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Drafting Considerations for Wills and Estate Practitioners

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ISBN-10: 1-55093-735-9
ISBN-13: 978-1-55093-735-0

Deficient, Ineffective and Flawed: Rectification and Validation of Wills in Alberta

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Legal Education
Society of Alberta

For: *Drafting Considerations for Wills & Estates Practitioners*

Edmonton, Alberta – November 7, 2019

Calgary, Alberta – November 14, 2019

DEFICIENT, INEFFECTIVE AND FLAWED: RECTIFICATION AND VALIDATION OF WILLS IN ALBERTA

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INTRODUCTION¹

Historically, courts in common law jurisdictions had very limited power to correct drafting mistakes in wills.² The equitable power to rectify contracts that failed to give effect to the parties' intentions did not apply to wills, and although courts had the power to delete or remove words that were included in error, they had no authority to add words to the will.³

Prior to the coming into force of the *Wills and Succession Act* ("WSA"),⁴ Alberta was no exception: a will that failed to comply with the formal validity requirements set out in the *Wills Act*⁵ for the making of a will, would be invalid. Although the strict compliance rule was intended to protect testators,⁶ it inevitably led to testamentary frustration in some cases, with the courts refusing to admit to probate non-compliant documents, notwithstanding that they accurately reflected the testator's intentions.

To address this problem, legislatures in common law jurisdictions across Canada and around the world enacted and implemented reforms in the form of "dispensing" and "rectification" provisions. In general terms, the former are designed to validate a document that embodies the testamentary intentions of the testator but fails to comply with one or more of the legal formalities associated with making a will. The latter are designed to correct drafting errors and mistakes that result in the testator's wishes being frustrated.

In Alberta, the Alberta Law Reform Institute ("ALRI") conducted extensive studies of these issues and the legislative solutions implemented in other jurisdictions, and in a series of reports, made two key recommendations:

- firstly, that the courts be given a broad dispensing power to validate a will, or an alteration, revocation or revival of a will, even if it did not comply with the formalities of the *Wills Act*;⁷ and

¹ The author gratefully acknowledges Steven Climenhaga, Student-at-Law at Borden Ladner Gervais LLP, for his assistance in the research and preparation of this paper.

² Alberta Law Reform Institute, "Wills and the Legal Effects of Changed Circumstances," Final Report No. 98 (August 2010) [ALRI Report No. 98] at pages 115-117.

³ *Edmunds Estate*, 2017 ABQB 754 [*Edmunds Estate*] at para 19.

⁴ SA 2010 c W-12.2 [WSA].

⁵ RSA 2000 c W-12.

⁶ Alberta Law Reform Institute, "Wills: Non-Compliance with Formalities", Final Report No. 84 (June 2000) [ALRI Report No. 84] at pages 5-6 ; see also Alberta Law Reform Institute, "The Creation of Wills" Report for Discussion No. 20 (September 2007) [ALRI Report No. 20].

⁷ ALRI Report No. 84.

- secondly, that the courts be given expanded rectification powers so as to correct accidental errors arising from:
 - an error arising from an accidental slip, omission or misdescription,
 - a misunderstanding of the testator's instructions, or
 - a failure to carry out the testator's instructions.⁸

In 2010, the Alberta legislature enacted the WSA, which included the dispensing and rectification provisions found at sections 37 through 39 of the WSA. This significantly changed this landscape by giving Alberta courts the authority to dispense with certain formalities, correct certain non-compliance and rectify wills so as to give effect to the testamentary intentions of the testator. As the Alberta Court of Queen's Bench observed in *Re McNeill Estate*,⁹ these new legislative provisions represent:

[...] a move away from strict compliance with the formalities. Courts are now allowed to validate wills that would have failed under the former legislation, so long as there is substantial compliance with the formalities and the document sets out the testamentary intentions of the testator.¹⁰

These new dispensing and rectification rules apply in any estate where the testator died after the coming into force of the WSA (*i.e.* February 1, 2012), regardless when the will (or alteration of the will) was made.¹¹

Although these rules represent a departure from strict compliance, the powers conferred by these provisions are significantly narrower than those recommended by ALRI, and differ from the powers conferred by other jurisdictions, both in terms of scope and scheme.¹²

This paper examines Alberta's unique dispensing and rectification powers, their application, scope and relationship to one another.

⁸ ALRI Report No. 98 at page 125.

⁹ 2016 ABQB 645 [*McNeill Estate*].

¹⁰ *Ibid* at para 108.

¹¹ WSA at ss. 8(2), s. 126.

¹² For further reading, please see "Non-Compliant Wills – When Those Scribbles on a Napkin May Actually Be a Will", by Peter Glowacki prepared for prepared for LESA's Wills & EPAs – Commonly Occurring Issues, January 2019.