform Act provides:

*Bequests to witness void*

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

- (a) the person so attesting;
- (b) the spouse; or
- (c) a person claiming under either of them,

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

*Where will signed for testator by another person*

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

- (a) the person so signing;
- (b) the spouse; or
- (c) a person claiming under either of them,

but the will is not invalid for that reason.

*Where no undue influence*

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

*Exception*

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

**Re Trotter**

**[1899] 1 Ch 764; cb, p.471**

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

**Re Ray’s Will Trusts**

**[1936] Ch 520; cb, p.474**

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

## **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.

—

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**

[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).

[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”.

[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.

[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:

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.

[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**

[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:

**[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.**

**[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 testatrix's intention to revoke or maintain the 2002 will was admissible. Held: Not admissible. The court held that the common law rule disallowing direct evidence of the testator's intention divorced from the interpretation of an ambiguity remains good law.

Per Juriansz J.A.:

**23 ... [t]he general rule of the common law is that in construing a will, the court must determine the testator's intention from the words used in the will, and not from direct extrinsic evidence of intent.**

24 Of course, it is always possible that the testator's expression of her testamentary intentions may be imperfect. When a will takes effect and is being interpreted, the testator is no longer available to clarify her intentions. Extrinsic evidence is admissible to aid the construction of the will. The trend in Canadian jurisprudence is that extrinsic evidence of the testator's circumstances and those surrounding the making of the will may be considered, even if the language of the will appears clear and unambiguous on first reading. Indeed, it may be that the existence of an ambiguity is only apparent in the light of the surrounding circumstances...

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

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

**27 The law properly regards the direct evidence of third parties about**

**the testator's intentions to be inadmissible. There would be much uncertainty and estate litigation if disappointed beneficiaries like Dr. Rondel could challenge a will based on their belief that the testator had different intentions than those manifested in the will.**

...

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

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

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

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 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.

[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: *McLaughlin 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.

...

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

...

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.), *Re 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 equally (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 equally (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 divorce (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.