WHERE THERE'S (NOT) A WILL: INTESTACIES, PARTIAL INTESTACIES AND REMEDIES

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INTRODUCTION

Intestacies, whether full intestacies, or partial intestacies, occur for a variety or reasons. Possible scenarios include a person dying not having executed a will, inadvertently or deliberately; a deceased person's previously executed will having been revoked by marriage; the testator having chosen to revoke or destroy a will; a beneficiary to whom a residuary gift is made having predeceased the testator; or a testator's will, or a portion thereof, being declared invalid due to a drafting error, undue influence, lack of capacity, or other reasons.

In Ontario, *the Succession Law Reform Act*[1] governs intestacies and partial intestacies and provides a statutory framework under which an estate, or a portion of an estate, is to be distributed where it is not properly covered by the terms of a will. In the most basic terms, the *SLRA* provides that in an intestacy, the deceased's spouse and family members will inherit through a prescribed order of priority. Interesting factual scenarios arise, however, where a testator dies inadvertently intestate or partially intestate, through a mistake that undermines the executed will, such that individuals whom the deceased may not have even known, or from whom the testator was estranged, end up inheriting, counter to the testator's intentions.

In this paper we review recent intestacy and partial intestacy cases and examine how the courts have interpreted and remedied situations of complex, flawed or unclear wills, drafting errors, or scenarios where the named beneficiaries can no longer benefit. The following cases show the delicate balancing act that must be performed by reviewing courts in dealing with wills that are less than clear, in cases that are often brought to the courts by those with sharply competing interests.

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1. R.S.O. 1990, c. S.26 ("*SLRA*").

ONTARIO'S INTESTATE LEGISLATION: WHO INHERITS ON AN INTESTACY?

In Ontario, inheritance under an intestacy is governed by Part II of the *SLRA*.

The relevant sections of the *SLRA*[2] provide that on an intestacy or partial intestacy, property[3] will pass to the spouse, children and next of kin of the deceased according to a set order of priority.

Spouses are first in the order of priority in an intestacy. For the purposes of an intestacy, a "spouse" is defined as a married spouse.[4]

If the deceased is survived by a spouse and no children, then the entire property passes to the surviving spouse. Section 44 of the *SLRA* provides as follows:

> 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.

If the deceased has left a spouse and children, then the spouse receives the preferential share, currently prescribed as $200,000. The balance of the deceased's property, if any, is subsequently divided between the spouse and the child or children.[5] If there is one child, the spouse is entitled to one-half of the residue in addition to the $200,000 and the child receives the other half of the residue.[6] If there is more than one child, the spouse is entitled to the $200,000 plus one-third of the residue and the children would divide two-thirds of the residue among themselves.[7]

In cases where a deceased has no spouse and no children, the property passes to the deceased's parents, brothers and sisters, or nieces and nephews, in that order. If the deceased is not survived by any of these family members, then the property passes to the deceased's "next of kin".[8]

2. Sections 44 to 49.
3. The term "property" is used in the relevant sections of the *SLRA*, presumably as a reflection of the possibility that a deceased die intestate not in respect of his or her entire estate, but in respect of a portion of the estate in which case a partial intestacy arises
4. "Spouse" is defined under s. 1 of the *SLRA* and for the purposes of an intestacy as "either of two persons who, (a) are married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act."
5. Section 45, *SLRA*.
6. Section 46, *SLRA*.
7. Section 47, *SLRA*.
8. Section 47(6), *SLRA*.

Legislation similar to the *SLRA* is found in other provinces.[9] The basic premise of the legislation is that a person's spouse and family members are the rightful beneficiaries of a deceased's estate. However, depending on the facts and circumstances of each person's particular family tree, the family members who end up inheriting could include individuals whom the deceased did not know or choose to know.[10]

THE GOLDEN RULE: THE PRESUMPTION AGAINST INTESTACY

The primary rule of will interpretation is that a court ought to strive to give effect to the testator's subjective intentions.[11] Courts refer to this as the "golden rule", also known as the presumption against intestacy.[12]

The application of the golden rule means that in cases where there are two possible constructions of a will, one which would effectively direct the disposition of all or part of an estate, and another which would lead to an intestacy, then the court will likely prefer the former.[13]

A court's analysis is guided as well by the rules on the admissibility of evidence. While a court may look to the words in the will to determine a testator's intentions, it is proscribed from applying direct extrinsic evidence of third parties. The leading Ontario Court of Appeal case of *Robinson Estate v. Robinson*,[14] confirmed the inadmissibility of such extrinsic evidence in the construction of a will:

9. See the CBA's Table of Concordance of Provincial Succession Laws at www.cba.org/CBA/sections_wills/main/Tables_2013.aspx.
10. As an interesting aside, the U.K. recently made changes to its inheritance legislation. The *Inheritance and Trustees Powers Act 2014 (IPTA 2014)* came into effect October 1, 2014. The new legislation is similar to Ontario's *SLRA*; however it has expanded classes of intestate heirs to include civil partners, adopted children and other family relationships. The legislation also provides for an indexed spousal preferential share which allows for increases in value upon periodic review.
11. *Burke, Re* (1959), 20 D.L.R. (2d) 396, [1960] O.R. 26 at p. 30, [1959] O.J. No. 706 (Ont. C.A.).
12. See *Kapousouzian Estate v. Spiak*, 2014 ONSC 2355, 240 A.C.W.S. (3d) 1051, 2014 CarswellOnt 7387 (Ont. S.C.J.) at para. 13 [*Kapousouzian*]; *Frohlich Estate v. Wedekind*, 2012 ONSC 3775, 217 A.C.W.S. (3d) 1005, 2012 CarswellOnt 8099 (Ont. S.C.J.) at para. 22 [*Frohlich*]; *MacDonnell, Re* (1982), 133 D.L.R. (3d) 128, 11 E.T.R. 52, 35 O.R. (2d) 578 (Ont. C.A.).
13. *Kapousouzian, ibid.*, citing *Tribble Estate v. McGuire* (1993), 1 E.T.R. (2d) 69, 42 A.C.W.S. (3d) 1113, [1993] O.J. No. 2274 (Ont. Gen. Div.) at para. 12.
14. 2011 ONCA 493, 337 D.L.R. (4th) 193, 7 C.P.C. (7th) 231 (Ont. C.A.), leave to appeal refused (2012), 295 O.A.C. 400 (note), 433 N.R. 393 (note), 2012 CarswellOnt 1518 (S.C.C.) [*Rondel*].

> . . . 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 is 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.
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> 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.[15]

The only exception to the rule precluding direct extrinsic evidence of intent in a court of construction is where there is an "equivocation" in the will.[16]

Rondel also set out other categories of evidence that are potentially admissible for consideration in the interpretation of a will:

- circumstances including the character and occupation of the testator;
- the amount, extent and condition of the testator's property;
- the number, identity, and general relationship to the testator of the immediate family and other relatives;
- the persons who comprised the testator's circle of friends; and
- any other "natural objects of his [or her] bounty".[17]

To determine the testator's intentions, the court will invoke the so-called "armchair rule" where the court will notionally "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".[18]

15. *Ibid.* at paras. 23-24 (emphasis added).
16. *Ibid.* at para. 29.
17. *Ibid.* at para. 26 quoting Bayda J.A. in *Haidl v. Sacher* (1979), 106 D.L.R. (3d) 360, 7 E.T.R. 1, [1979] S.J. No. 428 (Sask. C.A.).
18. *Kapousouzian, supra* footnote 13 at para. 11.

Rondel, as well, set out the circumstances under which a court would 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.[19]

In the 2009 case of *Lipson v. Lipson*,[20] Justice Pattillo set out the circumstances that must be met before a court may delete or insert words to rectify an error in a will. Those scenarios are set out as follows:

> 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.[21]

RECENT CASE LAW

Below is a review of select recent cases that address potential intestacies. The decisions show that each decision turns on the particular facts of the case. The courts continue to apply the "golden rule" and the "armchair rule" and try to avert intestacies where possible, while balancing the complex and daunting rules of the admissibility of applicable extrinsic evidence.

The following cases have been divided into two categories: the first, where the court found against an intestacy; and the second, where the court found an intestacy or partial intestacy.

19. *Rondel*, *supra* footnote 14 at para. 24.
20. (2009), 52 E.T.R. (3d) 44, 183 A.C.W.S. (3d) 302, [2009] O.J. No. 5124 (Ont. S.C.J.) at para. 42 [*Lipson v. Lipson*].
21. *Ibid.* at para. 42.

i) Cases Where The Court Found Against an Intestacy

McLaughlin Estate v. McLaughlin[22]

In this Ontario 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 the testator's explicit intentions. However, in subsequent proceedings the rectified secondary will was held to be invalid by a motions judge, who found the testator could not have knowledge and approval of the contents of a will she had never read. The court then ordered the primary will to be proven in solemn form.[23]

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.

In 2010, Mrs. McLaughlin executed two wills: a primary will and a secondary will. She had also previously executed wills in 1991, 1994 and 2002.

The 2010 secondary will exclusively addressed the disposition of Mrs. McLaughlin's house while the 2010 primary will dealt with the balance of her estate.

In the process of preparing the wills, the drafting solicitor had confirmed with Mrs. McLaughlin that she had no relationship with Thomas or Judith, and that she did not want to include them as beneficiaries in her wills. Mrs. McLaughlin had excluded these two children from her previous wills. In the drafting of the 2010 wills, the drafting 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 errors was that the named beneficiaries could claim entitlement to two separate bequests, one under the primary will and one under the secondary will and the residue under the secondary will would be distributed on intestacy among all five of her children instead of just the intended three children.

Furthermore, both wills included the following paragraph: "I hereby revoke all wills made before this will", which had the inadvertent effect of revoking the primary will, leaving only the secondary will, also resulting in intestacy.

22. 2014 ONSC 3162, 99 E.T.R. (3d) 71, 242 A.C.W.S. (3d) 1003 (Ont. S.C.J.).
23. *McLaughlin v. McLaughlin*, 2015 ONSC 3491, 2015 CarswellOnt 7998 (Ont. S.C.J.); *McLaughlin Estate v. McLaughlin*, 2015 ONSC 4230, 2015 CarswellOnt 9800 (Ont. S.C.J.).

The estate trustee, who was 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 clear 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 an intestacy, such that all of the children should share in the estate. Judith stated that it was implausible that so many individuals including Mrs. McLaughlin, the drafting solicitor, his secretary, and Daniel had reviewed the wills and not noticed the errors. She argued that if Mrs. McLaughlin read over the secondary will and understood it, it should be presumed that she knew and approved of the contents.[24] Judith argued 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.[25]

Thomas, who was also excluded from the wills, adopted Judith's argument and added his own, including asking the court to declare the entire estate intestate and order it divided in a manner that took into account abuse he had allegedly suffered at the hands of his mother and father.[26]

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

> Ultimately, the answer to this question is resolved in considering the balance of probabilities of what must have occurred. Finding that Mrs. McLaughlin read and knew what she was signing and intended the result that would occur would not make sense given the balance of the evidence 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 the intestacy even though the document that created the intestacy also duplicated the bequest to her grandchildren and daughters-in-law. I would have to 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 entire 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.[27]
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> . . . The effect of leaving out the residue clause would lead to intestacy and I should avoid that.[28]

24. *Ibid.* at para. 41.
25. *Ibid.* at para. 45.
26. *Ibid.* at para. 48.
27. *Ibid.* at para. 79.
28. *Ibid.* at para. 82.

Justice Lemon found that this was "one of those exceptional cases that requires a rectification of the will" as signed by Mrs. McLaughlin.[29] Justice Lemon looked at the drafting errors and the surrounding circumstances and concluded as follows:

> . . . I find that the clerical error of [the drafting solicitor] has created a document that does not reflect the wishes of Mrs. McLaughlin. Creating 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.[30]

However, subsequent to the ruling of Lemon J. a motion was brought by the estate trustee of Mrs. McLaughlin's estate to vacate the previous notice of objection that had been filed by the disinherited children that had thwarted the issuance of a certificate of appointment. The estate trustee took the position that as the secondary will had been rectified and the previous wills also disinherited Judith and Thomas, they had no financial interest and therefore could not file a notice of objection. In addition the estate trustee contested the objection as the objections were not supported by affidavit evidence.[31]

Justice Price adjourned the issue of whether the notice of objection could be vacated until a determination was made about which of the wills of Mrs. McLaughlin was her last will and testament.[32] The court also adjourned the issuance of the certificate of appointment of Daniel McLaughlin so that Judith and Thomas could file proper affidavit evidence.[33]

Justice Price then invoked his jurisdiction as a probate court to take an inquisitorial approach concerning the probate and non-probate wills validity by invoking Cullity J.'s decision in *Otis v. Otis* and in *Etore v. Etore Estate*.[34] Justice Price then turned his mind to the evidence he could consider as a superior court judge sitting as a probate court. He invoked an article of Cullity J. for the proposition that:

> [W]hile direct evidence of a testator's intentions is admissible in a court of construction only in exceptional cases-for the main part cases of

29. *Ibid.* at para. 86.
30. *Ibid.* at para. 87 (emphasis added).
31. *McLaughlin v. McLaughlin*, 2015 ONSC 3491 at paras. 19-20 and 28-30.
32. *Ibid.* at para. 30.
33. *Ibid.* at para. 19.
34. *Ibid.* at paras. 31-34; *Otis v. Otis*, 2004 CarswellOnt 1643, 7 E.T.R. (3d) 221, [2004] O.J. No. 1732 (Ont. S.C.J.); *Ettorre Estate, Re*, 2004 CarswellOnt 3618, 11 E.T.R. (3d) 208, [2004] O.J. No. 3646 (Ont. S.C.J.).

> equivocations – there has been no such limitation in a court of probate. In any case where it is alleged that words had been included in a will contrary to the intentions of the testator and, in consequence, without her knowledge and approval, direct evidence of such intention will normally be required and will be admissible.[35]

The court then turned to the findings of Justice Lemon focusing on Lemon J.'s statement that neither the drafting solicitor nor Mrs. McLaughlin could have read her most recent will.[36] Justice Price in describing a probate court's jurisdiction stated:

> A probate judge has an obligation, independent of the parties' positions, to ascertain the intention of testator where there is an obvious issue as to the formal validity of a Will. As Lemon J. was being asked to address the issue of rectification, and was not invited to determine the formal validity of the Will, he was not called upon to consider the implications of having found that the testatrix never read her Will. On this basis, the issue would not be *res judicata*, and this court would not be precluded by the doctrine of issue estoppel from considering it.[37]

The court then ordered a subsequent hearing to receive submissions on whether the will was valid in light of Lemon J.'s finding it had not been read by the testator or solicitor.[38] In addition, Price J. ordered there to be submissions on whether the rectification of the will as ordered by Lemon J. necessarily imbues the will with validity, which would therefore not allow the court to consider its validity as it would be sitting in appeal on Lemon J.'s rectification.[39]

At the return of the hearing Justice Price held that the secondary will was invalid and ordered the primary will be proven in solemn form.[40] In making this finding the court noted that counsel for Mr. Walsh, the drafting solicitor and counsel for the estate trustee, acknowledged that the court was not precluded from making a determination as to the validity of the secondary will. The court and counsel appeared to be *ad idem* that rectification and proving a will in solemn form were separate matters and therefore Justice Price would not be reviewing the correctness of Lemon J.'s reasons.[41]

Justice Price found that he was bound by Justice Lemon's findings that the will had not been read by the drafting solicitor or the testator.[42]

35. *Ibid* at para. 40.
36. *Ibid.* at para. 46.
37. *Ibid.* at para. 47.
38. *Ibid.* at para. 50.
39. *Ibid.* at para. 48.
40. *McLaughlin v. McLaughlin*, 2015 ONSC 4230 at para. 89.
41. *Ibid.* at para. 35.

The court provided a rich analysis of what it means for a testator to have knowledge and approval of the contents of a will. In concluding the secondary will was invalid the court stated:

> The often-quoted passage is that, "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 put before me as carrying it out.'" This passage has been relied on as the basis for rectifying many wills, and Mr. Rabinowitz would argue that provides a rationale upon which a court could find that a will such as the one in *Lipson* was valid, although the validity of that will was not an issue before the court in that case. A proper understanding of the principle, however, requires a reading of the full passage from *Parker v. Felgate*, which the Privy Council approved, and our Supreme Court upheld:
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> > *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."
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> In cases where a will has been prepared in accordance with the testator's instructions, the testator's failure to read it, or hear it read, will not invalidate it. However, the principle cannot give validity to a will that has not been prepared in accordance with the testator's instructions, after the court has rectified it. In such a case, neither a reading of the will by, or to, the testator, nor the solicitor's preparing of the will in accordance with the testator's instructions, as in *Parker v. Felgate*, has occurred to support a finding of validity. *Parker* is premised on the solicitor taking instruction *and preparing the will in accordance with those instructions*. In the present case, and in *Lipson*, that did not occur. The lawyer did not draft the will according to the client's instructions. Because the testatrix also did not read the will or have it read to her, there was no safeguard to ensure that it reflected her instructions.
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> In cases where wills are rectified *and there is a clear finding that the testator could not have read the will or had it read to her* because the mistake is patent, as it is here and was in *Lipson*, a judge, while addressing the issue of rectification, could also determine that the will is invalid, based on the testatrix's lack of knowledge and approval of its contents. The exception in *Parker* would not apply in those circumstances. Whatever the solicitor's instructions, he clearly did not follow

42. *Ibid.* at paras. 63-67.

> them, as is obvious (and as was obvious to Lemon J.) based on the patent errors in the secondary will.[43]

The court therefore declared the secondary will invalid and ordered the primary will be proven in solemn form, leaving open the possibility that there could be a partial intestacy. The ruling of Justice Price is currently under appeal at the Court of Appeal.

Frohlich Estate v. Wedekind

In this Ontario 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. She passed away in 2007. Her will provided that 25% of the residue of her estate was to go to Jurgen Frohlich. However, 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 to $500,000. The executor sought a determination of whether the monies ought to be distributed amongst the surviving named residuary beneficiaries under the will, or the deceased's next of kin. The residuary beneficiaries under Ms. Frohlich's will were relatives of her late husband, with whom she had had a relationship. Her next of kin, on the other hand, were relatives living in Germany whom Ms. Frohlich had never met. These relatives were located not through any personal contact but through the services of 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 intentions 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".[44] The court concluded as follows:

> 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.
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> . . . . .
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> 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.[45]

43. *Ibid.* at para. 82-84.
44. *Frohlich Estate v. Wedekind*, 2012 ONSC 3775, 217 A.C.W.S. (3d) 1005, 2012 CarswellOnt 8099 (Ont. S.C.J.) [*Frohlich*].

Justice Gunsolus found a contrary intention in the Will "with the assistance of evidence of her friends"[46] 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.

Dick, Re[47]

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

The deceased's holograph will read as follows:

> 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 the testator's four surviving children. The deceased had had two other children who predeceased her. Those deceased children were survived by their own children, the deceased's grandchildren. The deceased had no spouse at the time of her death. Under the Alberta *Intestate Succession Act*,[48] if an intestacy had been 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*, by Professor Albert Oosterhoff,[49] concluded as follows:

> 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 dispository effect. As it is followed by the listing of the Testatrix's

45. *Ibid.* at paras. 17 and 22.
46. *Frohlich*, *supra* footnote 44 at para. 23.
47. 2011 ABQB 704, 73 E.T.R. (3d) 136, (*sub nom.* Cuthbertson Estate, Re) 526 A.R. 195 (Alta. Q.B.) [*Cuthbertson*].
48. R.S.A. 2000, c. I-10.
49. Albert Oosterhoff, *Wills and Succession: Text, Commentary and Materials*, 6th ed. (Toronto: Thomson Carswell, 2007).

> 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.[50]

McGregor Estate, Re[51]

In this case, the British Columbia Supreme Court was asked for an opinion with respect to a residual clause in the will of Nell McGregor. The applicant was the Bank of Nova Scotia Trust Company, the executor of the estate.

In her will, Ms. McGregor had left the residue of her estate to "Auxiliary to Woodlands" ("Woodlands"), a charity that no longer existed at the time of her death. The executor sought direction on whether the will set out a general charitable intent such that the *cy-pres* doctrine applied, or in the alternative, whether the gift would lapse and pass on an intestacy.

The terms of Mr. McGregor's will provided that the residue of her estate was to be placed in trust for the lifetime of her son who was mentally disabled. The will provided that on the testator's son's death, the residue would then pass to a charity, Woodlands, which was the home in which her son had lived.

Approximately one year after Ms. McGregor died, Woodlands closed down. Her son was relocated to a different home, operated by Healthy Opportunities for Meaningful Experience Society ("H.O.M.E.S."). The testator's son resided there until his death in 2013.

At the time of the testator's son's death, the residue of the estate was valued approximately $250,000. If the court found an intestacy, the sole heir pursuant to British Columbia's intestacy legislation[52] would have been a distant relative in England. In the course of its administration and the proceedings, the executor sent a letter to the relative in England 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:

50. *Cuthbertson, supra* footnote 47 at para.10.
51. 2014 BCSC 896, 241 A.C.W.S. (3d) 252, 2014 CarswellBC 1370 (B.C. S.C.) [*McGregor*].
52. *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13.

> *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.[53]

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 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.[54]

Justice Power then applied the reasoning in *Buchanan Estate, Re*[55] and *Montreal Trust Co. v. Richards*,[56] 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".[57] 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.[58]

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 the use of the funds to the extracurricular activities of their residents to meet the testator's intention to benefit and improve the lives of mentally challenged persons.

53. *McGregor, supra* footnote 51 at paras. 19-20.
54. *McGregor, supra* footnote 51 at para. 28.
55. (1996), 11 E.T.R. (2d) 8, 61 A.C.W.S. (3d) 841, [1996] B.C.J. No. 402 (B.C. S.C.), affirmed (1997), 20 E.T.R. (2d) 100, 44 B.C.L.R. (3d) 283, 164 W.A.C. 55 (B.C. C.A.).
56. (1982), 14 E.T.R. 108, [1983] 1 W.W.R. 437, 40 B.C.L.R. 114 (B.C. S.C.).
57. *McGregor, supra* footnote 51 at para. 30.
58. *McGregor, supra* footnote 51 at paras. 34-35.

Marley v. Rawlings[59]

This case of the Supreme Court of the United Kingdom provides insight on the issue of rectification of wills in the United Kingdom. In this case the court chose to rectify a will, which resulted in the testator's two sons receiving nothing and his entire estate passing to a man who was not related to him but whom he had 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 Marley. Mr. Marley was not related to them but they had both treated him as their son.[60] By an oversight, however, the solicitor had each spouse execute the other spouse's will and nobody noticed. The error went unnoticed after Mrs. Rawlings's death in 2003. It was only upon Mr. Rawlings's passing in 2006 that the error was noticed. Mr. Rawlings's estate was valued at approximately £70,000.

The Rawlings's two sons challenged the validity of the Mr. Rawlings's will. Mr. Marley, the named beneficiary in both wills, argued that the will ought to be rectified by the court.

In probate proceedings the court found that 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 the will had been signed by the named testator, it was not open to the court to rectify the will under the *Administration of Justice Act 1982*. Section 20 of that Act 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 for a will as set out in the *Wills Act 1837*. Mr. Marley appealed that decision to the Supreme Court.

Lord Neuberger, writing for the majority, first reviewed the approach to be taken in interpreting wills in the U.K., writing as follows:

> 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.[61]

59. [2014] UKSC 2 (U.K. S.C.).
60. Note: The decision makes no reference to the relationship between the testator and his sons or why he might have chosen to disinherit them.

Lord Neuberger noted 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".[62]

Lord Neuberger also referred to s. 21 of the *Administration of Justice Act 1982* that provides that where a will or a 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).[63]

The court dismissed the sons' two arguments that the will could not be rectified as it was not a "will", and 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 met the legal definition of a "will" such that it could be rectified:

> 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*].[64]

61. *Marley v. Rawlings*, *supra*, footnote 59 at para. 20.
62. *Ibid.* at para. 23.
63. *Ibid.* at para. 54.
64. *Ibid.* at para. 60.

With respect to the sons' argument that there had been no clerical error, 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 s. 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 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 s. 20(1)(a), provided of course the testator's intention was clear.[65]

The Supreme Court allowed the appeal and held that the will should be rectified such that it reflected Mr. Rawlings's name rather than 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 Estate v. Spiak[66]

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

Violet Kapousouzian died in 2011 with a will that was executed in 1973. The value of her estate was approximately $350,000. The issue before Justice Wilton-Siegel was a bequest in the testator's will to four named beneficiaries, who were children of her first cousin and who 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 were made to locate other relatives of Violet who would inherit under an intestacy. The search led to two first cousins in Bulgaria (the "Bulgarian cousins"). There was evidence that Violet had had contact with these Bulgarian cousins in the 1970s and 80s, but not subsequently.

Justice Wilton-Siegel referenced the general rule:

65. *Ibid.* at para. 72.
66. 2014 ONSC 2355, 240 A.C.W.S. (3d) 1051, 2014 CarswellOnt 7387 (Ont. S.C.J.) [*Kapousouzian*].

> . . . 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.[67]

Referring to the first exception, Justice Wilton-Siegel noted that the four beneficiaries were named individually and there was no evidence that Violet had intended to treat them as a class.[68]

As for the second exception, Wilton-Siegel J. concluded that there was not enough evidence to establish that Violet had a contrary intention to intestacy. Justice Wilton-Siegal distinguished the facts from those in *Frohlich* on the following grounds:

- Violet knew that 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.[69]

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: "[t]he 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."[70]

Wilton-Siegel J. found that "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.[71] The residue passed on intestacy pursuant to s. 47(6) of the *SLRA* to Violet's Bulgarian cousins.

Das Estate v. Acevedo[72]

In this decision, the Nova Scotia Supreme Court found in favour of intestacy. Unlike the *Kapousouzian* decision, however, it was not

67. *Ibid.* at para. 10.
68. *Ibid.* at para. 15.
69. *Ibid.* at paras. 19-24.
70. *Ibid.* at para. 25.
71. *Ibid.* at paras. 26-27.
72. 2012 NSSC 441, (*sub nom.* Das Estate, Re) 324 N.S.R. (2d) 305, 1029 A.P.R. 305 (N.S. S.C.) [*Das Estate*].

distant relatives who 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 and that she could use such sums of income and capital of his estate as she saw fit. Although Mr. Das and his wife had separated, they had not divorced and were on good terms near the end of his life. The excluded RBC account held nearly $1,000,000 while the balance of Mr. Das's his estate was worth only approximately $24,000. 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 will did not make any provision for the distribution of the funds in the RBC account, except in the case where Mr. Das's wife failed to survive him by ten days, in which case the account was to pass to his daughter and various charities. As Mr. Das's wife did survive him by more than ten days there was no manner set out in the will for the distribution of those funds.[73] 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 Mr. Das's wife. Justice LeBlanc considered these documents to be testamentary in nature, but held that while they were persuasive, they were not binding.[74] Those documents provided guidance to the executor in distributing the estate but she was not legally required 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.[75]

LeBlanc J. 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.[76]

73. *Ibid.* at para. 10.
74. *Ibid.* at para. 22.
75. *Ibid.* at para. 32.

LeBlanc J. 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's intentions, including that Mr. Das intended to create an 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.[77] LeBlanc J. 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".[78]

LeBlanc J. 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".[79]

He then 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 10 days. The account passed to his wife and daughter on a partial intestacy.[80]

Malo v. Markowsky[81]

In this Saskatchewan decision, the executor had applied to the court for directions regarding an "ambiguous" clause in the will of

76. *Ibid.* at para. 33 citing *Re Follett Estate*, [1955] 1 W.L.R. 429.
77. See *Stork Estate v. Stork* (1990), 38 E.T.R. 290, 72 O.R. (2d) 625, [1990] O.J. No. 617 (Ont. H.C.), and *Myhill Estate v. Office of the Children's Lawyer* (2001), 39 E.T.R. (2d) 90, [2001] O.T.C. 303, [2001] O.J. No. 1570 (Ont. S.C.J.).
78. *Das Estate*, *supra* footnote 72 at para. 46.
79. *Das Estate*, *supra* footnote 72 at para. 51.
80. *Das Estate*, *supra* footnote 72 at para. 62.
81. 2014 SKQB 261, 244 A.C.W.S. (3d) 995, 1 E.T.R. (4th) 267 (Sask. Q.B.) [*Markoswsky*].

John Markowsky who died in 2013. The clause in question stated as follows:

> (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.[82]

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 that all of the money in the account at the Prince Albert Credit Union was to be divided among the listed persons.[83]

At the time of his death the deceased did not have any government bonds. His UGG shares were valued at approximately $888 and he had approximately $430,000 on deposit at the Prince Albert Credit Union divided between a main account ($110,000), a small account ($5) and 10 term deposit accounts (valued at $320,000 together). The will did not refer to, or describe, any of these individual accounts.

No extrinsic evidence was provided to aid in the interpretation of the will.[84] Justice Tholl started by reviewing the will itself to determine the deceased's intentions:

> 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.[85]

Tholl J. 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.[86] He then went on to apply the "armchair" rule:

82. *Ibid.* at para. 4.
83. *Ibid.* at para. 5.
84. *Ibid.* at para. 6.
85. *Ibid.* at para. 13.
86. *Ibid.* at paras. 7-8.

> 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 to his investment or term deposit accounts. Also, based on the wording in the will it was clear to the court that the deceased intended to deal only 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, 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. 3(e)(9)(a) to (f). Such an intention is not discoverable when examining the will as a whole.[87]

The UGG shares, valued at $888, were ordered to be divided amongst the listed beneficiaries and the court declared that the deceased died intestate with respect 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. The facts were, however, that the deceased had four children and multiple grandchildren but no spouse. Under *Saskatchewan's Intestate Succession Act 1996*,[88] where there is no spouse but issue, the estate is to be divided *per stirpes* among the issue.

Hanson v. Mercredi[89]

In this decision of the Alberta Court of Queen's Bench, the court concluded that the testator would not have intended to disinherit any

87. *Ibid.* at para. 16.
88. S.S. 1996, c. I-13.1.
89. 2012 ABQB 506, 80 E.T.R. (3d) 307, (*sub nom.* Lubberts Estate, Re) 548 A.R. 1 (Alta. C.A.) [*Lubberts*].

of her children and found a partial intestacy under which all of her children would inherit.

The deceased, Johanna Lubberts, died in 2009 and was survived by her four children. Ms. Lubberts had made a holograph will in 2008, after previously executing a will drafted by a lawyer in 2002. She had also 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."[90]

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 make these decisions together and without yielding to any pressure applied by possible recipients.[91]

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.[92] 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.[93] 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. The court concluded that the testator had intended that Paul and Irene act as a "conduit for the distribution of her estate".[94]

90. *Ibid.* at para. 18.
91. *Ibid.* at para. 9.
92. *Ibid.* at para. 15.
93. *Ibid.* at paras. 19-21.
94. *Ibid.* at para. 28.

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 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.[95]

Paul and Irene appealed this decision to the Alberta Court of Appeal. The appeal court upheld the motion judge's decision.[96] In making its decision, the appeal judges set out three questions to address. These were as follows:

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? Or did the testator intend to make a gift of her estate or give a power of appointment to Paul and Irene?[97]

The court, in answering these questions, provided as follows:

> [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

95. *Ibid.* at paras. 40-41.
96. *Hanson v. Mercredi*, 2014 ABCA 216, 98 E.T.R. (3d) 1, [2014] 10 W.W.R. 41 (Alta. C.A.).
97. *Ibid.* at paras. 4-6.

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 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".[98] 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

98. *Ibid.* at para. 72.

her grandchildren had sufficiently upset her that she was excluding him from her will.[99]

Both the appellants and respondents were awarded their costs on a full indemnity basis from the estate.

ANALYSIS AND CONCLUDING COMMENTS

The recent decisions reflect the balancing act that courts exercise in attempting to apply a presumption against intestacy without speculating or construing words to give a forced meaning to the will simply to avoid an 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 our review, it can also be observed that courts will often take steps to avoid intestacies where distant or unknown relatives would inherit in a manner that would apparently be counter to the testator's intentions.

The law on intestacies is complex in that it requires a reviewing court to consider what the testator's intentions were at the time the will was prepared. 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 be made only 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*,[100] Justice Lissaman 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.

99. *Ibid.* at para. 72.

100. (1991), 40 E.T.R. 221, 1991 CarswellOnt 528, [1991] O.J. No. 3475 (Ont. Gen. Div.).

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 deceased did not indeed intend to die intestate. However, if, as Justice Lissaman reasoned, an intestacy need not be supported by an intention of intestacy, then the question is where that leaves the presumption against intestacy.

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*.[101] As such, it is 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 way to construe the issue is to view the presumption against intestacy as simply a preliminary presumption, and one that is not directive on courts' decisions.

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-à-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 a court is restricted to deleting words.

101. *Supra*, footnote 44.

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 expressed in the will comply with the formal requirements for valid wills. The task 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".[102] 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*[103] 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 *Rondel*,[104] may have occurred in *McLaughlin*[105] where the nature of the corrections of the rectification court were not described, but the court appeared to accept that it had jurisdiction to add words in an exercise of its probate jurisdiction.

In the decision of Justice Price in *McLaughlin*, he propounded the difference of a probate court and court of construction when considering evidence and invoking the court's inquisitorial approach as a probate court. The court stated:

> While it is true that in exercising its jurisdiction as a probate court, this court undertakes a task that forms part of its broad civil jurisdiction, a distinction must be made insofar as the court's approach to the evidence of the validity of a Will, as distinct from the interpretation of the Will, is concerned. Where this court exercises its jurisdiction as a probate court,

102. M. Cullity, "Rectification of Wills – A Comment on the *Robinson* Case" (2012), 31:2 E.T.P.J. 127 at p. 134. For a fulsome discussion on the distinction between the court's Probate Jurisdiction and the Jurisdiction to Interpret Wills, see pp. 132-34.
103. *Supra*, footnote 20.
104. *Supra*, footnote 14.
105. *Supra*, footnote 23.

> as distinct from a court of construction, it must approach the evidence before it in a distinctive manner.[106]

Where courts relax the rules of admissibility between a probate court and court of construction and permit words to be added, the door may have been 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 gauge certainty of outcome.

106. *Supra*, footnote 46 at para. 39.