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Wills & EPAs - Commonly Occurring Issues

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Non-compliant Wills: When Those Scribbles on a Napkin May Actually Be a Will

Wills & EPAs - Commonly Occurring Issues

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NON-COMPLIANT WILLS: WHEN THOSE SCRIBBLES ON A NAPKIN MAY ACTUALLY BE A WILL

INTRODUCTION

This paper reviews the scope and application of two provisions of the *Wills and Succession Act*[1] that are bringing about a significant change to probate practice and litigation. Section 39 expands the power of the court to rectify a will in order to carry out the testamentary intentions of the testator. Sections 37 and 38 contain "dispensing powers", allowing the court to validate a document or record that represents the testamentary intentions of the testator despite lack of compliance with the formalities of will-making. This paper will briefly review the legislative history of these provisions, and discuss how similar provisions have been applied in other Canadian and international common-law jurisdictions.

PREVIOUS LAW

Strict Compliance

Alberta was previously currently a "strict compliance" jurisdiction. The formal requirements associated with the making of a will, set out in the *Wills Act*[2] had to be strictly followed or the will was not valid. The traditional rule was recently reiterated by the Alberta Court of Queen's Bench in *Re McNeill Estate* (2016)[3] as follows:

> Traditionally, the law required strict compliance with formal requirements such as having the will signed by the testator and acknowledged by two witnesses who were present at the same time. If these formalities were not met, the will was declared invalid.

A strict application of this rule may lead to hardship and testamentary frustration in some cases but the courts held that any ability to waive compliance had to find its source in legislation, not judicial discretion.

Rectification of Wills

At common law, courts have very little power to rectify wills despite obvious mistakes made by a testator.[4]

A distinction is made when rectification applications are heard by a "court of probate" or a "court of construction". When sitting as a court of probate, the Court must determine whether the testamentary instrument submitted for probate constitutes the true last will of the Deceased. The focus for the court will be on issues like testamentary capacity, knowledge and approval, and due

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[1] SA 2010, c W-12.2.

[2] RSA 2000, c. W-12.

[3] McNeill Estate (Re), 2016 ABQB 645 at paragraph 108.

[4] Despite the long history of this rule, Lord Neuberger recently opined in Marley v. Rawlings, 2014 UKSC 2 at para. 28 that there is "no convincing reason" why the remedy of rectification, as applied in the commercial context, should not also apply to wills. However, he held that it was not necessary to consider the point further due to the 1982 statute enacted in the UK empowering the court to rectify wills.

execution. Extrinsic evidence is admissible in probate actions, including direct evidence as to the testator's intentions, in order to determine the validity of the document.

At the probate stage, the Court may add or delete words from the Will. Mr. Justice P.M. Clark summarized the law in *Conner v. Bruketa Estate* (2010):

> The Court may "complete the testator's Will" by supplying words that have been omitted if it is satisfied that an omission has occurred and it is able to discover what the testator meant.
>
> Oosterhoff at 467-468.
>
> In Re-Raiter, (1979), 1979 CanLII 1920 (ON SC), 24 OR (2d) 603 (Ont. HCJ), Justice Cromarty of the Ontario High Court of Justice found that:
>
> > One of these exceptions [to allow extrinsic evidence to be considered in interpreting testator intention] is based on the principle that it is the duty of every Court of construction, in interpreting a Will, to put itself as much as possible in the testator's chair. The words of the Will must be interpreted not only by a literal reading of them, but the Court must, when reading the Will, *have a knowledge of the circumstances surrounding the testator at the time of the making of the Will and up to and until his decease* [...]In order to do this the Court is entitled to receive and consider extrinsic evidence to determine what the circumstances actually were. [emphasis added].[5]

Once a document has been admitted to probate, and the Court is asked to interpret its meaning and effect, the Court is said to be sitting as a "court of construction". At this point, the Court must deal with the Will that has been probated and cannot delete or add words to it. The scope of admissible evidence is more constrained in a construction hearing than a probate matter. The court may only consider the words of the will and, applying the "armchair rule", the evidence of the surrounding circumstances known to the testator at the time the will was made. Direct evidence of the testator's intentions is not admissible except in very restricted circumstances.

NEW LAWS

Alberta and British Columbia have both enacted legislation that substantially overhauls the law relating to wills, succession and estate administration. Alberta enacted the *Wills and Succession Act*, S.A. 2010, c. W-12-2 (the "***WSA***") in 2010, and it came into force on 1 February 2012. This statute was preceded by substantial work by the province's Law Reform Institute. The *Wills, Estates and Succession Act,* S.B.C. 2009, c. 13 (the "***WESA***") was enacted in 2009 but did not come into force until 31 March 2014. The provisions of the *WESA* largely reflected the work and recommendations of the BC Law Institute in its 2006 report.

[5] *Conner v. Bruketa* Estate, 2010 ABQB 517 at para. 71 and 72.