I. INTRODUCTION

A Will is a challenging document to draft as it must address all of the testator’s current and future family issues and assets, as well as properly outline the testamentary wishes. As a result, a Will must be broadly drafted to take into account changes to a testator’s personal circumstances and must include a number of alternative distribution schemes to plan for possible scenarios that may occur after the Will is signed. The law carefully protects the sanctity of the Will as once a testator has died he is no longer able to explain his wishes and intention, and there is a significant risk that beneficiaries and other claimants will seek to have ‘selective’ evidence admitted that supports their respective positions. As a result, our statutory and common law has developed rules and procedures to address how construction and interpretation issues, and mistakes in Wills, are addressed by the Court. Further, as a result of how our Court system has developed, different evidence and remedies are available before and after the Grant of Probate is issued. Since mistakes and interpretation issues in Wills are inevitable, it is important for an estate practitioner to be able to identify and categorize the issues and understand the process to have these matters addressed properly. Finally, drafting and practice lessons can be learned through a better understanding of the mistakes and issues in Will that arise to reduce the likelihood of such problems in the future.

II. JURISDICTION OF THE COURT

In Alberta until 2000, there was a separate Surrogate Court created by the Surrogate Court Act (Alberta). In March of 2000 the Surrogate Court Act (Alberta) was repealed and the jurisdiction of the Surrogate Court was continued in the Court of Queen’s Bench. Since that time the Court of Queen’s Bench has had the power to deal with all matters related to probate, interpretation of wills, administration of estates and trusts, and the related equitable remedies.

Historically, there were a number of English courts that had jurisdiction over different types of matters and a basic understanding of these different Courts will assist in a review of the issues that are outlined below. First, two different Courts dealt with probate: i) the Ecclesiastical Courts

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4 R.S.A. 2000 c. C-31, s. 2(1.1) and see also the Judicature Act, R.S.A. 2000 c. J-2, ss. 2(2), 4(a) and (c), 5(1)(a) and (e), 5(3)(a) and (b), 6(1), 15 and 16, which specifically outlines all of the powers of the Court of Queen’s Bench related to wills, estate, trusts and equity.
dealt with personal property; and ii) the Common Law Courts dealt with real property. By the 1850’s the probate jurisdiction for both personal and real property was granted to a new separate Probate Court created by English legislation, (the “Court of Probate”). Second, starting in the mid-1500’s England’s Chancery Court jurisdiction expanded to address estate matters, including estate administration issues, related debt issues and estate disputes, (the “Court of Construction/Interpretation”). Over time the Court of Probate and the Court of Construction/Interpretation were granted and developed distinct powers and rules about the admissibility of evidence and remedies. Although the Court of Queen’s Bench (Alberta) now has jurisdiction over all will, estate administration and estate litigation matters, this historical division of the Courts affects our practice today. The ‘ghosts’ of these two separate Courts remain embedded in Alberta’s Court of Queen’s Bench Rules, Surrogate Rules, legislation, common law and the law of equity. Estate practitioners should have a basic understanding of this historical separation of the Courts to help determine whether an issue with the Will should be brought to the Court before or after the Grant of Probate is issued.

III. COMMON TYPES OF ERRORS AND PROBLEMS IN WILLS

The following is a list of common types of errors and problems in Wills:

1. Mistakes:
   • Accidental – “I divide the residue of my estate equally among my children and grandchildren” - where the testator only wanted the residue to go to his children.
   • Mistake in a Will based on fraud by a third party which induced the testator to make a gift in their Will.

2. Two persons or properties that meet the description listed in the Will:
   • “I give $5,000 to my grandson, Jake”- the testator has two grandsons named Jake.

3. Incorrect description of persons or objects:
   • “I give my bank account #4564567 to my brother” – the testator does not have a bank account with that account number.

4. Missing Words:
   • “The residue of my estate shall be divided equally among my children, Sue, Tim and Bob, who survive me” – The testatrix had 4 children and the solicitor accidently omitted her fourth child, Grace.

5 For a more detailed analysis of the history of the development of law of succession and estates and the jurisdiction of the Courts in Canadian history, see Oosterhoff, A.H. Oosterhoff on Wills an Succession, 6th Ed.(Toronto: Thomson Carswell, 2007), [“Oosterhoff”].