RECOGNIZING ISSUES OF INTERPRETATION AND CONSTRUCTION, RECTIFICATION, AND VARIATION

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INTRODUCTION

Henry VIII was somewhere in between his fourth and fifth wives when English law first allowed the disposition of property by will.[1] Given the intensity and complexity of wills litigation, one can be forgiven for concluding that, to borrow a phrase from Douglas Adams, "This had made a lot of people very angry and been widely regarded as a bad move."[2] Even after half a millennium of modernization, the law of wills interpretation has retained some historical idiosyncrasies that baffle even experienced practitioners. The aim of this paper is to clarify the law by discussing interpretation and construction, rectification, and variation in a practical manner.

This paper is intended as a guide to counsel representing estate trustees to assist them in identifying issues within wills, and to distinguish between the need to pursue applications for interpretation and construction, rectification, and variation. In each case, the process of identifying which issue above is relevant, if any, begins with the obvious: a close reading of the will or wills. Some common issues – incorrect usage of "issue" and "children", irreconcilable provisions, confusing drafting, missing clauses, improperly constituted trusts, and tainted spousal trusts – may be readily apparent. However, certain issues may not be apparent until much later, when more of the surrounding circumstances related to the deceased become known.

[1] *Statute of Wills*, 1540, 32 Hen. 8, c. 1.
[2] *The Restaurant at the End of the Universe,* ed (London: Pan Books, 2009), at p. 1.

Where an issue with the will is not identified or investigated, an estate trustee may be found in breach of his or her fiduciary duties. Three fundamental duties of a trustee – the duty to "obey the directions of the settlement or trust instrument", the duty to "exercise ordinary care and prudence", and the duty to account[3] – are of particular relevance in such cases. An estate trustee may be held personally liable for any losses to the estate resulting from a failure to identify and address problems with a will and thus inadvertently breach a fiduciary duty. By extension, his or her lawyer may also face a negligence claim for failing to properly advise the estate trustee. This is what we're trying to avoid. In pursuit of avoiding such, a brief definition of construction and interpretation, rectification, and variation is provided below, following which the law, procedure, and jurisprudence regarding each concept will be examined in greater detail.

Definitions

Interpretation and Construction: Interpretation and construction are separate legal concepts, but best addressed together due to their interrelated nature in the context of wills:

> Interpretation is the process of ascertaining the subjective meaning of the testator from the words of his or her will in light of the surrounding circumstances. Construction is a default process used when attempts at interpretation fail, and it involves the application of rules or operating assumptions concerning presumed intent and meaning when the testator's actual intention and meaning cannot be ascertained from the will and the admissible evidence.[4]

[3] Margaret O'Sullivan, EA book, Cjh 10, 10.1.1, p 10-1 2015-Rel 2
[4] James MacKenzie, *Feeney's Canadian Law of Wills,* 4th ed (Toronto, Ont: LexisNexis 2000) (loose-leaf updated 2017, release 67-4) at p. 10-7.

Rectification**:** Broadly speaking, rectification is "an equitable remedy designed to correct errors in the recording of terms in written legal instruments."[5] In the context of estates law, rectification is "aimed mainly at preventing the defeat of the testamentary intentions due to errors or omissions by the drafter of the will."[6]

Variation**:** In Ontario, the variation of wills is only available pursuant to the *Variation of Trusts Act*,[7] which provides a definition of variation at subsection 1(1): "any arrangement…varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts."

I: INTERPRETATION & CONSTRUCTION

The Law

The need for interpretation and construction arises where there is an ambiguity in the will. As noted above, construction and interpretation are separate concepts, both intended to assign meaning to the words in a written document. The modern Canadian approach to interpreting a will is focused on determining the subjective intent of the testator. *Feeney's* describes the process for interpreting a will as follows: "the objective of the court of construction should be to determine the precise disposition of property intended by the testator. The court should attempt to ascertain, if possible, the testator's actual or subjective intent opposed to an objective intent presumed by law."[8]

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[5] *Canada (Attorney General) v. Fairmont Hotels Inc.,* 2016 SCC 56, [2016] 2 S.C.R. 720 at 38.
[6] *Robinson Estate v. Robinson*, [2010] ONSC 3484, 2010 CarswellOnt 4576, at 24.
[7] R.S.O. 1990, c. V.1.
[8] Footnote 4, *supra,* at p. 10-1.

This approach was explicitly followed in *Re Kaptyn Estate,*[9] a widely reported case about the construction and interpretation of wills. In that case, Brown J., as he then was, referred to the "armchair rule", which requires that the Court puts itself "in the place of the testator at the time he made his will",[10] using evidence of the surrounding circumstances at the time of the execution of the will in order to determine the subjective intent of the testator. A detailed discussion of admissible evidence in a will interpretation is provided below.

Interpretation and construction are unique in the estates context, in large part because the testator is no longer alive to give evidence as to his or her intent in using certain words or making certain dispositions of property. Additionally, a will speaks from death, and as such, "because no one can claim to have relied on the words in the will, the court is free to ignore the objective meaning and may concentrate on the subjective meaning."[11]

The Court may use certain rules of construction to give meaning to ambiguous words in a will. In brief, the Court may consider: the ordinary or dictionary meaning rule, which uses definitions of the word to resolve an ambiguity; the technical words rule, which assigns certain words, like legal terms, their field-specific definitions; the *esjudem generis* rule, which resolves inconsistencies in the general and enumerated definitions of a group or class by viewing the latter as limiting the former; the overriding context rule, which asserts that the ambiguous word must be understood in the full context of the document; and the rule regarding the meaning of words of futurity, which suggests that while in general, the circumstances surrounding the

[9] 2010 ONSC 4293, 2010 CarswellOnt 5804.
[10] *Ibid* at 35.
[11] Footnote 4, *supra,* at p. 10-2.

execution of the will should be taken into consideration, the property comprised in a will must be construed as at the date of death of the testator.[12]

In sum, the Court's primary objective is to give effect to the testator's subjective intent in interpreting an ambiguous will. The Court therefore prefers to rely on the "armchair rule" rather than rules of construction that may disregard the unique circumstances of a testamentary instrument. If a Court is unable to resolve the ambiguity using the above methods, a bequest may be found void.

Admissible Evidence

The evidence that is admissible in an interpretation and construction application is limited, as no direct evidence of a testator's intention is admissible when the Court is construing a will. The policy argument underlying such an approach to evidence rests on the notion that a will reflects the testamentary wishes of the deceased, and as such, should not be overridden by other direct evidence of testamentary intent. The concept also serves to guard against disappointed beneficiaries who may try to proffer all kinds of evidence to prove that they were supposed to receive certain bequests.

Certain extrinsic evidence is admissible, however, whether or not there is an ambiguity on the face of the will.[13] This evidence is generally related to the circumstances surrounding the execution of the will. When considering evidence of the surrounding circumstances, the Court may take into account, *inter alia*, evidence of: "the testator's peculiar and unique use of

[12] Footnote 4, *supra,* at p. 11-01 to 11-10.
[13] *Robinson v. Robinson Estate*, 2011 ONCA 493, 2011 CarswellOnt 5819, at 24.

language, all the circumstances surrounding his or her life and all the things known to him or her at the time he or she made his or her will which might bear on the type of dispositions he or she actually intended to make by the will" (footnotes omitted).[14]

A Note on Probate

The above is concerned with testamentary instruments that have been probated (or, to use the modern terminology, wills for which a Certificate of Appointment of Estate Trustee has been issued) and which therefore fall under the evidentiary rules regarding the construction and interpretation of wills. While the historically separate functions of the Court of Probate and the Court of Construction are now both within the jurisdiction of the Ontario Superior Court of Justice, the rules regarding the admission of evidence vary greatly depending on which function the court is exercising.

The role of the Court of Probate was to determine which words constitute the last valid testamentary instrument of the deceased. A wider variety of evidence may be examined by the court in making such a determination. As articulated in *Feeney's*:

> At the probate stage, it may be possible to defeat a will on the grounds of fraud, undue influence or mistake by proving that the testator's true intention differed from that set out in the will. For this purpose, any extrinsic evidence, including direct evidence of the testator's intention, is admissible.[15]

Following the Ontario Court of Appeal's decision in *Robinson v. Robinson Estate*,[16] discussed further below, Justice Maurice Cullity and Albert Oosterhoff commented on the muddying of the

[14] Footnote 4, *supra*, at p. 10-1.
[15] *Ibid,* at p. 10-12.1.
[16] Footnote 13, *supra*.

probate and construction jurisdictions in modern jurisprudence.[17] This is important to the topic at hand because the probate jurisdiction has historically allowed for the deletion (but not insertion) of words from a testamentary instrument, based on a finding that they do not reflect the testamentary intentions of the deceased, and therefore should not form part of the deceased's testamentary instrument.[18] This deletion can be based on direct evidence of a testator's intentions, which are inadmissible for a court exercising the construction jurisdiction. Until the law in this area is clarified, counsel should be aware of and be prepared to argue that the probate court has jurisdiction to delete words in a will.

Procedure

Where there is an ambiguity in the will, an application may be brought for advice and directions related to interpretation issues, *inter alia*, pursuant to the *Rules of Civil Procedure*[19] (the "**RCP**"). The originating process for such an application starts with a Notice of Application brought by the estate trustee(s). The Notice of Application must be issued, following which it must be served upon any person with a financial interest in the outcome of the proceedings pursuant to Rule 38.06 of the RCP.

The RCP requires that an application brought on notice be served at least ten (10) days before the return date of the hearing, for respondents resident in Ontario, and at least twenty (20) days before the return date of the hearing for respondents residing elsewhere. Where there is a party under minority, or unborn, the Office of the Children's Lawyer (the **"OCL**") must be served

[17] The Honourable Maurice Cullity, Q.C., "Rectification of Wills – Commentary on the Robinson Case," *14th Annual Estates and Trusts Summit, Law Society of Upper Canada* (November 9, 2011); Albert Oosterhoff, "The Discrete Functions of the Courts of Probate and Costruction," *19th Annual Estates and Trusts Summit, Law Society of Upper Canada* (November 3, 2016).
[18] See *Morell v. Morell*, [1882] L.R. 7 P.D. 68 (P.D.); *Barylak v. Figol*, [1995] O.J. No. 3623 (G.D.).
[19] R.R.O. 1990, Reg. 194.

with the application materials. Additionally, where a party is under mental disability, the Public Guardian and Trustees ("**PGT**") must be served. Rule 7 of the RCP outlines the procedure for proceedings involving parties under disability, and provides that a litigation guardian must be appointed for such an individual by the Court. The PGT may be appointed as a litigation guardian of last resort where there is no appropriate individual willing to act. However, Rule 7.03(2) states that the OCL shall act for minor and unborn respondents in estates and trusts proceedings, unless the Court orders otherwise.

Rule 14.05(3) of the RCP governs the matters that may be brought before the Court by way of application. It provides that a Notice of Application may be issued when seeking:

> (a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;
>
> (b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;
>
> (c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;
>
> (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
>
> ….
>
> (f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;
>
> ….
>
> (h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

Any party served with a Notice of Application must deliver a Notice of Appearance, failing which, he or she is not entitled to:

(a) receive notice of any step in the application;

(b) receive any further document in the application, unless,

(i) the court orders otherwise, or

(ii) the document is an amended notice of application that changes the relief sought;

(c) file material, examine a witness or cross-examine on an affidavit on the application; or

(d) be heard at the hearing of the application, except with leave of the presiding judge.[20]

The Notice of Application must be followed by the service and filing of an Application Record and Factum (though the Court may dispense with the requirement for delivery the latter) at least seven (7) days before the hearing date. The requirements for the Application Record and Factum are set out in Rule 38.09(1) and (2) of the RCP. In the case of an application made for advice and directions regarding the interpretation and construction of a will, the Application Record should contain an affidavit setting out the relevant issues and any supporting documentation relevant to a determination of the issues. Respondents must file their responding materials at least four (4) days before the hearing pursuant to Rule 38.09(3) of the RCP.

Sample Cases

Gibbon Estate v. Sleeping Children Around the World[21]

[20] *Rules of Civil Procedure*, footnote 8, *supra*, at Rule 38.07(2).

The deceased made a handwritten will (the "**First Will**"), and five years later executed a formal will (the "**Second Will**"). The deceased made several handwritten notes on both wills after the date of execution of the Second Will. The Court held that the handwritten markings on the First Will did not serve to revive it, as they were not signed by the testator and therefore did not amount to a holograph codicil. The note on the Second Will, however, was signed by the deceased, and though it was clearly misdated, was found to be a valid handwritten codicil. The result of the codicil was that the residue of the deceased's estate was to be divided equally between two charities. However, one of the charities was misidentified in the Second Will, and in any case, now operated under a different name. In relying on extrinsic evidence of the surrounding circumstances, especially the fact that a successor charity continued to operate at the same address as the misidentified charity, the Court held that the half residue of the estate was bequeathed to the successor charity.

Koziarski Estate v. Sullivan[22]

The estate trustee brought an application for advice and directions in this case relating to the interpretation of the word "issue" in the deceased's 1977 will, which was made before the deceased had any grandchildren. One of the deceased's children, who had an illegitimate child, died before the testator. The Court held that the deceased's illegitimate grandson was not entitled to inherit under the word "issue", as section 1(3) of the *Succession Law Reform Act,*[23] which provides that children born outside of marriage are treated the same as children of a marriage, unless a contrary intention is shown in the will, only apples to wills made after March 31, 1978.

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[21] 2010 ONSC 6355, 2010 CarswellONt 8799.
[22] 2017 ONSC 2704, 2017 CarswellOnt 6325.
[23] R.S.O. 1990, c. S.26.

The Court was therefore unable to apply current notions of public policy to allow the illegitimate grandson to inherit under the deceased's will.

Moffet Estate v Irwin[24]

In this case, the testator purchased property that was referred to by two separate municipal addresses. The testator allowed the respondent beneficiary to farm both properties, but only gifted one "municipal address" to the beneficiary in the will. The beneficiary alleged that both lots were intended to be gifted to him and so the estate trustee brought an application for interpretation of the will. Extrinsic evidence of the surrounding circumstances of the use of the land at the time of the will was executed was allowed. The Court held that the testator was aware of the two separate municipal addresses for the properties, and as a result that the testator had intended to exclude the property with the municipal address that was not named in the will from the bequest to the respondent beneficiary.

Thoman v. Armgardt Estate[25]

The testator in this case made two wills: one, in 1996, governing her Canadian property (the "**Canadian Will**"), and the other, in 1997, governing her German property. In her Canadian Will, the testator bequeathed the residue of her Canadian estate "to [her] next of kin in equal shares." The trial judge interpreted the residue clause as bequeathing the residue to the testator's Canadian relatives in equal shares, relying in part on the plurality of "shares' in the clause in finding that the testator intended to gift the residue to multiple individuals. The testator's German relatives appealed, and the Court of Appeal reversed the decision of the trial judge and

[24] 2011 ONSC 5420, 2011 CarswellOnt 9361.
[25] 2003 CarswellOnt 899, [2003] O.J. No. 982 (C.A.), rev'g 2002 CarswellOnt 2620, 46 E.T.R. (2d) 298 (S.C.J.).

interpreted the clause as bequeathing the residue of the estate to the testator's sister, her closest blood relative. In doing so, the Court of Appeal relied on the ordinary meaning of "next of kin" (i.e. closest blood relations), finding that at the time of execution, the testator could not have known whether or not her sister would survive her, and so used the term "next of kin" so that, should her sister predecease her, the sister's children (the deceased's nieces and nephews) would receive the residue of her estate in equal shares.

II: RECTIFICATION

The Law

The leading case with respect to the rectification of a will is *Robinson v Robinson Estate*[26] ("***Robinson***"). In that case, the estate trustee brought an application for both interpretation and rectification. The applicant argued that the testator did not intend to revoke her 2002 will, which dealt with her European assets (the "**Spanish Will**"), despite the comprehensive revocation clause which was part of her 2006 will, which dealt with her Canadian assets (the "**Canadian Will**"). The Court held that the equitable doctrine of rectification was not available in this case, finding that if a mistake was made, it was made by the testator in misunderstanding the legal effect of the revocation clause in the Canadian Will, rather than by the solicitor in drafting the will according to the her instructions.[27]

Belobaba J., in so finding, offered the following summary of the law of rectification, at paragraphs 24 to 27:

[26] *Robinson v. Robinson Estate*, 2011 ONCA 493, 2011 CarswellOnt 5819, aff'g 2010 ONSC 3484, 2010 CarswellOnt 4576, leave to appeal to SCC refused 2011 CarswellOnt 14400.
[27] Footnote 6, *supra,* at 28-29.

24 Where there is no ambiguity on the face of the will and the testator has reviewed and approved the wording, Anglo-Canadian courts will rectify the will and correct unintended errors in three situations:

> (1) where there is an accidental slip or omission because of a typographical or clerical error;
> (2) where the testator's instructions have been misunderstood; or
> (3) where the testator's instructions have not been carried out.

25 The equitable power of rectification, in the estates context, is aimed mainly at preventing the defeat of the testamentary intentions due to errors or omissions by the drafter of the will. This is a key point. Most will-rectification cases are prompted by one of the above scenarios and are typically supported with an affidavit from the solicitor documenting the testator's instructions and explaining how the solicitor or his staff misunderstood or failed to implement these instructions or made a typographical error.

26 Courts are more comfortable admitting and considering extrinsic evidence of testator intention when it comes from the solicitor who drafted the will, made the error and can swear directly about the testator's instructions. They are much less comfortable relying on affidavits (often self-serving) from putative beneficiaries who purport to know what the testator truly intended.

27 Here is how *Feeney's* puts it:

> [T]he application for rectification is usually based on the ground that, by some slip of the draftsman's pen or by clerical error, the wrong words were inserted in the will; the mistake may be latent in the letters of instruction or other documents. Yet, when the mistake is that of the draftsperson who inserts words that do not conform with the instructions he or she received, then, provided it can be demonstrated that the testator did not approve those words, the court will receive evidence of the instructions (and the mistake) and the offending words may be struck out.

The Court of Appeal, in dismissing the appeal, emphasized that while the 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" (emphasis added), a rectification could not be ordered based on the admissible evidence where the words of the Canadian Will

were clear and unambiguous. The common law rule excluding direct evidence of the testator's intentions was thus affirmed.

Prior to *Robinson*, in *Lipson v. Lipson*, the Court provided a summary of the test for when the Court will rectify a testamentary instrument through the deletion and/or addition of words:

> (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.[28]

One further issue in a rectification application is the deceased's knowledge and approval of the contents of the will. Knowledge and approval are essential for a will to be valid, and as a point of principle, a successful rectification can only be made to a valid will. In *Parker v. Feldgate,* which has been followed by the Supreme Court of Canada, the Court held that:

> If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: "I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out." [29]

[28] [2009] O.J. No. 5124, 2009 CarswellOnt 7474, at 42.
[29] (1883), L.R. 1 P.D. 64 (Eng. Prob. Ct.).

It is apparent that in genuine cases of rectification, the drafting solicitor did not prepare the will or wills in accordance with the instructions of the testator. Therefore, the testator cannot be said to approve of the knowledge and contents of the will(s) insofar as a mistake was made by the drafting solicitor. This may be true even if testators have read the will(s) or had the will(s) read to them. Testators often rely heavily on their solicitors; they may not understand the legal minutia of a will, and cannot reasonably be expected to identify all errors within a will.

Therefore, the Court will only rectify a will in very particular circumstances, which must include a clear mistake in the will that, absent rectification, would defeat the deceased's testamentary intentions. The Court will not rectify a will based on speculative evidence of a testator's intentions, or where it believes that the error was the result of a mistake by the testator in giving instructions or understanding the legal consequences thereof.

Admissible Evidence

Certain extrinsic evidence is admissible on a rectification even where the will appears clear and unambiguous on its face, as an ambiguity may only become apparent when understood in the context of available extrinsic evidence.[30] In the *Robinson* case, three parties submitted affidavits stating their belief that the deceased had never intended to revoke the Spanish Will: the drafting solicitor of the Canadian Will; the deceased's romantic partner, Richard Rondel, a beneficiary under the Spanish Will; and a close friend of the deceased. The trial judge found that these affidavits were inadmissible, however, as they contained direct evidence of the testator's intentions.

[30] Footnote 13, *supra.*

In the *Robinson* case, the solicitor's evidence was only that he believed that the deceased had not intended to revoke her Spanish Will, and not that he had received instructions to that effect. This evidence was therefore inadmissible. Generally, however, affidavit evidence from the drafting solicitor is a required component of an application for rectification if the lawyer is alive and capable. Other evidence, such as earlier wills and codicils of the testator, and the solicitor's file and notes, may be admitted where appropriate.[31]

Procedure

The estate trustee(s) must bring an application for rectification, as the drafting solicitor has no standing to do so. The procedure for bringing an application to rectify a will is similar to that outlined above with respect to matters of interpretation and construction. As noted above, the primary difference is that an application for rectification is almost always accompanied by an affidavit from the drafting solicitor outlining the error(s) contained in the will that the application is seeking to rectify. Given that this is an admission of mistake on the part of the drafting solicitor, he or she will generally be represented by LawPro counsel in such proceedings, unless he or she fails to report the matter to the insurer, in which case coverage might be denied.

As a matter of practice, a drafting solicitor should contact LawPro immediately upon learning of a potential issue with a will he or she has drafted. Generally, LawPro will assign the drafting solicitor counsel for any litigation that might ensue. Drafting solicitors should bear in mind that privileged information should not be disclosed to any party unless privilege has been explicitly waived by the estate trustee(s), or the Court has ordered disclosure of such information. It is also

[31] *Alexander Estate v. Adams* (1998), [1998] B.C.J. No. 199 (S.C.), at 19.

important to remember that, even where solicitor-client privilege is waived, a lawyer still owes a duty of confidentiality to the client.

Sample Cases

Balaz v. Balaz Estate[32]

The testator in this case executed a Secondary Will containing a spousal trust. As the result of the inclusion of certain trustee powers in the Secondary Will, including the power to make loans from the trust to persons other than the spouse, the spousal trust was tainted, and would have created severe tax consequences for the estate. The spouse, as estate trustee of the Secondary Will, applied for rectification. The evidence of the drafting solicitor demonstrated the language that tainted the spousal trust was the result of an inadvertent mistake, and that the testator had clearly intended to create a valid spousal trust pursuant to the *Income Tax Act.*[33] The Court, with the approval of the Minister of National Revenue, therefore rectified the will by deleting the language that tainted the spousal trust.

Daradick v. McKeand Estate[34]

In this case, a solicitor was instructed to include a provision in the will to gift the testator's matrimonial home to the testator's daughter. The solicitor's secretary, who drafted the will, did not see the note containing that instruction and so the gift was never included in the will. The court rectified the will by adding a provision providing that the home was bequeathed to the daughter.

[32] 2009 CarswellOnt 2007, [2009] O.J. No. 1573.
[33] R.S.C. 1985, c. 1 (5th Supp.).
[34] 2012 ONSC 5622, 2012 CarswellOnt 12438.

McLaughlin Estate v. McLaughlin[35]

In this case, the testator left a Primary Will dealing with the bulk of her estate, and a Secondary Will dealing with her home. As a result of drafting errors, certain bequests were duplicated in the Primary and Secondary Wills, and the Secondary Will contained a revocation clause that revoked the Primary Will. The drafting solicitor submitted affidavit evidence regarding the drafting errors. The Court rectified the Secondary will by deleting the duplicated bequests and the revocation clause. The Court of Appeal ultimately upheld the rectification as ordered by the trial judge.[36]

Welton Estate v. Haugrud[37]

The decision in this case demonstrates how one or two small mistakes in a will can create significant litigation. In the deceased's Secondary Will, the drafting solicitor mistakenly referred to the redemption of Class "D" shares in a company, when the deceased in fact owned Class "E" shares. In the same clause, the drafting solicitor also mistakenly provided that 150 shares were to be redeemed to generate net proceeds of $2,000,000 for his son and his first daughter, when the redemption of 300 shares was necessary to generate such proceeds. The deceased's accountant and the drafting solicitor provided evidence that they had discussed the Class "D" shares in the course of preparing the will, with the confusion arising from a contemplated, but ultimately unimplemented, corporate reorganization. At the date of death, the Class "D" shares were owned by the deceased's second daughter.

[35] 2014 ONSC 3162, 2014 CarswellOnt 9315.
[36] *McLaughlin v. McLaughlin Estate*, 2016 ONCA 899.
[37] 2016 ONSC 8150, 2016 CarswellOnt 20791, leave to appeal to the C.A. granted.

The deceased's widow submitted that the clause in question should be interpreted as: (1) requiring the estate to pay $1,000,000 outright to the son, and (2) requiring the second daughter to redeem her class "D" shares and split the proceeds with the first daughter, arguing that such shares were held in a resulting trust by the second daughter. The widow also argued that she was supposed to receive the residue of the estate outright, though the will gave her a life interest in the residue with a gift-over to the deceased's three children. The widow did not challenge the will, but did sue the drafting solicitor for negligence. The Court, however, preferred the evidence of the drafting solicitor and the accountant, and ordered that the will be rectified by removing "150" and "D" in the impugned clause, and inserting "300" and "E" in their place. The decision is under appeal.

III: VARIATION

The Law

There are several reasons why the beneficiaries or trustee(s) of a trust might wish to vary that trust, including: confusing provisions, unfair terms, insufficient assets, and mistakes in the original trust document. In Ontario, testamentary documents may only be varied pursuant to the *Variation of Trusts Act*[38] (the "**VTA**"). The VTA is brief; in its entirety, it reads:

> 1. (1) Where any property is held on trusts arising under any will, settlement or other disposition, the Superior Court of Justice may, if it thinks fit, by order approve on behalf of,
>
> (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting;
>
> (b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the

[38] R.S.O. 1990, C. V.1.

> happening of a future event a person of any specified description or a member of any specified class of persons;
>
> (c) any person unborn; or
>
> (d) any person in respect of any interest of the person that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined,
>
> any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.
>
> (2) The court shall not approve an arrangement on behalf of any person coming within clause (1) (a), (b) or (c) unless the carrying out thereof appears to be for the benefit of that person.[39]

The VTA has been described[40] as an extension of the rule in *Saunders v. Votier*,[41] which allows the *sui juris* beneficiaries of a trust to demand immediate distribution of the trust assets where there are no parties who may become entitled to a subsequent interest in the trust (i.e., where there is no gift-over). The VTA takes this rule a step further, allowing the Court to approve the variation or revocation of a trust on behalf of any person listed in subsections (1)(a), (b), (c) or (d). This is of course dependent on adherence to clause 1(2) of the VTA, which states that the Court will only approve a variation for unborn parties, parties with a future interest in the trust, parties who are minors, or incapable parties where the arrangement appears to be for their benefit.

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[39] *Ibid.*
[40] Brian A. Schnurr, *Estate Litigation*, 2d ed, loose-leaf (Toronto: Carswell, 1994) Chapter 15.2(a), at p. 15-2.
[41] (1841), Cr. & Ph. 240, 41 E.R. 482 (Eng. ch. Div.).

Re Irving[42] sets out criteria for the Court to consider in determining whether or not a proposed variation should be approved:

i. Does the variation keep alive the basic intention of the testator or settlor?;
ii. Does the variation benefit those for whom the Court is asked to consent?; and
iii. Whether a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks of the variation, would likely accept it.[43]

Therefore, a judge must essentially stand in the shoes of the beneficiary or beneficiaries on behalf of whom the Court is being asked to approve the variation, and additionally, give deference to the intent of the testator in setting up the trust. As for the benefit to the unborn, unascertained, contingent, minor, or incapable beneficiaries, the case law suggests that a there are variety of situations which the Court has considered as sufficient to meet the requirements of the VTA. Reasons as diverse as the avoidance of future litigation, the issuance of insurance policies benefitting the non-*sui juris* beneficiaries, tax advantages, and family harmony are some examples which have been held to be sufficiently beneficial to earn the Court's approval.

Procedure

The variation of trust begins with the preparation of a Deed of Arrangement, which details the variation of the trust that is being sought. The Deed of Arrangement names and is signed by all of the *sui juris* beneficiaries of the trust.[44] This demonstrates that the *sui juris* beneficiaries consent to the proposed changes to the trust. Generally, the Deed of Arrangement is also signed

[42] (1975), 1975 CarswellOnt 581, [1975] 11 O.R. (2d) 442 (H.C.).
[43] Craig Vander Zee and Tanisha G. Tulloch, "Identifying When to Bring and the Distinctions between Applications for Interpretation and Applications for Rectification," *Practice Gems: The Administration of Estates 2013, Law Society of Upper Canada* (2013) at p 2-19.
[44] *Ibid* p.2-20.

by the trustees as an affirmation of their consent to act under the varied terms of the trust.[45] The parties on behalf of whom the Court is being asked to consent are not named, nor are their litigation guardians.

The Deed of Arrangement generally includes:

i. Recitals which provide background on the parties, trustee, names of all potential beneficiaries and provisions of the trust including, as necessary, the term in the trust that is being varied. Recitals regarding the trusteeship and any prior Deeds of Arrangement might also be necessary;
ii. A paragraph that the Deed of Arrangement is subject to Court approval on behalf of the incapacitated beneficiary or beneficiaries;
iii. Paragraphs setting out the variation, explaining where the variation fits into the existing trust document, and expressly identifying the paragraph numbers of any additions or deletions;
iv. Paragraphs addressing, if applicable, any action that is required as part of the variation;
v. A paragraph allowing for the Deed of Arrangement to be signed in counterpart if there are numerous parties;
vi. A paragraph addressing the payment of the costs of the preparation of the Deed of Arrangement and the Application. The costs of related to the variation may be paid out of the trust property; and
vii. A paragraph indicating that the parties have obtained independent legal advice, perhaps attaching any ILA Certificates.

An Affidavit of Execution might also be prepared and attached to the Deed of Arrangement.[46]

Once the Deed of Arrangement has been prepared and signed, the proposed variation of a trust is brought by way of an application, the procedure for which has already been discussed. The application is usually brought by one or more of the *sui* juris beneficiaries, one or more trustees, or both. The Notice of Application must seek a Judgment approving the variation on behalf of any beneficiaries under subsections (1)(a), (b), or (c) of the VTA. Other relief sought might

[45] *Ibid*.
[46] *Ibid* at 2-20 to 2-21.

include representation orders pursuant to Rule 10 of the RCP, costs, and any ancillary relief required to complete the variation of the trust.[47]

In the case of a variation, the Application materials would include the grounds for the relief, the Deed of Arrangement and affidavit material that demonstrates how the variation is for the direct benefit of any beneficiaries for whom the Court must approve the variation.

Sample Cases

Coffie v. Coffie Estate[48]

The trust in this case was created by the testator to protect his adult daughter, promote self-sufficiency, and ensure the daughter's financial viability when she was no longer able to work. Capital encroachments were made, and the daughter sought to vary the trust in order to have greater access to the funds. The OCL had agreed to the sum of $15,000 being paid into court for the benefit of unborn or other children to address the requirements of the VTA, as proposed by the daughter in her variation application. The Court, however, denied the application based on the basis that the original intent of the testator was to provide for his daughter when she could no longer work, and that the proposed variation had the potential to render her impecunious later in life.

Finnell v. Schumacher Estate[49]

The deceased in this case created a trust in his will which postponed the division of capital until 21 years after the death of the deceased's son (the "**division date**"), at which time the three-

[47] *Ibid* at p. 2-22.
[48] 1996 CarswellOnt 5026.
[49] 1990 CarswellOnt 479, 20 A.C.W.S. (3d) 1301 (C.A.), rev'g 1988 CarswellOnt 606, 66 O.R. (2d) 301 (H.C.).

quarters of the capital was to be given to a charitable foundation created by the will, with the remainder divided between the issue of the deceased's son in equal shares *per stirpes*. Until the division date, the income was to be divided as follows: 5/8ths to the charitable foundation; 2/8ths to the son or his issue, alive, from time-to-time on a *per stirpes* basis; and 1/8th to the deceased's daughter and on her death to the charitable foundation. Substantial mining properties were included in the assets of the trust.

The deceased's son applied to have the trust varied so that revenue from the mining properties, which the law deems to be capital, be distributed to the current income beneficiaries as it was generated, and proposed that these beneficiaries forego a fractional portion of their income entitlements in favour of the future contingent income and capital beneficiaries of the trust. Additionally, the variation application proposed that the trustees be given the power to establish *inter vivos* trusts, such that an "estate freeze" could be undertaken that would defer capital gains tax on the real property assets of the trust until the division date.

The Court of Appeal, in reversing the decision of the trial judge approving the variation, held that the immediate benefit to the income beneficiaries was significant, whereas any benefit to the beneficiaries on whose behalf approval was sought was speculative. The Court therefore found that the variation would not be prudent for the future income beneficiaries. Additionally, the Court held that demonstrating a benefit to a class of beneficiaries as a whole was insufficient to meet the requirements of the VTA; an applicant must demonstrate that the variation benefits each member of a class as an individual.

Lafortune v. Lafortune Estate[50]

This case concerns a trust created by a will which made provision for the deceased's widow, former spouse, and children, all adults born of the deceased's first marriage. The trust contained a clause that made provision for the former spouse and the children contingent on the former spouse releasing the deceased's estate from any other claims, as well as other issues related to the vesting of certain indefeasible interests. The Court approved the proposed variation, which eliminated the contingency and made immediate realization and distribution of assets in the originally stated proportions to the widow, former spouse, and children. The interests of the contingent infant beneficiaries were also protected by insurance policies taken out on the lives of the adult children. Interestingly, in this case, the trustees opposed the variation, but were overruled by the court.

Re Zekelman[51]

In this case, an *inter vivos* trust was created for the exclusive benefit of the settlor's infant child, should he survive the settlor and attain the age of 25 years. After the settlor had more children, he brought an application to vary the trust so as not to discriminate between them. The variation provided for equal benefits to all his children and for vesting at the age of 21. The Court approved the variation, finding that the accelerated vesting date, the avoidance of a source of family dissension (alternatively, the creation of family harmony), and the substantial probability of tax benefits were sufficient to meet the requirements of the VTA.

CONCLUSION

[50] 1990 CarswellOnt 507.
[51] [1971] 3 O.R. 156 (H.C.).

The law respecting the interpretation and construction, rectification, and variation of wills has a long and complex history. The public policy consideration of giving effect to the valid testamentary disposition of a testator underlies most of these complexities. For this reason, the Court attempts to determine the subjective intent of the testator in an interpretation and construction application and the actual intent of the testator in a rectification application. Moreover, consideration is still given to the intent of a testator even where an application is made to vary a trust.