



## **Where There's (Not) a Will: Intestacies, Partial Intestacies and Remedies**

by Kimberly Whaley and Ameena Sultan,<sup>1</sup>  
Whaley Estate Litigation

### **INTRODUCTION**

Intestacies, or partial intestacies, exist for a number of reasons: a person dies having never executed a will; a person executes a will, but it is revoked due to marriage or the testator chooses to revoke it by destroying it or a person to whom a residuary gift is made predeceases the testator; or a person executes a will with the intention that it has dealt with one's entire estate but after the testator's death the will (or a portion of the will) is declared invalid due to a drafting error, undue influence, lack of capacity, or other reasons.

In Ontario the *Succession Law Reform Act* R.S.O. 1990, c.S.26 ("SLRA") governs intestacies or partial intestacies, and provides a statutory framework under which the estate, or a portion of the estate, will be distributed. In the most basic terms, the deceased's next of kin will inherit through a prescribed order of priority. Where someone dies inadvertently intestate or partially intestate, having thought the estate was properly disposed of by executing a valid will, but through mistake does not fully dispose of the estate, then relatives virtually unknown/estranged may become beneficially entitled contrary to the testator's intentions.

In the within paper, we review recent intestacy and partial intestacy cases and examine how the Courts are interpreting and potentially remedying these situations. We start with a brief review of Ontario's intestacy legislation, relevant rules in the interpretation of wills and the so-called "presumption against intestacy".

---

<sup>1</sup>Co-authored by Kimberly Whaley and Ameena Sultan with special acknowledgment and thank you extended to the Honourable Mr. Maurice Cullity who provided the co-authors with valuable discussion, consideration, analysis and comments on the within collaboration

## ONTARIO'S INTESTATE LEGISLATION: WHO INHERITS?

In Ontario, the *SLRA* governs intestacies under Part II: “*Intestate Succession*”.

An intestacy or partial intestacy will pass to the spouse and next of kin of the deceased according to a set order of priority, with the spouse being first in line (if there are no issue):

Where a person dies intestate in respect of property and is survived by a spouse and not survived by issue, the spouse is entitled to the property absolutely.<sup>2</sup>

Section 45 of the *SLRA* addresses a spouse's entitlement to a preferential share in cases of partial intestacy. If a person dies intestate in respect of property having a net value of *not more than* the preferential share (currently prescribed as the first \$200,000.00) and is survived by a spouse and issue, the spouse is entitled to the property absolutely.<sup>3</sup>

If the property has a net value of *more than* the preferential share and the deceased had both a spouse and issue, the spouse inherits the preferential share of \$200,000.00 with the balance of the estate divided according to the number of children of the deceased. For example, if there is one child, the spouse is entitled to one-half of the residue in addition to the \$200,000.00 and the child would receive the other half of the residue. If more than one child, the spouse is entitled to the \$200,000 plus 1/3 of the residue and the children would divide 2/3 of the residue among themselves.<sup>4</sup>

Other scenarios are also covered under the *SLRA*, such as when a deceased has no spouse and no children, then the property in question would pass to parents, brothers and sisters, or nieces and nephews (in that order) and thereafter, the property passes to the deceased's “next of kin”. Similar legislation exists across Canada.<sup>5</sup> The basic

---

<sup>2</sup> *SLRA* at s.44.

<sup>3</sup> *SLRA* at s.46

<sup>4</sup> *SLRA* at s.47

<sup>5</sup> See the CBA's Table of Concordance of Provincial Succession Laws at [http://www.cba.org/CBA/sections\\_wills/main/Tables\\_2013.aspx](http://www.cba.org/CBA/sections_wills/main/Tables_2013.aspx)

premise of the legislation is that a person's spouse and next of kin are the rightful beneficiaries of the deceased's estate. However, depending on the facts and circumstances of each case, "next-of-kin" could expand across the globe to individuals virtually unknown to the deceased.

Section 47 of the *SLRA*, and the relevant subsections refer to situations where "a person dies intestate in respect of property..." such that it is possible that a deceased dies intestate not in respect of the entire estate, but in respect of a portion of the estate, in which case a partial intestacy arises.

***Aside: Recent Changes to UK Intestacy Legislation***

As an interesting aside, the U.K. has only recently made changes to its inheritance legislation. The *Inheritance and Trustees Powers Act 2014 (IPTA 2014)* came into effect October 1, 2014.<sup>6</sup> The new legislation is similar to our *SLRA* but it addresses spouses, civil partners, adopted children, and other family relationships. Moreover it has an indexed spousal preferential share the quantum of which is reviewed periodically to allow for increases in value.

**TESTATOR'S INTENTIONS AND THE PRESUMPTION AGAINST INTESTACY**

The primary rule of will interpretation is that the court should strive to give effect to the testator's subjective intentions.<sup>7</sup> The court will apply the general "golden rule" that presumes that a testator did not intend to die intestate.<sup>8</sup> Accordingly, if a will has two possible constructions one of which would make an effective disposition of all or part of the estate, and the other would result in intestacy, a court may prefer the former.<sup>9</sup> In

---

<sup>6</sup> *The Inheritance and Trustee Powers Act, 2014 (IPTA, 2014)*  
[http://www.bailii.org/uk/legis/num\\_reg/2014/uksi\\_20142039\\_en\\_1.html](http://www.bailii.org/uk/legis/num_reg/2014/uksi_20142039_en_1.html)

<sup>7</sup> *Re Burke* [1960] O.R. 26 (C.A.) at p.30.

<sup>8</sup> Also known as the presumption against intestacy. See *Kapouzian Estate v. Spiak*, 2014 ONSC 2355 at para. 13, [hereinafter *Kapousouzian*]; *Frohlich Estate v. Wedekind et al*, 2012 ONSC 3775 (CanLII) at para. 22, *Re MacDonnell*, 1982 CanLII 1844 (ONCA) [hereinafter *Frohlich*]

<sup>9</sup> 2014 ONSC 2355 citing *Tribble Estate v. McGuire* (1993), 1 E.T.R. (2d) 69, (Ont. Gen. Div.) at para.12

Ontario, a lapsed residuary gift also passes upon intestacy to the deceased's spouse or next of kin, unless there is a contrary intention in the will.<sup>10</sup>

The Court will first look to the words in the will itself to determine the testator's intentions, and not direct extrinsic evidence of third parties. The leading Ontario Court of Appeal case of *Rondel v. Robinson Estate*,<sup>11</sup> confirmed as precedent in such cases, the inadmissibility of such extrinsic evidence in the construction of a will:

*“ . . .The fundamental purpose of the law of wills is to give effect to the testamentary intentions of the testator for the distribution of her estate. The general rule of the common law 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.***

*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.”<sup>12</sup>*

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.<sup>13</sup>

*Rondel* also confirmed other admissible evidence for consideration in aiding in the interpretation of the will:

- *such circumstances as the character and occupation of the testator;*
- *the amount, extent and condition of his or her property;*

---

<sup>10</sup> *Mladen (Resnick) v. McGuire* 2007 CanLII 10904 (ONSC); *Kossak Estate v. Kosak*, (1990) 72 O.R. (2d) 313 (H.C.J.); see also *Doplihar Estate v. Stopar*, (1990) 75 O.R. (2d) 374 (Gen. Div.) and *Reid Estate v. Chan Estate*, [1996] O.J. No. 3124 (Gen.Div.).

<sup>11</sup> 2011 ONCA 493, leave to appeal to the SCC refused [2011] SCCA 536[hereinafter *Rondel*].

<sup>12</sup> *Ibid.* at paras. 23-24.

<sup>13</sup> *Ibid.* at para. 29.

- *the number, identity, and general relationship to the testator of the immediate family and other relatives;*
- *the persons who comprised his or her circle of friends, and*
- *any other “natural objects of his [or her] bounty”.<sup>14</sup>*

To determine the testator’s intention, the Court will invoke the so-called “armchair rule” where the Court will “sit in the place of the testator”:

*In the interpretation of a will, as contemplated in Re Burke, [1960] O.R. 26 (C.A.) at p. 30, a court must ascertain the testator’s subjective intention at the time of execution of the will: Each Judge must ‘endeavour to place himself in the position of the testator at the time when the will was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property’.<sup>15</sup>*

*Rondel* moreover, confirmed when a Court will rectify a will:

*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.<sup>16</sup>*

According to *Lipson v. Lipson*,<sup>17</sup> 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*

<sup>14</sup> *Ibid.* at para. 26 quoting Bayda J.A. in *Haidl v. Sacher*, [1979] 106 D.L.R. (3d) 360 (C.A.).

<sup>15</sup> *Kapousouzian*, *supra* note 8 at para. 11.

<sup>16</sup> *Rondel*, *supra* note 11 at para. 24.

<sup>17</sup> 2009 CanLII 66904 ONSC at para. 42 [hereinafter *Lipson v. Lipson*]

*from a reading of the will as a whole and in light of the surrounding circumstances.*

## **RECENT CASE LAW**

Below is a review of select recent cases that address potential intestacies. The decisions show that each case turns on its own particular facts, with the application of the “golden rule” which evinces courts trying to avert intestacies where possible, and the “armchair rule” applied where courts attempt to sit in the place of the testator, all the while balancing the complex and daunting rules of the admissibility of applicable extrinsic evidence.

The following review of cases has been divided into two categories: where the Court found against an intestacy and where the Court found an intestacy or partial intestacy.

### **i) Cases Where The Court Found Against an Intestacy**

#### ***McLaughlin et al v. McLaughlin et al, 2014 ONSC 3162***

In this case the Court rectified a will, and avoided a partial intestacy, by correcting a drafting lawyer’s clerical error. A partial intestacy would have benefited the deceased’s two estranged children contrary to her intentions.

Mrs. McLaughlin died in 2012 at the age of 93 and had been predeceased by her husband. They had six children together, one of whom had died in 2001. The deceased had had no contact with two of her children, Thomas and Judith, for several years prior to her death.

Mrs. McLaughlin executed two wills in 2010, a Primary Will and a Secondary Will (she had previously executed wills in 1991, 1994, and 2002). The Secondary Will dealt with the disposition of her house and the Primary Will dealt with the balance of her estate. The drafting solicitor had confirmed with Mrs. McLaughlin that she had no relationship

with two of her children and that she did not want to include them as beneficiaries in her will (like the previous wills she had executed).

However, when drafting the 2010 Wills, the solicitor inadvertently repeated bequests to Mrs. McLaughlin's grandchildren and daughters-in-law in both Wills and omitted a residue clause from the Secondary Will. The effect of the drafting error was that the beneficiaries could claim entitlement to two separate bequests, one under the Primary Will *and* one under the Secondary Will, and the residue of the Secondary Will would be distributed on intestacy amongst all five of her children, instead of just the intended three.

Furthermore, both Wills had the following paragraph: "*I hereby revoke all wills made before this will*", which would mean that the Primary Will would have been revoked leaving only the Secondary Will, also resulting in intestacy.

The Estate Trustee (Mrs. McLaughlin's son, Daniel) argued that the Secondary Will should be rectified as it contained drafting errors and failed to reflect Mrs. McLaughlin's instructions.

Judith, the daughter who had had no contact with her mother for several years, argued that the Secondary Will revoked the Primary Will, resulting in intestacy, and that all of the children should share in the estate. She expressed reservations over the fact that a large number of people (Mrs. McLaughlin, the drafting solicitor, his secretary, and Daniel) could have read the document and not seen the many drafting errors. Judith argued, amongst other things, that if Mrs. McLaughlin read over the Secondary Will and she understood it, it should be presumed that she knew and approved of the contents.<sup>18</sup> Judith submitted that the Secondary Will should not be changed as the words were clear and unambiguous and no extrinsic evidence of Mrs. McLaughlin's intentions should be introduced.<sup>19</sup>

---

<sup>18</sup> *McLaughlin v. McLaughlin*, 2014 ONSC 3162 at para. 41 [hereinafter *McLaughlin*].

<sup>19</sup> *Ibid.* at para. 45.

Thomas, the son who had had no contact with his mother for several years also adopted Judith's argument and added his own, including asking the Court to declare the estate intestate and to have it divided in such a way to take into account abuse he had suffered in the past allegedly at the hands of his mother and father.<sup>20</sup>

In answering the question, "Did Mrs. McLaughlin Know What she was Signing?" Justice Lemon concluded that:

*Ultimately the answer to this question is resolved in considering the balance of probabilities of what must have occurred. Finding Mrs. McLaughlin read and knew what she was signing and intended the result that would occur would not make sense given the balance of probabilities that I know is correct or is conceded. If I accept that she meant what she signed, then I must find that she meant to create an intestacy even though the document that created the intestacy also duplicated the bequest to her grandchildren and daughters-in-law. I would find that in one document. Mrs. McLaughlin wanted to duplicate the bequests, revoke a second document being signed at the same time and create an intestacy that effectively shared the estate with all of her children rather than do that directly. That would make no sense. There is no evidence that would suggest that that was her intent.<sup>21</sup>*

*. . . The effect of leaving out the residue clause would lead to intestacy and I should avoid that.<sup>22</sup>*

Justice Lemon found that this was "one of those exceptional cases that requires a rectification of the will" as signed by Mrs. McLaughlin:

*. . . I find that the clerical error of [the drafting solicitor] has created a document that does not reflect the wishes of Mrs. McLaughlin. **Creating an intestacy would not make sense in accordance with the rest of the surrounding circumstances.** Based on all of the prior wills and supporting documents, the proposed corrections would give effect to what is consistent with Mrs. McLaughlin's intentions.<sup>23</sup>*

### **Frohlich Estate v. Wedekind et al, 2012 ONSC 3775**

---

<sup>20</sup> *Ibid.* at para. 48.

<sup>21</sup> *Ibid.* at para. 79.

<sup>22</sup> *Ibid.* at para. 82.

<sup>23</sup> *Ibid.* at paras. 86-87.



In this case the Court found against an intestacy under which “virtual strangers” to the deceased would have benefited.

Christel Frohlich was a widow and had no children when she passed away in 2007. According to her Will, 25% of the residue of her estate was to go to Jurgen Frohlich but he had predeceased her by 15 years. There was no gift-over provision. The executor sought directions from the Court on how to distribute the 25% residuary gift valued at approximately \$400,000 - \$500,000.00. The executor wanted to know if the money should be distributed amongst the surviving named residuary beneficiaries (who were relatives of her husband and with whom the deceased had a relationship) or whether it ought to be divided amongst the deceased’s next of kin, all of whom were “virtual strangers” to Mrs. Frohlich and were only located through a genealogical researcher in Germany.

The Court acknowledged that a lapsed gift passes on intestacy unless there is a contrary intention in the will and that when a court interprets a will it must determine the testator’s intention at the time the will was made. If the court cannot find the testator’s intention from the ordinary meaning of the words in the will, it must resort to the use of the “armchair rule”.<sup>24</sup> The Court concluded that:

*In reviewing the terms of the Last will and Testament, the Testator did not appear to consider or intend to have anyone, other than those specifically named therein, to benefit from her estate. It would not appear to have been her intention that any portion of her estate go to persons unknown or who she had never met, or maintained contact with, during the majority of her own lifetime.<sup>25</sup>*

*...  
It is therefore open to the court to find that a reasonable and common-sense interpretation of the Testator’s Last Will and Testament would provide that the lapsed gift should be distributed among the named surviving residuary beneficiaries. In arriving at this conclusion, the court is mindful of the “golden rule”, applicable to the interpretation of Last Wills and Testaments, which states that where there are two interpretations which can be applied to a Will it is the interpretation which favours testacy, rather than intestacy, that should be applied.<sup>26</sup>*

---

<sup>24</sup> *Frohlich Estate v. Wedekind et al*, 2012 ONSC 3775. [hereinafter *Frohlich*]

<sup>25</sup> *Ibid.* at para. 17.

<sup>26</sup> *Ibid.* at para. 22.

Justice Gunsolus found a contrary intention in the Will “with the assistance of evidence of her friends”<sup>27</sup> and that the lapsed residuary gift should not be distributed on intestacy but only among those named residuary beneficiaries to whom the deceased had been close.

### ***Cuthbertson Estate 2011 ABQB 704***

In this case the Court chose to read words into a basic holograph will instead of finding intestacy. This resulted in only the deceased’s surviving children inheriting her estate. Had intestacy been found, the deceased’s grandchildren from her predeceased children would have inherited as well.

The deceased’s holograph will read:

*I am Goldie Cuthbertson. . . I revoke all former wills. I appoint Constance Dick as my executor and trustee to: Connie Dick, Dennis Comm, Barbara Brunlees, Tom Cuthbertson*

The people listed were her four surviving children. Two children had predeceased the testator but they left behind surviving grandchildren. The deceased had no spouse at the time of death. Therefore under the *Alberta Intestate Succession Act*, R.S.A. 2000, c. I-10, if intestacy was found the estate would have been distributed *per stirpes* amongst her issue, including her grandchildren from her deceased children.

The Court however, after quoting extensively from *Wills and Succession, Sixth Edition* by Prof. Albert Oosterhoff, concluded that:

*While the handwritten document before me is exceedingly short, I conclude that it is arguable . . . that the word ‘to’ in this case is intended to have dispositive effect. As it is followed by the listing of the Testatrix’s four surviving children, as there is no intent to the contrary evident, the presumption against intestacy and the principle that effect should be given to all words support the position taken in favour of the four named children.*<sup>28</sup>

---

<sup>27</sup> *Frohlich*, *supra* note 24 at para. 23.

<sup>28</sup> *Cuthbertson*, 2011 ABQB 704 at para.10.

**McGregor Estate (Re), 2014 BCSC 896**

When a testator left the residue of her estate to a charity that no longer existed, the British Columbia Supreme Court in *McGregor Estate* chose to distribute the testamentary gift under a *cy-pres* doctrine rather than find that the gift lapsed and passed on a partial intestacy.

Under her Will, the residue of the testator's estate was to be placed in trust for the lifetime of her son who was mentally challenged. After his death it was to pass to a charity - a home where the testator's son had lived, called Woodlands. However, Woodlands closed down a year after the testator died and her son was moved to a different home, Healthy Opportunities for Meaningful Experience Society (H.O.M.E.S.) until his death in 2013. At the time of her son's death, the residue of the testator's estate was approximately \$250,000.00. If the Court found intestacy, the sole heir at law under British Columbia's intestacy legislation<sup>29</sup> would have been a distant relative in England. The trustee sent a letter to this relative but did not receive a response.

Justice Power first noted that when a testator leaves a legacy to an institution which ceases to exist, the gift either lapses and falls to be distributed on intestacy, or comes under the *cy-pres* doctrine. The doctrine of *cy-pres* applies to save the gift where the court can infer that the testator intended to devote that property to a general charitable purpose:

*Cy-Pres means "as near as" possible; according to the Court of Appeal in Re Buchanan Estate, in cases where a charitable gift or bequest has become impossible or impracticable, it allows the court to apply the property to some other charitable purpose as nearly as possible resembling the original purpose.*<sup>30</sup>

Justice Power observed:

*....it appears that Ms. McGregor's intent was to help fulfil the objects of the Auxiliary for Woodlands. She wished to support their efforts to improve the lives of the mentally challenged by providing opportunities for activities or services that*

---

<sup>29</sup> *Wills, Estates and Succession Act*, S.B.C. 2009, c.13.

<sup>30</sup> *McGregor Estate (Re)* 2014 BCSC 896 at paras. 19-20 [hereinafter *McGregor*]

would not otherwise be available. The question is whether the gift was specific to the residents of Woodlands who were benefited by the work of the Auxiliary.<sup>31</sup>

Justice Power then applied *Re Buchanan Estate*<sup>32</sup> and *Montreal Trust Company v. Richards*<sup>33</sup> which held that a court “always leans in favour of charity” and away from an intestacy, and should be “more ready to infer a general charitable intention than to infer the contrary”.<sup>34</sup> Justice Power concluded:

*I am persuaded that the residual gift in the deceased’s will expresses a general charitable intent for similar reasons to those expressed by Hogarth J. in Re Buchanan Estate. As in that case, the gift here was a residuary bequest to a charitable institution with no gift over on its failure. Because the testator did not address what would happen in the case of a lapse, I can infer that she planned that the money would go towards a general charitable purpose. . . .It is my view that her intent was to continue to benefit a charitable purpose that her son benefited from during his lifetime. . . .There is no indication of any intent to benefit any other next of kin or a desire to see the money fall into intestacy.*<sup>35</sup>

Justice Power found that H.O.M.E.S. was an appropriate recipient of the gift under the *cy-pres* doctrine, however on the condition that they limit its use to the extracurricular activities of their residents to meet the testator’s intention to benefit and improve the lives of the mentally challenged persons by providing additional or extra services.

### ***Marley v. Rawlings* [2014] UKSC 2**

This case of the Supreme Court of the United Kingdom is an interesting read on the issue of rectification of wills in the United Kingdom. In this case the Court chose to rectify a will, which resulted in a testator’s two sons receiving nothing and his entire estate passing to a man who was not related to him but whom he treated like a son.

Alfred and Maureen Rawlings executed short wills that were identical in terms. Each spouse left his or her estate to the other, but, if the other had already died, or survived the deceased spouse for less than a month, the entire estate would be left to Terry

---

<sup>31</sup> *McGregor*, *supra* note 30 at para. 28.

<sup>32</sup> (1996), 11 E.T.R. (2d) 8 (B.C.S.C.), affirmed (1997), 44 B.C.L.R. (3d) 283 (C.A.).

<sup>33</sup> 1982 CanLII 732 (BCSC).

<sup>34</sup> *McGregor*, *supra* note 30 at para.30.

<sup>35</sup> *McGregor*, *supra* note 30 at paras. 34-35.

Marley. Mr. Marley was not related to them but they treated him as their son.<sup>36</sup> By an oversight however, the solicitor had each spouse execute the other spouse's will and nobody noticed. While the wife died in 2003, no one noticed the error until the husband died in 2006. He had approximately £70,000.00 in his estate.

The Rawlings' two sons challenged the validity of the Mr. Rawlings' Will. In probate proceedings the Court found the Will was invalid and dismissed Mr. Marley's claim for rectification of the will on the grounds that i) the Will was not a "will" as it did not satisfy certain requirements of the *Wills Act 1837* (including that the will must be signed by the testator) and ii) even if it had, it was not open to the Court to rectify the Will under the *Administration of Justice Act 1982* (Section 20 allows for the rectification of a will only if the testator's intentions were not carried out due to a clerical error or a failure to understand his or her instructions).

On appeal the Court of Appeal upheld the decision namely on the first ground that the Will did not satisfy the requirements laid out in the *Wills Act 1837*. Mr. Marley appealed to the Supreme Court.

Lord Neuberger, writing for the majority, first reviewed the approach to be taken in interpreting wills in the U.K.: "*Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the word used in their documentary, factual and commercial context.*"<sup>37</sup> Also that "*the well-known suggestion . . . that when interpreting a will, the court should 'place itself in the testator's arm-chair' is consistent with the approach of interpretation by reference to the factual context.*"<sup>38</sup>

Lord Neuberger also referred to a statutory provision relating to the interpretation of wills (Section 21 of the *Administration of Justice Act 1982*) that provides that where a will or a

---

<sup>36</sup> Note that the decision makes no reference to the relationship between the testator and his sons or why he might have chosen to disinherit them.

<sup>37</sup> *Marley v. Rawlings* 2014 UKSC 2 at para. 20. [hereinafter *Marley v. Rawlings*]

<sup>38</sup> *Ibid.* at para. 23.

part of a will is “meaningless” or “ambiguous on the face of it” or the “language used in any part of it is ambiguous”, extrinsic evidence, including evidence of the testator’s intention may be admitted to assist in its interpretation.

After reviewing the facts and circumstances surrounding the execution of the Will, Lord Neuberger concluded that:

*. . . the present circumstances seem to give rise to a classic claim for rectification. As Black LJ, who gave the leading judgment in the Court of Appeal, observed in para.7 ‘[t]here can be no doubt as to what Mr. and Mrs. Rawlings wanted to achieve when they made their will and that was that [Mr. Marley] should have the entirety of their estate and that [their sons] should have nothing’. . . Thus, there is certainty as to what Mr. Rawlings wanted, and there is certainty as to how he would have expressed himself (as there can be no doubt that he would have signed the will prepared for him if he had appreciated the mistake).<sup>39</sup>*

The Court dismissed the sons’ two arguments that: i) the Will could not be rectified as it was not a “will”, and ii) that if it was a will, the mistake made by the drafting solicitor was not one that could be rectified, as it was not a “clerical error”.

In response to the first argument, Justice Neuberger held that the Will was a ‘will’ capable of rectification:

*It is true that the Will purports in its opening words to be the will of Mrs. Rawlings, but there is no doubt that it cannot be hers, as she did not sign it; as it was Mr. Rawlings who signed it, it can only have been his will, and it is he who is claimed in these proceedings to be the testator for the purposes of [the Wills Act 1837]. . . It does not appear to me that a document has to satisfy the formal requirements of [the Wills Act 1837], or of having the testator’s knowledge and approval, before it can be treated as a ‘will’ which is capable of being rectified pursuant to the [Administration of Justice Act 1982].<sup>40</sup>*

With respect to the ‘clerical error’ argument, Justice Neuberger stated:

*If, as a result of a slip of the pen or mistyping, a solicitor (or a clerk or indeed the testator himself) inserts the wrong word, figure or name into a clause of a will, and it is clear what word, figure or name the testator had intended, that would undoubtedly be a clerical error which could be rectified under section 20(1(a) [of the Administration of Justice Act 1982]. It is hard to see why there should be a different outcome where the mistake is, say, the insertion of a wrong clause*

---

<sup>39</sup> *Ibid.* at para. 54.

<sup>40</sup> *Ibid.* at para. 60.

*because the solicitor cut and pasted a different provision from that which he intended. Equally, if the solicitor had cut and pasted a series of clauses from a different standard form from that which he had intended, I do not see why that should not give rise to a right to rectify under section 20(1)(a), provided of course the testator's intention was clear.*<sup>41</sup>

The Supreme Court allowed the appeal and held that the Will should be rectified such that it reflected Mr. Rawlings name instead of Mrs. Rawlings. Mr. Marley inherited the entire estate and the deceased's two sons inherited nothing.

**ii) Where the Court Found an Intestacy or Partial Intestacy**

***Kapousouzian v. Spiak* 2014 ONSC 2355**

Unlike *Frohlich*, the Court in this decision chose to find a partial intestacy which resulted in distant relatives in Bulgaria inheriting the residue of a testator's estate.

Violet Kapousouzian died in 2011 with a will that was executed in 1973. The value of her estate was approximately \$350,000.00. The issue before Justice Wilton-Siegel was a bequest in her Will to four named beneficiaries (children of her first cousin, all of whom lived in the United States). Three of the named beneficiaries had predeceased Violet. The Will did not provide for a further gift over in the event that any of the named beneficiaries predeceased Violet. Extensive efforts to locate other relatives of Violet identified two first cousins in Bulgaria. There was evidence that Violet had contact with the Bulgarian cousins in the 1970s and 80s, but not subsequently.

Justice Wilton-Siegel referenced the general rule:

*...where a residual gift lapses, it passes on an intestacy. This rule is subject to two exceptions: 1) where the residual gift is a class gift; and 2) where there is a contrary intention in the Will.*<sup>42</sup>

---

<sup>41</sup> *Ibid.* at para. 72.

<sup>42</sup> *Kapousouzian*, *supra* note 8 at para.10.

Under the first exception, Justice Wilton-Siegel noted that the four beneficiaries were named individually and he was not persuaded that Violet intended to treat them as a class.<sup>43</sup>

On the second exception, Justice Wilton-Siegel concluded that there was not enough evidence to establish that Violet had a contrary intention to intestacy and distinguished the facts from those in *Frohlich*:

- *Violet knew three of the four beneficiaries had predeceased her, but she chose not to change her will;*
- *while Violet had a relationship with those named beneficiaries there was no evidence that she had a relationship with their children; and*
- *Violet was aware of the existence of her Bulgarian cousins.*<sup>44</sup>

While the drafting solicitor testified that it was apparent to him that Violet considered the named beneficiaries who lived in the United States to be her only family, and that she did not mention the existence of the Bulgarian relatives, Justice Wilton-Siegel paid little heed to this, stating that: “*The Court cannot draw an inference of a contrary intention from an impression of the solicitor of forty years ago in the absence of supporting evidence.*”<sup>45</sup>

Justice Wilton-Siegel found, “*the evidence before the Court [was] not sufficient to find an intention that the lapsed residuary gifts should devolve on the named beneficiaries*” or that the gifts to the deceased beneficiaries should be distributed to their estates.<sup>46</sup>

The residue passed on intestacy pursuant to s.47(6) of the *SLRA* to Violet’s next of kin – her Bulgarian first cousins.

### **Re Das Estate, 2012 NSSC 441**

---

<sup>43</sup> *Kapousouzian, supra* note 8 at para. 15.

<sup>44</sup> *Kapousouzian, supra* note 8 at paras. 19-24.

<sup>45</sup> *Kapousouzian, supra* note 8 at para. 25.

<sup>46</sup> *Kapousouzian, supra* note 8 at paras.26-27.



In this decision, the Nova Scotia Supreme Court found in favor of intestacy, however it was not distant relatives that inherited, rather it was the deceased's wife and daughter.

Hari Das committed suicide on July 12, 2010. His Will directed that all of his property, except for an RBC investment account, was to be given in trust to his wife (from whom he was separated, but had not divorced, and with whom he was on good terms) and that she could use such sums of income and capital of his estate as she saw fit. The excluded RBC Account held almost \$1 million while the rest of his estate was worth only approximately \$24,000.00. He also had many assets that passed outside of the estate to his wife, including a house, life insurance proceeds, RRSP and pension proceeds.

The only provision made to distribute the substantial funds in the RBC Account was triggered if his wife failed to survive him by ten days in which case the RBC Account would pass to his daughter and certain charities. The wife survived him by more than ten days so the provision was not triggered.<sup>47</sup> One of the charities listed, The Blind People's Association of India, filed an affidavit in the proceedings.

Mr. Das had also left behind some signed notes. One note contained an untitled numbered list containing directions concerning gifts of cash and personal effects addressed to Ms. Das. Justice LeBlanc considered these documents to be testamentary in nature, but were only persuasive, not binding.<sup>48</sup> The documents provided some guidance to the executor in distributing the estate but she was not legally bound to follow the directions.

In determining what to do with the "gap in the will" around the RBC Account, Justice LeBlanc started with the "armchair rule":

*....When interpreting a will, a judge should place himself or herself in the position of the testator to try to discern the intention in the testator's mind at the time the will was executed. . . .Once an intention is ascertained, then the court may give effect to it.*<sup>49</sup>

---

<sup>47</sup> *Re Das Estate*, 2012 NSSC 441 at para. 10. [hereinafter *Re Das Estate*]

<sup>48</sup> *Ibid.* at para. 22

<sup>49</sup> *Ibid.* at para. 32

Justice LeBlanc then articulated a two-part test to determine when a court may supply words to remedy an alleged omission:

*The rule as so expressed has two limbs. The first is that the court must be satisfied that there has been an inaccurate expression by the testator of his intention, and the second is that it must be clear what words the testator had in mind at the time when he made the apparent error which appears in the will. It is the second part of the rule that, I think, presents the greatest obstacle to the respondents in case. Unless one can be reasonably certain from the context of the will itself what are the words which have been omitted, then one cannot apply the principle at all, and one has to take the language as one finds it.*<sup>50</sup>

Justice LeBlanc found that the Court would have to make “a quantum leap to assume that Mr. Das intended to do one thing or another on the basis of the evidence presented”. The drafting solicitor had no notes or any specific recollection of her discussions with Mr. Das. The notes left behind by Mr. Das also failed to clarify his intention. Therefore, there were many possible interpretations of Mr. Das’ intention, including that Mr. Das intended to create intestacy, or that he intended to give his wife the account absolutely and not part of a trust. Justice LeBlanc observed that courts will tend to apply a more literal rule of interpretation and refrain from speculating about what the testator intended.<sup>51</sup> Justice LeBlanc acknowledged that he had to “be careful to balance any extrinsic evidence with the express meaning of the words within the four corners of the will as drafted.”<sup>52</sup>

Justice LeBlanc observed that while there was a presumption against intestacy, he found that “this does not permit the courts to engage in speculation about the will-maker’s intention or ignore the possibility that the testator intended a partial intestacy.”<sup>53</sup>

---

<sup>50</sup> *Ibid.* at para. 33 citing *Re Follett Estate*, [1955] 1 W.L.R. 429.

<sup>51</sup> See *Stork Estate v. Stork* (1990), 72 O.R. (2d)625 (HCJ) and *Myhill Estate v. Office of the Children’s Lawyer*, [2001] O.T.C. 303 (S.C.J.).

<sup>52</sup> *Re. Das Estate*, supra note 47 at para. 46.

<sup>53</sup> *Re. Das Estate*, supra note 47 at para. 51

Justice LeBlanc concluded that the Will did not properly dispose of the testator's RBC Account and that the Court did not have sufficient evidence of the deceased's intention "to supply any words, otherwise omitted, that would allow his investment account to pass to the charities" which would have inherited had his wife failed to survive him by ten days. The account passed to his wife and daughter on a partial intestacy.<sup>54</sup>

***Malo v. Markowsky, 2014 SKQB 261***

In this Saskatchewan decision, the executor applied to the court for directions regarding an "ambiguous" clause in the will of John Markowsky who died in 2013. The clause stated:

***(3)(e)(9) Government Bonds and shares including UGG shares to be sold and proceeds deposited in my account at the Prince Albert Credit Union and divided as follows:***

- a) 32% to my daughter Iris Malo of Edmonton, Alberta;*
- b) 6% to my daughter, Eileen Hanson, of Domremy, Saskatchewan;*
- c) 16% to be shared equally among the children of Eileen Hanson;*
- d) 6% to my son Eugene Markowsky, of Wakaw, Saskatchewan;*
- e) 34% to be shared equally among the children of my son Eugene Markowsky,*
- f) 6% to my daughter, Joanne Otte, of Big River Saskatchewan.<sup>55</sup>*

The question presented to the Court was whether this clause directed that the proceeds from the sale of the bonds and shares was to be divided amongst the listed beneficiaries or whether this clause directed all of the money in the account at the Prince Albert Credit Union was to be divided amongst the listed persons.

At the time of his death the deceased did not have any government bonds. His UGG shares were valued at approximately \$888.00 and he had approximately \$430,000.00 on deposit at the Prince Albert Credit Union divided between a main account (\$110,000.00), a small account (\$5.00) and ten term deposit accounts (valued at \$320,000.00). The will did not refer to, or describe, each of these individual accounts.

---

<sup>54</sup> *Re. Das Estate*, supra note 7 at para. 62.

<sup>55</sup> 2014 SKQB 261 at para. 4. [hereinafter *Malo v. Markoswsky*]

No extrinsic evidence was provided to aid in the interpretation of the will.<sup>56</sup> Justice Tholl started by reviewing the will itself to determine the deceased's intention:

*The will is to be read as a whole and each clause is to be read within the context of the entire will. Taking into account the will as a whole, the specific words used are to be given their prima facie or ordinary meaning, unless the testator's intention cannot be determined, in which case the rules of construction must be relied upon.*<sup>57</sup>

Justice Tholl then confirmed the presumption against intestacy and that although the will speaks as of the date of death, it is the testator's intentions on the date he made the will that are relevant and need to be identified.<sup>58</sup> Justice Tholl then went on to apply the "armchair" rule:

*In examining para. 3(e)(9) of the will, the court must do its best to determine John's intentions by considering the words he chose to use in that paragraph when examined in the context of the will as a whole. The court must sit in John's "armchair" and determine what he meant by the words he chose in that paragraph when considered together with the words he chose throughout his will.*

The Court determined that the use of the words "account" and "deposit" meant the deceased must have only intended to refer to his general deposit account at the Credit Union and not his investment or term deposit accounts. Also, based on the wording in the will it was clear to Justice Tholl that the deceased only intended to deal with the proceeds of his government bonds and UGG shares and not all of the money in the credit union account. While the deceased did not have any government bonds at the time of his death and his UGG shares only amounted to \$888.00, the Court confirmed that it was the deceased's intention at the time he made the will, and when he had government bonds, that was relevant to the interpretation:

*Even sitting in John's armchair, the court is not allowed to re-write para. 3(e)(9) to convert it into a residue clause. Despite John's intention to deal with his entire estate, it would be stretching the words used in para. 3(e)(9) far beyond any reasonable interpretation to create a residue clause from the paragraph. The court cannot speculate whether John would have wanted to leave the residue of his estate to the same persons, in the same percentages, as he listed in paras.*

---

<sup>56</sup> *Ibid.* at para .9.

<sup>57</sup> *Ibid.* at para. 13.

<sup>58</sup> *Ibid.* at paras.14-15.

3(e)(9)(a) to (f). Such an intention is not discoverable when examining the will as a whole.<sup>59</sup>

The UGG shares (\$888.00) were ordered to be divided amongst the listed beneficiaries and the Court declared that the deceased died intestate with regard to the remaining substantial funds held in the accounts at the credit union. The decision did not deal directly with who inherited on the intestacy, however, the deceased had four children and multiple grandchildren but no spouse. Under Saskatchewan's *Intestate Succession Act* 1996, S.S. 1996, c I-13.1, where there is no spouse but issue, the estate is to be divided *per stirpes* among the issue.

***Lubberts Estate* 2012 ABQB 506, upheld 2014 ABCA 216**

In this decision, the Court concluded that the testator would not have intended to disinherit any of her children and found a partial intestacy under which all of her children would inherit.

The deceased died in 2009 and had four living children. The deceased had made a holograph will in 2008, after previously executing a will drafted by a lawyer in 2002 and had prepared holograph codicils to that will in 2004, 2005, and 2007. The 2008 Holograph Will revoked all previous wills and codicils, stating: "*I revoke all previous made wills and especially so the will made under the advice of [my lawyer] . . . That Will has outlived its purpose. . .*"<sup>60</sup>

The Court was asked for directions on the interpretation of one clause in the 2008 holograph Will, which stated:

*My entire estate – cash, my house [ . . . ] and my quarter section of land [ . . . ] if it is then still in my possession, I leave to my son Paul Johan Lubberts and to my youngest daughter Irene Lubberts Hanson to jointly manage it and use it for their own benefit as salary for instance, or for the benefit of one of their siblings or of one of my grandchildren – as for instance medical expenses. Irene and Paul will*

---

<sup>59</sup> *Ibid.* at para.16.

<sup>60</sup> 2014 ABCA 216 at para. 18.

*make these decisions together and without yielding to any pressure applied by possible recipients.*<sup>61</sup>

The issue was whether this clause made a gift to Paul and Irene, attempted to make them trustees, or gave them a power of appointment. Paul and Irene took the position that the will either gave them the residue of the estate as an unconditional gift or gave them a power of appointment. The deceased's other two children took the position that their mother had intended the clause in the will to create a trust.<sup>62</sup> The parties agreed that if the Court found that it was the testator's intention to create a trust, the intended trust would fail for lack of certainty of objects and the estate would pass by intestacy.

Paul and Irene argued that the testator's revocation of all previous wills meant a "wholesale rejection" of the previous will and codicils, and an intention to "repudiate" the beneficiaries under those testamentary documents. The Court disagreed as the testator expressly contemplated that Paul and Irene could use the money for the benefit of their siblings and her grandchildren.<sup>63</sup> The Court also found that the language of the Holograph Will showed that the testator did not intend to gift her estate to Paul and Irene as a gift. She intended, rather, that Paul and Irene act as a conduit for the distribution of her estate.<sup>64</sup>

The Court found that the testatrix intended to create a trust, rather than a power of appointment, but that the trust failed for lack of certainty of objects and the estate passed by way of intestacy:

*In my view, the language employed by the testatrix indicates that she intended to impose an obligation on Paul and Irene. Paul and Irene are required to make all decisions in relation to the estate together: "Irene and Paul will make all those decisions together and without yielding to any pressure applied by possible recipients". They are directed to jointly "manage" the estate and "use it" to benefit themselves, their siblings or the grandchildren, with examples of such benefits provided. They are not merely empowered to dispose of the estate to any or all of these persons. . . I conclude that the Holograph Will gave the estate to Paul and Irene to hold as trustees. The parties have agreed that, if a trust were intended, it*

---

<sup>61</sup> *Ibid.* at para.9.

<sup>62</sup> *Ibid.* at para. 15.

<sup>63</sup> *Ibid.* at para. 21.

<sup>64</sup> *Ibid.* at para. 28.

*fails due to uncertainty of its objects, as only non-exclusive examples of the intended benefits (salary and medical expenses) are provided. Giving effect to this agreement, I conclude that the intended trust fails, and the estate will pass by intestacy.*<sup>65</sup>

Paul and Irene appealed this decision, however, the Alberta Court of Appeal upheld the motion judge's decision.<sup>66</sup> The Court answered three questions:

- 1) *What is the objective of a court asked to review a will?*
- 2) *What are the best means of achieving this objective?*
- 3) *Is Justice Ross' conclusion that the testator intended to create a trust correct?*

The Court in answering these questions stated:

*[9] To be faithful to the testator's will, a court must identify the meaning the testator wished to convey by her choice of words. This can only be done, in many cases, if the court has access to relevant evidence which records information, in existence at the time the testator signed her will, about the testator's family and the nature of various family relationships, close friends, interests and many other facts which might influence the testator when engaged in the will-making process. A court, aware of important information about the testator, must carefully read the entire will, giving the words she selected or approved their ordinary meaning. This assumption is made because the testator probably intended to attach the ordinary meaning the community of which she is a part gives to these words. If the will and the context within which it is made reveals that the testator had a different intention, a court must adjust its linguistic standards and give the will a meaning consistent with the testator's language values.*

*[10] Ascertaining the testator's will is a subjective – as opposed to objective – enterprise. Values foreign to interpreting contracts and laws are paramount in interpreting wills. A will incorporates a series of choices, which are unilateral acts, and plays a role in our society completely different from that performed by legal instruments which are the product of multiple actors – such as contracts or laws. Subject to public policy concerns, there is no good reason to give a testator's last will and testament a meaning not completely faithful to her wishes.*

*[11] Parties who advance a claim to property the testator disposes under her will and others with a legitimate interest in ensuring that the testator's intentions are honoured may present to the court information about the life of the testator which may assist the court allocate the testator's property in the manner she wished. There is one qualification which must be stated. Because Ms. Lubberts made her*

---

<sup>65</sup> *Ibid.* at paras.40-41.

<sup>66</sup> 2014 ABCA 216.

*will on April 8, 2008, the Court may not review evidence that relates to the intention of the testator with respect to specific dispositions. But this is not the case for wills made after January 31, 2012. Section 26(c) of the Wills and Succession Act, S.A. 2010, c. W-12.2 states that a court “may admit ... evidence of the testator’s intent with regards to the matters referred to in the will”.*

*[12] Ms. Lubberts did not intend to give her entire estate to Paul and Irene and leave nothing to her other two children. The words in the April 8, 2008 will and other relevant information disclose that the testator intended to create a trust for the benefit of her children and grandchildren. As the parties have agreed that she failed to create a valid trust, it follows that her estate will be distributed in accordance with governing intestacy principles.*

*[13] Justice Ross came to the correct conclusion.*

With respect to the testator’s intention, the Court found that she was a mother interested in the future financial security of her children and grandchildren, and that a gift to only two of her children that would leave nothing for her other two children and several grandchildren did not make sense. The Court found that the “likelihood she intended to do this is very low”.<sup>67</sup> They also noted that nothing in the Holograph Will revealed a desire on the testator’s part to disinherit any of her children. If she had such an intention, she would have said so in plain English. In earlier versions she made it clear that one of her grandchildren had annoyed her sufficiently that he was out of the will.<sup>68</sup> Both the appellants and respondents had their costs on a full indemnity basis from the estate.

## **ANALYSIS AND CONCLUDING COMMENTS**

The recent decisions evidence a balancing act where courts attempt to exercise, to favour a presumption against intestacy, while not speculating or construing words to give a forced meaning to the will simply to avoid intestacy. It appears that courts are attempting to balance testators’ true intentions as against the deceased’s next-of-kin’s statutory rights to inherit under intestacy legislation. From the within review, it can also be gleaned that Courts will often take steps to avoid intestacies where distant or

---

<sup>67</sup> *Ibid.* at para.72.

<sup>68</sup> *Ibid.* at para.72.



unknown relatives would inherit in a manner that would apparently be counter to the testator's intentions.

The law on intestacies is tricky in that it requires the reviewing court to consider in part, at least, what the testator's intentions were at the relevant time. The involvement of the court at that juncture necessarily raises with it the question of what a court is entitled to interpret, import, construe and rectify as well as the historic distinction between courts of probate and courts of construction.

To begin with, however, it cannot be said that the state of the law is such that a finding of intestacy can only be made if there is a finding that the testator intended to die intestate. The statutory rights of surviving spouses and next of kin are given weight for the very reason that the law presumes that certain individuals are entitled to inherit, and that this may well reflect the intentions of the deceased. Furthermore, in many cases where partial intestacies are found, courts do not find or need to find that there was an intention of the deceased to die intestate.

In the 1991 decision of *Downey Estate v. Foster*<sup>69</sup> Lissaman J., wrote as follows in response to the argument that the testator's purported revocation of her will was conditional on the execution of another will:

*A finding of an intestacy in no way depends on an intention to die intestate and there is no room for the application of any presumption against intestacy.*

If indeed a finding that a testator died wholly or partially intestate does not depend on the existence of an intention to do so, then the question of the scope and application of the so-called "presumption against intestacy" arises. The courts have frequently treated this as a presumption of intention, that is, that the person did not indeed intend to die intestate. However if, as Lissaman J., reasoned, an intestacy need not be supported by an intention of intestacy, then where does that leave the presumption against intestacy?

---

<sup>69</sup> *Downey Estate v. Foster*, [1991] O.J. 3845 (Gen.Div.)

One possible way of reasoning this is to view the presumption of an intention in favour of testacy rather than intestacy as a principle of construction that is applied with the words in a will – construed in accordance with other applicable rules of construction concerned with disclosing the meaning to be given to them – are capable of more than one interpretation. In those cases, interpretations that will avoid intestacy are preferred to those that would give rise to intestacy. This concept and use of the presumption against intestacy is established in the authorities cited within.

That being said, this principle is somewhat difficult to reconcile in light of the decision in *Frohlich*.<sup>70</sup> As such, it is a difficult for a reviewing court faced with a choice between different constructions, each of which stems from the wording in a will. In fact, under the guise of interpreting the actual words used, the court in that case appeared to be adding words that reflected what the court believed the testator would have intended if her attention had been directed to the gap in the dispositions made in the will. It would seem preferable then, in the interests of clarity to explain such cases not in terms of a presumption of intention, but rather on the basis of a more general principle that intestacies are to be avoided.

Another complex area that these decisions touch upon, is in the blurring of the distinction between principles applied where a court is rectifying the words of a will in an exercise of its probate jurisdiction vis a vis the rules of construction. Traditionally, there were two main differences in approach. First, direct evidence of a testator's intention is relevant and admissible in the exercise of its probate jurisdiction, yet only exceptionally in a court of construction; and, second, while construing a will a court may insert words in rectification of a will, while in its probate jurisdiction only permitted to delete words.

This issue of the distinction between, and the roles of courts of construction and probate is complex but relevant as it sets out what courts can and cannot do to attempt to deal with complicated situations where the deceased's intentions are not clear. Historically, courts of probate were charged with determining whether the testator's intentions as

---

<sup>70</sup> *Supra*, note 24

expressed in the will comply with the formal requirements for valid wills. And the job of correcting wrongly omitted or inserted words “fall[s] squarely within the jurisdiction of a court of probate whose function is to accept as provisions of such a will only words that contain the testamentary intentions of the deceased and to reject words that do not do so.”<sup>71</sup> It is to the court of probate to determine whether words do not reflect the testator’s testamentary intentions and whether they ought to be struck.

This leaves it then to the court of construction to interpret the words that the probate court has deemed to reflect the intentions of the testator.

In cases like *Lipson v. Lipson*<sup>72</sup> it is sometimes difficult to tell whether the court was referring to the probate jurisdiction to rectify wills, or to questions of construction. This tendency to blur the distinction - encouraged, perhaps, by the reasoning of the Court of Appeal in *Ronde*<sup>73</sup> - may have occurred in *McLaughlin*<sup>74</sup> where the nature of the corrections made by the court were not described, but the court appeared to accept that it had jurisdiction to add words in an exercise of its probate jurisdiction. By relaxing the rules of admissibility and permitting words to be added, the door may have been irreparably opened to an expanded exercise of jurisdiction to rewrite wills so as to avoid intestacies. The necessarily subjective application of the court set rules in light of the facts of each case, and the apparent increased willingness of courts to make findings so as to avoid intestacy, makes for an interesting and constantly evolving body of judge made law. What is increasingly more difficult for the litigator in Ontario, is to predict which approach a court may take and in turn to predict certainty of outcome.

*This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Please visit our website at <http://www.whaleyestatelitigation.com>*

<sup>71</sup> Cullity, M., “Rectification of Wills – A Comment on the *Robinson Case*”, ETPJ, vol. 31, no. 2, February 2012, pages 127 to 136, at page 134.

For a fulsome discussion on the distinction between the court’s Probate Jurisdiction and the Jurisdiction to Interpret Wills, see pages 132 to 134.

<sup>72</sup> *Supra*, note 17

<sup>73</sup> *Supra*, note 11

<sup>74</sup> *Supra*, note 18

*The authors do not give up publication or copyright associated with these materials.*

*Kimberly A. Whaley and Ameena Sultan*

*October 2014*

