THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

ESTATE LITIGATION UPDATE 2018
PAPER 4.1

Curing Deficiencies and Rectification of Wills

These materials were prepared by Stanley Rule and Taeya Fitzpatrick, both of Sabey Rule LLP, Kelowna, for the Continuing Legal Education Society of British Columbia, November 2018.

CURING DEFICIENCIES AND RECTIFICATION OF WILLS

I. Introduction

The curative power in section 58 and the rectification power in section 59 both became law in British Columbia when the *Wills, Estates and Succession Act* (the "*WESA*") came into force March 31, 2014.

As with many of the reforms in the *WESA*, the adoption of both the curative provision in section 58 and rectification provision in section 59 follow recommendations of the British Columbia Law Institute's comprehensive report on succession law, entitled *Wills, Estates and Succession: A Modern Framework* (the "*BCLI Report*"). The *BCLI Report* identified rigidities and harsh results in the law relating to both the formal requirements for a valid will, and correcting errors in a will, which these sections are intended to ameliorate.

We will first write about the substantive law of section 58 (if for no other reason than because 58 comes before 59). Then we will discuss section 59. In the last section, we will outline the procedures related to both sections.

II. Section 58

Section 58 of the *WESA* permits the court to give effect to a document, or other record, that does not comply with the formal signing and witnessing requirements for a valid will. It says:

> Court order curing deficiencies
>
> 58 (1) In this section, "record" includes data that
>
> (a) is recorded or stored electronically,
>
> (b) can be read by a person, and
>
> (c) is capable of reproduction in a visible form.
>
> (2) On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents
>
> (a) the testamentary intentions of a deceased person,
>
> (b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or
>
> (c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.
>
> (3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made
>
> (a) as the will or part of the will of the deceased person,
>
> (b) as a revocation, alteration or revival of a will of the deceased person, or
>
> (c) as the testamentary intention of the deceased person.
>
> (4) If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was.

Before this section was enacted, a defect in the execution of a will or codicil was fatal. For example, in *Toomey v. Davis*, 2003 BCSC 1211, the will-maker signed a codicil in the presence of two witnesses, but one of the two witnesses to the codicil did not sign in the presence of the will-maker. Mr. Justice Truscott was "completely satisfied that the codicil does express the true intentions of the testator as proven by the evidence and that the non-compliance with s. 4(c) was completely inadvertent and does not raise any doubt about the reliability of the codicil being a true record of the testator's wishes." Yet, because the codicil did not comply with section 5 of the *Wills Act*, the Court could not give effect to the codicil.

The *BCLI Report* recommended a broad power to allow the court to dispense with the formal requirements similar to section 23 of the Manitoba *Wills Act*. This stands in contrast to some

jurisdictions where the legislation requires some compliance with the formal requirements, such as requiring that the will-maker sign the document before the court may give effect to it. [1]

In the first reported decision in British Columbia, *Estate of Young*, 2015 BCSC 182, Madam Justice Dickson followed the Manitoba jurisprudence, and, in particular, the Manitoba Court of Appeal decision in *George v. Daily* (1997), 143 D.L.R. (4th) 27. Madam Justice Dickson's approach was quoted with approval by the Court Appeal in *Re Hadley Estate*, 2017 BCCA 311. She wrote at paragraphs 34 through 37:

> [34] As is apparent from the foregoing, a determination of whether to exercise the court's curative power with respect to a non-compliant document is inevitably and intensely fact-sensitive. Two principal issues for consideration emerge from the post-1995 Manitoba authorities. The first in an obvious threshold issue: is the document authentic? The second, and core, issue is whether the non-compliant document represents the deceased's testamentary intentions, as that concept was explained in George.
>
> [35] In *George* the court confirmed that testamentary intention means much more than the expression of how a person would like his or her property to be disposed of after death. The key question is whether the document records a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death. A deliberate or fixed and final intention is not the equivalent of an irrevocable intention, given that a will, by its nature, is revocable until the death of its maker. Rather, the intention must be fixed and final at the material time, which will vary depending on the circumstances.
>
> [36] The burden of proof that a non-compliant document embodies the deceased's testamentary intentions is a balance of probabilities. A wide range of factors may be relevant to establishing their existence in a particular case. Although context specific, these factors may include the presence of the deceased's signature, the deceased's handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests and the title of the document*: Sawatzky* at para. 21; *Kuszak* at para. 7; *Martineau* at para. 21.
>
> [37] While imperfect or even non-compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements the harder it may be for the court to find it embodies the deceased's testamentary intention: George at para. 81.

Despite the plethora of cases in B.C. in the last four years, it is still worth reading the decision in *George*, in which Mr. Justice Philp in the Manitoba Court of Appeal considered the functions of the formal requirements for the validity of a will.

The question in *George* was whether the Court ought to give effect to a letter from John Daily's accountant to Mr. Daily's lawyer, setting out proposed changes to Mr. Daily's will. Mr. Daily died two months later without signing a new will. Mr. Justice Philp concluded that the letter did not reflect Mr. Daily's deliberate or fixed and final intention, and should not be given effect as a will. Although the Manitoba Court of Appeal did not rule out the possibility that a document

---

1 See, for example, section 70 of PEI's *Probate Act*.

made by another person could be given effect as the deceased's testamentary intentions, there was no indication that Mr. Daily even knew about the accountant's letter, let alone that he approved of the contents.

Mr. Justice Philp set out three functions of the formal requirements: the "evidentiary" and "cautionary" function, the "channeling" function, and the "protective" function. He wrote at paragraph 21:

> 21 Imperfect compliance, even non-compliance, with the formal requirements under the Act may be excused by the application of the dispensation power under s. 23. Nevertheless, I think it is important to take a moment to review the purposes or functions of those formalities, and to understand what has been abandoned. In *Langseth*, I said of them (at p. 295):
>
> > Professor Langbein identified the main purposes or functions of the formality requirements of the Wills Act as (1) the "evidentiary" and "cautionary" functions in which the requirements of writing, signature and attesting witnesses impress the participants with the solemnity and legal significance; and provide the court with reliable evidence of testamentary intent and of the terms of the will; (2) the "channelling" function, in which the formal requirements result in a degree of uniformity in the organization, language and content of most wills; and (3) the "protective" function in which the formal requirements may protect the testator from imposition or fraud.

The evidentiary and cautionary function and the protective function are the most relevant considerations for determining whether a document that does not meet the formal requirements should be given effect.

We suggest that the question could be framed as follows: to the extent that a document[2] does not comply with the formal requirements, is there sufficiently reliable evidence to serve those functions? One practical implication is that the closer the document comes to meeting the formal requirements, the more likely it will be that the court will give effect to the non-compliant document. The document in *Toomey*, which was only technically insufficient, and which we have little doubt would have been given effect under section 58 (had it existed), sits on one end of the spectrum. A document made by a third-party, such as the one in *George*, sits on the other end. The further the record is from compliance, the more cogent the evidence will need to be to persuade the court to give effect to the document as the deceased's deliberate or fixed and final intention.

The cases are, not surprisingly, fact driven and unique. A few of the factors we cull from the cases are:

(a) Did the deceased create the document, or did someone else? It is less likely that a document will be given effect if created by someone other than the deceased?

---

2 We will generally use the word "document" as shorthand to refer to "a record, document or writing or marking on a will or document" except where the discussion requires greater specificity, such as in our discussion of electronic records.

(b) Did the deceased sign the document?

(c) Did the deceased date the document?

(d) Where did the deceased keep the document? Was it kept with the deceased's important documents in a place where it was likely to be found?

(e) Is the document labeled as a will?

(f) Is the document consistent with other evidence indicating the deceased's intentions?

(g) Did the deceased refer to the document as her will in conversations?

III. Electronic Data

The definition of "record" in subsection 58(1) expressly includes data that:

> (a) is recorded or stored electronically,
>
> (b) can be read by a person, and
>
> (c) is capable of reproduction in a visible form.

This appears to capture documents stored on a computer, or in a cloud, and emails.

The term "record" is also defined in section 29 of the Interpretation Act, which says:

> **"record"** includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise…"

We are not aware as at the time of writing this paper of any reported judgments in British Columbia determining whether to give effect to an electronic record under section 58.

In a Saskatchewan case, *Buckmeyer Estate* , 2008 SKQB 260, Mr. Justice Ottenbreit (then of the Court of Queen's Bench), declined to give effect to an email composed and sent by the deceased. The deceased had made a will in compliance with the *Wills Act*, but the issue was whether the court should give effect to an email as well as another non-compliant document. The dispensation provision, section 37 of the Saskatchewan *Wills Act,* did not expressly include electronic data, but the Court did not distinguish between a paper document and electronic record in reaching the conclusion that the email did not reflect the will-maker's testamentary intentions. Mr. Justice Ottenbreit described the email as follows:

> [5] The email dated August 23, 2007 consists of two pages. It is common ground that he authored it. It indicates that he is very sick and in his last days and states that he wants to give Gibson more information and express his wishes clearly before he passes. The deceased then lists all of his credit accounts "for when the time comes to square up my bills" and he observes "you will see I am considerably in debt so you are to use my insurance funds as per my will to deal with all that". He also gives a direction with respect to his cremation and where his ashes are to be sent as well as directions with respect to funeral services. The email indicates at the time that it is from John Buckmeyer (johnbuckmeyer@hotmail.com [to dave.gibson@sasktel.net]). The subject is "John's arrangements". Because it is email, John Buckmeyer's

> signature, in his hand, does not appear on the document but it is common ground that it contains his electronic signature.

Mr. Justice Ottenbreit found that the purpose of the email was to provide additional information and directions for the executor, and was not a testamentary document.

In *Rioux c. Coulombe*, 1996 CarswellQue 1226, the Superior Court of Quebec declared a will, the terms of which were on a floppy disk, as a valid holograph will. The Court applied section 714 of the *Civil Code of Quebec* which allows the court to give effect to a will that does not fully satisfy the conditions for a valid will.

There are reported cases from Australia in which the courts have considered whether to give effect to electronic data under legislative provisions that are analogous to section 58.

In *The Estate of Roger Christopher Currie, late of Balmain* [2015] NSWSC 1098, the Supreme Court of New South Wales gave effect to an electronic file saved to a USB stick, under section 8 of the New South Wales *Succession Act*, which permits the court to give effect to a non-compliant document "if the Court is satisfied that the person intended it to form his or her will…." The file was a typed document that started with "This is the last will and testament of Roger Christopher Currie". It appointed an executor, made specific bequests, and dealt with the residue of the estate. The document further stated that it was "signed" by the deceased on April 1, 2009. The parties never found a printed version of the document. The court found that the document constituted his last will and testament and ordered a copy to be admitted to probate.

In *Re Nichol; Nichol v Nichol* [2017] QSC 220, the Supreme Court of Queensland gave effect to a text message as the will of the deceased pursuant to section 18 of the Queensland *Succession Act 1981*. Before taking his life, the deceased composed, but did not send, the following text message:

> Dave Nic you and Jack keep all that I have a house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten. A bit of cash behind TV and a bit in the bank Cash card pin 3636
>
> MRN190162Q
>
> 10/10/2016
>
> My Will.

The court found that the deceased intended the text to operate as his will. The court also found that he had testamentary capacity. In considering whether the deceased had testamentary capacity, the Court noted that the presumption of validity of a duly executed will does not apply when the document is not signed and witnessed in accordance with the formal requirements.

There are at least two reported decisions in Australia in which courts gave effect to video recordings.

In *Estate of Wilden (Deceased)* [2015] SASC 9, the Supreme Court of South Australia gave effect to a DVD recording made by the deceased as testamentary document pursuant to section 12(2) of the South Australia *Wills Act*. On the recording, as transcribed, the deceased had stated

> ...this is ah somewhat of an official last will and testament as I don't have a written document anywhere at this stage. This is just um a fail safe until such time as I do get something like that done. Um. Um. My will is that everything

> that I own goes to my younger sister Sandra Carpenter and her husband Michael Carpenter and my two nephews Lachlan and Jacob. Um I don't have a wife or any children or anything like that at this stage so if anything should happen to me now or in the next few years or whatever um this is just so there is some kind of an official record of how things should be distributed. I don't want the rest of my family ie my other brothers and sisters to get anything... so um sell all my stuff, um um thousands of dollars worth of audio equipment um that should easily be sold off to go see my employer [name] he will probably buy it all off you...Um yeh keep what you want Sandra, sell what you want, enjoy, keep the money...

In addition to the video, the deceased typed and signed a document dated February 16, 2011, which reads:

> LAST WILL AND TESTEMENT [sic] WAYNE GREGORY WILDEN.
>
> THIS IS AN OFFICIAL LAST WILL AND TESTEMENT [sic] FOR MYSELF, WAYNE WILDEN. **THIS IS TO ADD TO MY VIDEO OF MY LAST WILL AND TESTEMENT [sic] RECORDED ON 11.5.05.**
>
> I WOULD LIKE TO OFFICIALLY RECORD THAT MY WILL IS THAT EVERYTHING I OWN GOES TO MY YOUNGER SISTER SANDRA CARPENTER AND HER HUSBAND MICHAEL CARPENTER AND MY TWO NEPHEWS [J] and [S].
>
> THIS INCLUDES MY PROPERTY AT [address], ALL POSSESSIONS, ALL MONEY IN BANK ACCOUNTS AND ALL SUPERANNUATION PAYMENTS AS MY NEXT OF KIN.
>
> I DO NOT WANT MY OTHER BROTHERS AND SISTERS OR THEIR FAMILIES TO RECEIVE ANYTHING.

Section 12(2) of the Wills Act provided:

> Subject to this Act, if the Court is satisfied that—
>
> (a) a document expresses testamentary intentions of a deceased person; and
>
> (b) the deceased person intended the document to constitute his or her will, the document will be admitted to probate as a will of the deceased person even though it has not been executed with the formalities required by this Act.

Justice Gray held that a DVD fell within the following definition of "document" in the South Australia *Interpretation Act*:

> document includes—
>
> (a) any paper or other material on which there is writing; and
>
> (b) any map, plan, drawing, graph or photograph; and
>
> (c) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
>
> (d) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device….

The court ordered that both a transcription of the DVD and the typewritten document be admitted into probate.

In *Estate of Wai Fun Chan (Deceased)* [2015] NSWSC 1107, the New South Wales Supreme Court gave effect to a DVD as a codicil to the deceased's last will and testament. The original will had been prepared by a solicitor, and was signed by the Deceased in compliance with the formal requirements for execution on March 6, 2012. The deceased made a video recording in Cantonese two days later in the presence of one of her children and the child's spouse, making additions to the will. A transcript of the recording was translated into English and admitted into probate as a codicil to the formal, valid will.

Justice Lindsay held that the DVD was a document as defined in the New South Wales legislation:

> The DVD is a "document" within the meaning of the Interpretation Act, section 21 because it is a "record of information" and, more specifically, it is a "thing" which, at least, falls within paragraph (c) of the definition of "document". It is a thing "from which sounds, images [and] writings can be reproduced with... the aid of" a DVD player: Treacey v Edwards [2000] NSWSC 846; (2000) 49 NSWLR 739 at 745[26]-[27] and [29]; Cassie v Koumans [2007] NSWSC 481 at [9]; In the Estate of Wilden (Deceased) [2015] SASC 9 at [10]- [12].

Interestingly, Justice Lindsay also held that section 10 of the New South Wales *Succession Act*, which provides that a disposition to an attesting witness is void, but allows the gift to be saved if "the Court is satisfied that the testator knew and approved of the disposition and it was given or made freely and voluntarily…," applied to the two persons who witnessed the deceased make the video tape. Section 10 is analogous to section 43 of the *WESA.* In the circumstances, the Court was satisfied that the deceased knew and approved of the disposition to the child who witnessed the video recording, and it was given or made freely and voluntarily.

Could a video recording be given effect under section 58? Possibly.

On the one hand, it should be noted that the definition of "record" in the WESA is narrower than the definitions of "document," in the two Australian cases cited above, which expressly include "sounds." A video cannot be "read by a person," at least not directly. The language used to define "record" in section 58(1) is among the recommendations in the *BCLI Report*, and comes from the Uniform Law Conference of Canada, section 19.1 of the *Uniform Wills Act* as amended in the Proceedings of the Eighty-fifth Annual Meeting (2003). The authors of the *BCLI Report* were of the opinion that the wording does not encompass an oral will. Footnote 126 of the *BCLI Report* reads:

> It should be noted that these criteria are still predicated on the concept of a will as a written text, and would not encompass an electronically recorded oral will or material that is exclusively machine-readable.

On the other hand, the definition of "record" is an inclusive one, and could perhaps be given a sufficiently broad interpretation to include a video recording.

IV. Lawyer's Drafts

Although in principle a solicitor's unsigned draft will can be given effect under section 58, in two British Columbia cases, the courts have declined to do so.

In *Re Bailey Estate*, 2016 BCSC 1226, Jann Bailey met with her solicitor on May 24, 2013, and gave her instructions for a new will, which included naming her husband, Alan Quinn as executor, and leaving property in Northern Ireland to him. The lawyer drafted a will and sent it to Ms. Bailey. They met again in July, 2014, Ms. Bailey having missed a number of scheduled meetings. The solicitor made further changes, and sent another draft to Ms. Bailey. They had a further meeting on October 20, 2014, in which Ms. Bailey provided some instructions for her personal possessions, and sent instructions in respect of her remains by email on October 30. The solicitor sent a further draft will on December 14, 2014, and sent emails to Ms. Bailey following up on the draft will in March and May, 2015. Ms. Bailey told her investment advisor in June that she needed to make another appointment to complete her will. She died on October 9, 2015, without signing the will.

Madam Justice Hyslop found that the evidence was insufficient to establish that it represented Ms. Bailey's deliberate and final testamentary intentions, and did not give the December 2014 draft will effect. She wrote:

> [50] I conclude that the preparation and the anticipated execution of the December 2014 draft will was not of paramount importance to Ms. Bailey. She gave instructions at different times, she missed meetings with Ms. Cates [the lawyer], there was a fee dispute, she put off reading a previous draft, and she postponed making an appointment to see Ms. Cates to review the will despite reminders by Ms. Cates by email on March 16 and May 7 of 2015. Ms. Bailey did not tell Ms. Cates whether she wanted changes to the December 2014 draft will or whether she wanted to execute it.
>
> [51] On July 31, 2015, Ms. Cates' spouse, Mr. Erlank [Ms. Bailey's investment advisor], met Ms. Bailey relating to investment matters. She told Mr. Erlank that she needed to set up an appointment "to complete" the December 2014 draft will. This statement, taken at its best, indicates that she wanted to replace her 2008 will with a new will. This also could mean that she had changes to make. She did not say to Mr. Erlank that she intended on signing the December 2014 draft will.
>
> [52] Between May of 2013 and December 8, 2014, Ms. Bailey did not indicate to anyone whether the December 2014 draft will set out her intentions. Despite Ms. Cates' opinion that the will represented a deliberate and final expression of Ms. Bailey's intentions, there is nothing that comes from Ms. Bailey either in word, deed or in writing as to whether the December 2014 draft will represented her final testamentary intentions.
>
> [53] For over two years, Ms. Bailey did not revoke her 2008 will by word or deed. Unlike Ms. Young [in *Re Young Estate*] , Ms. Beck [in *Re Beck Estate*, 2015 BCSC 676] and Ms. Yaremkewich [in *Re Yaremkewich Estate,* 2015 BCSC 1124], Ms. Bailey left nothing, either electronic or on paper that the December 2014 draft will represented her final intentions. There simply was no expression by Ms. Bailey whether the December 2014 draft will was a final expression of her testamentary intentions.

In *Re Herod Estate*, 2017 BCSC 318, Robert Herod made a will dated November 14, 2014, appointing his solicitor as his executor and trustee. On June 1, 2015, Mr. Herod instructed his solicitor that he wished to make changes to his will by removing some of the beneficiaries. It was difficult for Mr. Herod to go to the solicitor's office, and he wanted to sign it at home. The solicitor mailed the draft will to him on July 22, 2015 with a covering letter setting out

instructions on how to sign the will. He confirmed by telephone on July 29, 2015, that he had received the letter and the will, but did not say whether he had read the will. The solicitor followed up by leaving a voice message on September 30, 2015. Mr. Herod died on October 13, 2015, without signing the will.

Madam Justice MacNaughton did not give effect to the 2015 draft will. One of the key considerations was that there was no explanation for why Mr. Herod took no steps to arrange to have the will witnessed. He did not even sign or initial the will himself. In those circumstances, Madam Justice MacNaughton wrote that she could not "conclude that the 2015 will sets out Mr. Herod's settled intentions with respect to the disposition of his estate. Something more was required."

The difficulty in trying to establish that the draft will should be given effect under section 58 in both these cases is that there was not a good explanation as to why the deceased did not sign the draft wills despite having plenty of time to do so. An application to cure deficiencies in a draft will is more likely to be successful in circumstances where there is evidence that the deceased received and read the draft, made an appointment with the solicitor to sign it, but died unexpectedly before the appointment.

V. Evidence

The Court of Appeal confirmed in *Re Hadley Estate* that the court may consider extrinsic evidence of the deceased's intention. Madam Justice Dickson wrote:

> 40 Sitting as a court of probate, the court's task on a s. 58 inquiry is to determine, on a balance of probabilities, whether a non-compliant document embodies the deceased's testamentary intentions at whatever time is material. The task is inherently challenging because the person best able to speak to these intentions — the deceased — is not available to testify. In addition, by their nature, the sorts of documents being assessed will likely not have been created with legal assistance. Given this context and subject to the ordinary rules of evidence, the court will benefit from learning as much as possible about all that could illuminate the deceased's state of mind, understanding and intention regarding the document. Accordingly, extrinsic evidence of testamentary intent is admissible on the inquiry: *Langseth Estate v. Gardiner* (1990), 75 D.L.R. (4th) 25 (Man. C.A.) at 33; *Yaremkewich Estate, Re* [2015 BCSC 1124] at para. 32; *George* [*v. Daily* (1997), 143 D.L.R. (4th) 273 (Man. C.A.)]. As is apparent from the case authorities, this may well include extrinsic evidence of events that occurred before, when and after the document was created: see, for example, *Bennett* [*v. Toronto General Trusts Corporation*, [1958] S.C.R. 392]; *George*; *Estate of Young*; *MacLennan Estate, Re* (1986), 22 E.T.R. 22 (Ont. Surr. Ct.) at 33; *Caule v. Brophy* (1993), 50 E.T.R. 122 (Nfld. T.D.) at paras. 37 — 44.

In *Re Hadley*, the Court of Appeal upheld the trial judge's decision that notes made by the deceased in her journal ought not be given effect as a will. The trial judge, Madam Justice Adair, considered the fact that the deceased did not mention to anyone that she had made the journal entries, and did not mention them when, subsequent to making them, she spoke of planning to change her earlier will. The Court of Appeal rejected the appellant's argument that the trial judge was in error in admitting this evidence.

VI. Selected Recent Cases

In view of the large number of reported cases, we are not going to try to summarize all of the cases here, but have selected three recent cases: *Quinn Estate*, 2018 BCSC 365, *Mace Estate (Re*), 2018 BCSC 1284; and *Poulk Estate*, 2018 BCSC 1321. We have added an appendix with a more thorough list of cases, including a summary of the results.

The Quinn Estate case deals with the estate of former NHL coach Pat Quinn. Mr. Quinn and his wife, Sandra Quinn, settled a trust in the United States which dealt with assets in the United States. Mr. Quinn was an American citizen, and Mrs. Quinn had U.S. Green Card, but they lived in British Columbia. Their U.S. lawyer also drafted a will for Mr. Quinn dealing with his assets in Canada. The will provided that the residue of his Canadian Estate would "pour over" into a U.S. trust, referred to as the Quinn Family Trust.

The issue in this case was whether the distributive provision of the Canadian will is valid under British Columbia law. The will was signed by Mr. Quinn in the presence of two witness in accordance with the requirements of section 37 of the *WESA*. The will itself was formally valid. The difficulty was the "pour over" clause. The terms of the Quinn Family Trust allowed Mr. and Mrs. Quinn to amend it. Because they could amend the trust, the beneficiaries could be changed without compliance with the requirements of section 37.

Mr. Justice Funt, who heard the application, applied the decision in *Re Kellogg Estate*, 2013 BCSC 2292, appeal dismissed as moot 2015 BCCA 203, and held that the pour-over clause was invalid. There was an amendment to the Quinn Family Trust, but it was administrative in nature. Mr. Justice Funt rejected the argument advanced by one of Mr. Quinn's children that this case could be distinguished on that basis. Mr. Justice Funt held that the problem with the clause was that the Quinn Family Trust could be amended to change the beneficiaries, and it did not matter whether an amendment had been made.

Re Kellogg Estate was decided before section 58 came into effect. Can section 58 be applied to save the "pour-over" clause?

Mr. Justice Funt held that it cannot. In this case, the will itself complied with the formal signing and witnessing requirements. It was rather the structure that is inconsistent with the formal requirements of a will, by allowing changes to be made without compliance. He wrote:

> [55] Section 58 is not an independent provision. From its language, "[e]ven though the making, revocation, alteration, or revival of a will does not comply with this Act", s. 58 is tethered to s. 37. I agree with Ms. Francis, counsel for Sandra Quinn in her personal capacity, in her written submission:
>
> > 44. The policy reason behind section 58 is to enable the Courts to step in where a person has taken real steps to make a will, but the formalities have fallen short. It does not exist to enable the court to bless structures that circumvent the formalities all together, which is what a pour over clause to an amendable trust does. If the policy behind section 58 were to do away with testamentary formalities, then our WESA would not contain testamentary formalities. Rather, what section 58 reflects is a policy to ensure that a document that reflects the deliberate, fixed and final intention of a Deceased person is not set aside on the basis of failure to comply with a formality.

> [56] Section 58's scope is reflected in s. 59(1). Section 59(1) enables a will to be rectified where the will "fails to carry-out a will-maker's intentions" in specified circumstances. Section 59 does not allow rectification under any circumstances. If s. 58 were to be given an overly broad interpretation, s. 59(1) would have no purpose. Rectification could occur under s. 58 based on a simple assertion of testamentary intentions. Section 58 is a curative provision and not an independent provision designed to change fundamental principles of the law of wills.
>
> [57] In short, the statutory context shows that the purpose of s. 58 of WESA is to permit the Court to address circumstances of "formal invalidity" where the will-maker's "deliberate or fixed and final intention" as to the disposal of his or her property on death is found. [Quotation from Hadley Estate (Re), 2017 BCCA 311 omitted].
>
> [58] In the case at bar, the deficiency is not one of proper execution. All parties agree that the Will was properly executed.
>
> ….
>
> [62] The Quinn Family Trust was a revocable, amendable, inter vivos trust with the deceased being one of the two settlors and trustees. Although, as may be seen from clause 6.04, the Quinn Family Trust was part of an estate plan functioning during the deceased's life time, it was designed to be flexible, and left matters in flux. For example, shortly before the deceased's death, counsel had sent the November 21, 2014 letter addressed to the deceased and Sandra Quinn, which Sandra Quinn had the opportunity to read, and which recommended the assets be distributed "now". The distribution of all of the Quinn Family Trust assets would have had the effect of a revocation.

The decision in *Quinn Estate* is under appeal.

In *Re Mace Estate*, the deceased, Helga Mace made a will, dated June 8, 2001. This document was signed by the deceased and witnessed by a lawyer and an assistant. On November 10, 2014, Ms. Mace signed another typewritten document listing and purporting to dispose of a number of assets, including the proceeds of two parcels of real property. She did not dispose of all of her assets in the 2014 document, nor was there a revocation clause. She did not have her signature witnessed. Ms. Mace named the applicant, Marilyn Allison, as executor in the 2014 document.

When she was diagnosed with cancer, Ms. Mace told her friend Elizabeth Holland that there were two wills located in her dresser. Ms. Holland found both the 2001 will and the 2014 document in an envelope in the dresser. Ms. Mace asked her to take them to her lawyer.

Master McDiarmid found that the documents were genuine, and that the writing thereon was the writing of the deceased. It was significant that the 2014 document was titled "My Last Will and Testament," it appointed an executrix, it reasonably set the property and assets of the deceased, and it contained dispositive language. Master McDiarmid found that it was a testamentary document, and gave effect to the document under section 58.

Master McDiarmid found that the 2014 document did not revoke the 2001 will, but was intended as a codicil to it. After referring to the presumption that a will-maker does not intend to create an intestacy or partial intestacy, Master McDiarmid wrote at paragraph 52:

> [52] In this case, given the care with which the deceased set out her main assets and obviously turned her mind to the circumstances when she made her June 8, 2001 will, I am satisfied that the testator did not intend part of her estate to go on an intestacy. She intended to dispose of her entire estate.

In his reasons for judgment, Master McDiarmid provides a thorough review of the cases, too lengthy to quote here, but well worth reading.

In *Poulk Estate*, 2018 BCSC 1321, Madam Justice Church declined to give effect to an unsigned fill-in-the-blanks will form, completed by one of the deceased's sisters. The document was made when the deceased, Mark Poulk, was in the hospital, suffering from bowel cancer. He was in considerable pain and was taking opioid pain medication. The document purported to divide his estate among his four siblings, and excluded his daughter from whom he was estranged. However, he told a long-time friend that he intended to leave his estate to his daughter. There were notes by a social worker indicating that his family was focused on doing a will, but he wanted some time to think. On June 24, 2017, the day before he died, two friends came to witness the will, but Mr. Poulk was physically unable to sign. His middle name was misspelt on the document.

Madam Justice Church held that there was insufficient evidence that Mr. Poulk knew and approved of the contents of the document, or that it reflected a fixed and final testamentary intention. She wrote:

> [42] Even if there was sufficient evidence to establish that the deceased knew and approved the contents of the Will, it is far from clear that the Will was a fixed and final expression of the deceased's testamentary intention. It is apparent from the hospital records of the deceased that he may not have appreciated the severity of his illness or the imminence of his death. Up until the day prior to his death, he continued to express a plan to return home once he was better. This is consistent with the evidence that the deceased requested on June 21, 2017 that the Will not be the focus at the time.
>
> [43] The Will departs from the requirements for validity in s. 37 of WESA to a significant degree. While it is in writing, it does not bear the signature or indeed any handwriting of the deceased or the signatures of two witnesses. The absence of those key requirements for formal validity means that compelling and reliable evidence is required to satisfy this court that the Will represents the testamentary intention of the deceased. In this case, there is no such compelling and reliable evidence and what evidence there is before me falls far short of establishing that the Will is both final and authentic.
>
> [44] I find on the balance of probabilities that the Will does not represent a deliberate and final expression of the deceased's testamentary intentions. Accordingly, the Will cannot not be remedied under s. 58 of WESA.

VII. Section 59

Like Section 58, section 59 is a new provision (well, relatively new), which came into effect with the *WESA*. Also like 58, the purpose of the section is to ameliorate rigidities in the law. Unlike section 58, there are very few reported cases, and two of those in B.C. mention it almost in passing as an alternate to interpreting the will as drafted.

Here is what it says:

> 59 (1) On application for rectification of a will, the court, sitting as a court of construction or as a court of probate, may order that the will be rectified if the court determines that the will fails to carry out the will-maker's intentions because of
>
> (a) an error arising from an accidental slip or omission,
>
> (b) a misunderstanding of the will-maker's instructions, or
>
> (c) a failure to carry out the will-maker's instructions.
>
> (2) Extrinsic evidence, including evidence of the will-maker's intent, is admissible to prove the existence of a circumstance described in subsection (1).
>
> (3) An application for rectification of a will must be made no later than 180 days from the date the representation grant is issued unless the court grants leave to make an application after that date.
>
> (4) If the court grants leave to make an application for rectification of a will after 180 days from the date the representation grant is issued, a personal representative who distributes any part of the estate to which entitlement is subsequently affected by rectification is not liable if, in reasonable reliance on the will, the distribution is made
>
> (a) after 180 days from the date the representation grant is issued, and
>
> (b) before the notice of the application for rectification is delivered to the personal representative.
>
> (5) Subsection (4) does not affect the right of any person to recover from a beneficiary any part of the estate distributed in the circumstances described in that subsection.

Consider this section in light of the problems it is intended to address. The difficulties applicants faced in trying to correct drafting errors were summarized on page 37 of the *BCLI Report*:

> A court of probate can delete words included by mistake. The rationale is that such words were never intended to form part of the will, thus their deletion does no violence to the purposes of testamentary formalities.
>
> A court of construction is bound to accept the will in the form in which it emerges from probate. Any attempt to add words or otherwise alter the will amount to remaking the will and defeating the protective purpose of statutory formalities, no matter how reliable the evidence of testamentary intention. A court of construction can, however, ignore an unnecessary or inaccurate portion of a description (*falsa demonstratio*) or infer a correction by implication from the text of the will.
>
> Courts have been forced on many occasions to go to ridiculous lengths within these narrow rules to preserve the testator's true intent as far as possible. A notorious example is *Re Morris*, where a codicil intended to revoke a gift in clause "7(iv)" of the will omitted the "iv" and erroneously revoked all the gifts in clause 7. Unable to add words to correct the mistake, the probate court deleted the numeral "7" as surplusage, saving the rest of the gifts in clause 7 but also the one that was to be revoked.

Section 59 addresses these difficulties in a number of ways. First, if an application is made pursuant to section 59, no distinction is made between a court of probate and a court of construction.[3] This is important because probate is required before the court may interpret the will as a court of construction. Second, the court may add as well as delete words. Apart from this section, a probate court cannot add words. Third, the court may consider extrinsic evidence of the will-maker's intent. At common law, there are significant limitations to the admissibility of extrinsic evidence of the will-maker's intent when the court is interpreting a will (with limited exceptions the court may not consider evidence a long the lines of "the will-maker said she wanted to include Johnny"). It should be noted though that section 4 of the *WESA* also relaxes the restrictions on admissibility of extrinsic evidence of intention.

VIII. British Columbia Cases

There are a couple of cases wherein the courts have indicated that they would have applied section 59 if they had not reached the same result as a matter of interpretation under the common law principles.

In *Pace Estate*, 2016 BCSC 2306, Mr. Justice Greyell held that Mr. Dale Pace's will had not been revoked by his marriage to Sandra Kelly. He made his will on May 13, 2001, and they were married on August 17, 2002. Because they were married before the *WESA* came into effect, the will would have been revoked by the marriage pursuant to section 15 of the Wills Act, unless the will was made in contemplation of the marriage. Although the will did not contain language such as "this will is made in contemplation of my marriage to Sandra Eileen Kelly," he did refer to her in the will as his "common-law spouse," and he appointed her as his executor and left the residue of his estate to her. Mr. Justice Greyell found that the will was made in contemplation of the marriage, and was not revoked by the marriage. He reached that result by interpreting the will.

Mr. Justice Greyell then went on to say that if he had not reached the finding that the will was made in contemplation of marriage in his interpretation of it, he would have allowed the applicant's alternate claim pursuant to section 59 and would have rectified "the terms of the will to name Ms. Kelly as Mr. Pace's spouse in contemplation of their forthcoming marriage."

The respondent had argued that applying section 59 in this case would be to give it retrospective effect, but Mr. Justice Greyell rejected this argument. Because Mr. Pace died on September 4, 2015, after the WESA came into effect, section 59 applies, and its application here would not have a retrospective effect.

In *Paul Sugar Palliative Support Foundation v. Creighton Estate*, 2017 BCSC 502, the issue was whether the wording of a gift in a will to the Vancouver Foundation "to be added to the capital of The Paul Sugar Palliative Support Foundation," required the Vancouver Foundation to hold the capital permanently and pay only the income to The Paul Sugar Palliative Support Foundation, or whether that organization would have access to the capital to use as it decides.

---

3 For those interested in a more complete discussion of the distinction between the powers of a court of probate and those of a court of construction and the types of evidence permitted in each case, see Madam Justice Dardi's reasons for judgment in *Re Ali Estate*, 2011 BCSC 537 at paragraphs 21-37.

Madam Justice Gray found that the will-maker intended to allow the Paul Sugar Palliative Support Foundation to have access to the capital and use the funds as it decides, and interpreted the will accordingly, without resorting to section 59. Madam Justice Gray added that she would rectify the will pursuant to section 59 if her conclusion were wrong.

In determining that the will-maker intended to allow the charity access to the capital, Madam Justice Gray considered the evidence of the executor, who was also the lawyer who drafted the will, "to the effect that she understood the gift was going to be given to the Paul Sugar Palliative Support Foundation with no limitations, and that by using the word 'capital', there was not intended to be any limitation on how the funds were to be used."

In a recent case, *Syukur v. Yeh*, 2018 BCSC 1826, Mr. Justice Gomery found that a rectification claim was moot in the circumstances, but did consider section 59. The will-maker, Ruey-Chang Yeh, planned on transferring a 60% interest in a residence he owned in North Vancouver, to his spouse, Yumin Syukur. He wished to then leave his remaining interest to his two sons. He signed a will in which he left "all of my right, title and interest," in the residence. He did not complete the transfer of the 60% interest before he fell into a coma. Ms. Syukur, acting under an enduring power of attorney, transferred the residence to her daughter, who, in turn, transferred it to Ms. Syukur. She sought a declaration that she owned the residence, but held title in respect of a 40% interest on trust for the two sons. In the alternative, if the court found that the residence was part of the will-maker's estate, she sought rectification of the will to provide her with a 60% interest in the residence. Mr. Justice Gomery held that the residence was not part of the estate, but imposed a constructive trust in favour of the two sons with respect to a 40% interest in the residence on the basis that it would be against good conscience for her to retain a 100% interest.

> Mr. Justice Gomery did comment in obiter that he would not have rectified the will under section 59 even if he had found that the residence was part of the estate. The will itself was drafted in accordance with the will-maker's instructions. He wrote at paragraphs 105 and 106:[105] Perry's intention was not to convey to Yumin a 60% interest in the Home under the Will. It was to convey to her a 60% interest in the Home outside his estate, in advance of his death. He intended, by the Will, to convey to Daniel and Paul all of the 40% interest in the Home that he anticipated he would own on his death. This is not a case of an accidental slip or omission, misunderstanding of the testator's intentions, or failure to carry out the testator's intentions. The Will does what Perry intended it to do and s. 59 has no application in the circumstances.
>
> [106] Yumin's application is moot in any event, because the Home is not part of the estate and the rectification sought would either have no legal effect or a perverse legal effect (if it resulted in Yumin receiving 60% of the 40% interest in the Home held by the estate). But I would come to the same conclusion even if Yumin had not succeeded in removing 60% of the equity in the Home from the estate before death. In my opinion, if a testator intends a certain distribution based on certain steps to be taken before death and those steps are not taken, it cannot be said that the will fails to carry out the testator's testamentary intentions.

IX. Alberta

The Alberta *Wills and Succession Act*, which came into effect on February 1, 2012, has a similar (but not identical) rectification provision and there have been a few reported cases in Alberta.

In *Fuchs v. Fuchs*, 2013 ABQB 78, the Alberta Court of Queen's Bench rectified a will by inserting a clause stating that the will was made in contemplation of the will-maker, Mr. Hans Fuchs' marriage. Like B.C.'s now repealed Wills Act, the Alberta's Wills Act provided that marriage revoked a will unless there was a declaration in the will that it was made in contemplation of marriage. Although Alberta's Wills and Succession Act did not retain that the provision revoking a will on marriage, under Alberta's transition rules, the Wills Act provision revoking a will on marriage applied because the will-maker made the will before the new legislation came into effect. However, section 39 of the Alberta legislation allowing the court to rectify a will applies if the will-maker died after the legislation came into effect.

Mr. Fuchs made a will leaving his estate to Barbara Lippka (later Fuchs), with whom he was living. The will did not contain a provision stating that it was in contemplation of his marriage to her. They later married. Associate Chief Justice Rooke found that when he made his will, Mr. Fuchs intended the will to be in contemplation of his marriage, and the Court inferred that the solicitor who drafted the will either misunderstood or failed to give effect to Mr. Fuchs' instructions that he wished to ensure that Ms. Lippka received his estate whether he died before or after his intended marriage to her (there was no evidence from the solicitor).

In *Ryrie v. Ryrie*, 2013 ABQB 370, Mr. Justice Sisson rectified the dispositive clause below by deleting the names of the six children:

> To divide and distribute the residue of my estate among my children, Brian Martin Ryrie, Lynette Fern Ryrie, Wallace Bruce Ryrie, Lionel Gary Ryrie, Diane B. Howard and Barry David Ryrie, in equal shares, provided that if any child of mine has predeceased me leaving issue alive at my death, then I direct that such issue shall receive in equal shares, *per stirpes*, that share in my estate to which such deceased child of mine would have been entitled, had he or she survived me.

When the will maker, Bruce Alexander Ryrie, made his will, he had six surviving children, those named in the will, and two children who had died. One of the deceased children, Leslie Ryrie, had two children of his own, both of whom survived the will maker. All of the named children survived the will maker. The fundamental question in the case was whether the estate would be divided in six shares among the named children, or whether it would be divided in seven shares, with Leslie Ryrie's two children dividing one-seventh. The solicitor who drew the will gave evidence that the will maker replied affirmatively when she asked whether he wished Leslie's share to go to his children. She testified that her assistant put the surviving children's names in the dispositive clause, and she did not catch the error before the will was signed. Mr. Justice Sisson found that "the evidence is clear that there was 'an accidental slip, omission or misdescription,' together with 'a failure to give effect to, the Testator's instructions by a person who prepared the will.'"

X. England

England has had legislation permitting rectification of wills for longer. Section 20 of the Administration of Justice Act, 1982, c. 53 is similar, but section 20 (1) is worded somewhat more narrowly than section 59 (1) of the *WESA*. Section 20 (1) provides:

> (1)If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—
>
> (a) of a clerical error; or
>
> (b) of a failure to understand his instructions,
>
> it may order that the will shall be rectified so as to carry out his intentions.

Section 20 was considered by the United Kingdom Supreme Court in Marley v. Rawlings, [2014] UKSC 2. In that case, two spouses intended to make wills leaving their estates to each other, with a provision that if the other did not survive by one month, each left the residue of his or her estate to Terry Michael Marley, who was unrelated, but they considered him to be like a son to them. The wills were straight-forward enough, but with one problem: the husband signed the will intended for the wife, and the wife signed the will intended for the husband. After the husband's death, his wife having predeceased him, the United Kingdom Supreme Court rectified his will so that it contained the typed parts of the will signed by his wife.

XI. Ontario

It is also useful to look at recent jurisprudence in Ontario. In the absence of specific legislation comparable to section 59, in recent years, the courts in Ontario have applied the same criteria as set out in section 59 (1) to rectify wills.

Mr. Justice Balboa in *Robinson Estate v. Robinson*, 2010 CarswellOnt 4576, 2010 ONSC 3484, appeal dismissed 2011 ONCA 493, though declining to rectify the will in that case, set out the law of rectification of wills as follows:

> 24. 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.
>
> 25. The equitable power of rectification, in the estates context, is aimed mainly at preventing the defeat of the testamentary intentions due to errors or omissions by the drafter of the will. This is a key point. Most will-rectification cases are prompted by one of the above scenarios and are typically supported with an affidavit from the solicitor documenting the testator's instructions and explaining how the solicitor or his staff misunderstood or failed to implement these instructions or made a typographical error.

> 26. Courts are more comfortable admitting and considering extrinsic evidence of testator intention when it comes from the solicitor who drafted the will, made the error and can swear directly about the testator's instructions. They are much less comfortable relying on affidavits (often self-serving) from putative beneficiaries who purport to know what the testator truly intended.
>
> 27. Here is how *Feeney's* puts it:
>
> > [T]he application for rectification is usually based on the ground that, by some slip of the draftsman's pen or by clerical error, the wrong words were inserted in the will; the mistake may be latent in the letters of instruction or other documents. Yet, when the mistake is that of the draftsperson who inserts words that do not conform with the instructions he or she received, then, provided it can be demonstrated that the testator did not approve those words, the court will receive evidence of the instructions (and the mistake) and the offending words may be struck out.

This approach is illustrated in the decision of *Daradick v. McKeand Estate*, 2012 ONSC 5622 (CanLII). Ruth Caroline McKeand executed her last will on June 22, 2010. In previous wills, she had made a gift of her home to her daughter Ruth Caroline McKeand, but the last will as signed, omitted the gift. The solicitor who took instructions wrote a note "house moms name - 165,000 to go to Virginia" on the reverse side of a sheet with specific bequests. He gave affidavit evidence that he inadvertently wrote Ms. McKeand's instructions that she wished to give her house to her daughter Rugh McKeand's on the reverse side of the instructions sheet. His assistant did not see the note, and the will was completed without the gift. The evidence was not challenged.

Mr. Justice Matheson applied Mr. Justice Balboa's *dicta* quoted above, and rectified the will. He wrote:

> [44] I acknowledge that changing a will is not to be taken lightly. It is a document that the courts will not change except in the most exceptional circumstances.
>
> [45] I find that the error of Mr. Beresh can and should be corrected. Not to do so would be tragic. If the will were not rectified then the only other course of action would be a lawsuit against the lawyer or the estate. This would be very costly.
>
> [46] Therefore, the will of Ruth Caroline McKeand will be rectified by adding that the property known as 5 Birchmount Avenue, Welland, will be bequeathed to Virginia Laurel Daradick. All other terms will remain the same.

The Court in *Daradick* was not constrained to only delete words, but added them. Section 59 of *WESA* should also permit a British Columbia Court to add words where there is sufficient evidence to prove on a balance of probabilities that they were omitted "because of

> (a) an error arising from an accidental slip or omission,
>
> (b) a misunderstanding of the will-maker's instructions, or
>
> (c) a failure to carry out the will-maker's instructions."

XII. Mistake as to legal effect

How far does the court's power to rectify a will under section 59 extend?

The British Columbia Law Institute considered whether the courts should have the power to rectify a will if the will-maker failed "to appreciate the effect of the words used in the will," as the British Columbia Law Reform had recommended in a 1982 report, but rejected this broader approach. As set out on page 38 of the *BCLI Report*:

> The Testate Succession Subcommittee and Project Committee accepted that an error in a will should be rectifiable in order to fulfill testamentary intent, but were not willing to go as far as the former Law Reform Commission had gone. They declined to extend the power to cases in which the error stems from the testator's lack of appreciation of the legal effect of the terms of the will. The Commission had included this ground for rectification in its recommendation to take account of cases of incorrect use of legal language by testators writing their own wills. The Subcommittee considered that this would force the court into an overly subjective exercise of guessing what the testator's understanding had been. The danger of unintentionally remaking a will would be too great.

Interestingly, this question of whether section 59 may be used to rectify a will if the will-maker was mistaken as to the legal effect of the words used has been judicially considered, but not by a British Columbia court, and not since the *WESA* came into effect. In Ontario, Mr. Justice Balboa in *Robinson Estate* held that he could not rectify a revocation clause that had the effect of revoking the will-maker's Spanish will as well as her previous Canadian will. There was credible affidavit evidence that the will-maker did not intend to revoke her Spanish will, which dealt with her European assets, when she made her Canadian will. The solicitor who drafted the Canadian will was unaware of the Spanish will. Mr. Justice Balboa found that there was no ambiguity in the will, the will-maker approved of the words used in the will, and that the solicitor did not make a drafting error. The will-maker was mistaken about the legal effect of the revocation clause. In concluding that rectification was not available when the will-maker was mistaken about the legal effect of the words, Mr. Justice Balboa commented on the BCLI Report and on section 59 of the *WESA* as follows:

> Section 59 of the new Wills, Estates and Succession Act which passed Third Reading on September 24, 2009 (but is not yet in force) only codifies the three existing situations discussed above. As the B.C. Law Institute explains, the power of rectification 'would not be available in cases where the testator has misunderstood the legal effect of the language used in the will…'

For the reasons discussed above, we do not agree that section 59 is a codification of the common law, at least not in British Columbia.

The relatively narrow approach of refusing to grant rectification in cases where the will-maker is mistaken as to the legal effect of a clause, is consistent with the most recent Supreme Court of Canada's decision concerning the ambit of equitable rectification of contracts and other documents in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56.

Fairmont Hotels Inc. and two subsidiaries sought to rectify a directors' resolution in which the directors had redeemed certain shares, triggering a tax liability. The redemption was part of a number of transactions by the companies to finance the acquisition of two hotels. Both the Ontario Superior Court of Justice and the Ontario Court of Appeal had allowed rectification,

finding that the parties had, from the outset, a continuing intention to structure the transactions in a tax neutral way. Those two Ontario Courts had applied a previous leading authority from the Ontario Court of Appeal, *Juliar v. Canada (Attorney General*), 46 O.R. (3d) 104, aff'd (2000), 50 O.R. (3d) 728. In *Juliar* the Ontario Court of Appeal held that a transfer of shares for a promissory note that triggered a tax liability could be rectified so that the transaction would be an exchange of shares for shares, with the effect of deferring tax, on the bases that the parties had a common continuing intention to avoid an immediate tax liability.

The Attorney General of Canada appealed the decision allowing rectification in Fairmont, and Mr. Justice Brown for the majority of the Supreme Court of Canada, allowed the appeal, holding that Fairmont Hotels Inc. had not met the criteria for rectification. The majority found that the parties had not established that they had "reached a prior agreement with definite and ascertainable terms." It was insufficient for the parties to intend to structure their affairs in a tax neutral manner in order to rectify the transaction. The court may rectify a document that incorrectly sets out a specific agreement.

Mr. Justice Brown summarized the law on rectification at paragraph 38 as follows:

> To summarize, rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. Where the error is said to result from a mistake common to both or all parties to the agreement, rectification is available upon the court being satisfied that, on a balance of probabilities, there was a prior agreement whose terms are definite and ascertainable; that the agreement was still in effect at the time the instrument was executed; that the instrument fails to accurately record the agreement; and that the instrument, if rectified, would carry out the parties' prior agreement. In the case of a unilateral mistake, the party seeking rectification must also show that the other party knew or ought to have known about the mistake and that permitting the defendant to take advantage of the erroneously drafted agreement would amount to fraud or the equivalent of fraud.

In this case, in the majority's view, the facts did not permit rectification. As set out in paragraph 40:

> The error in the courts below is of a piece with the principal flaw I have identified in the Court of Appeal's earlier reasoning in Juliar. Rectification is not equity's version of a mulligan. Courts rectify instruments which do not correctly record agreements. Courts do not "rectify" agreements where their faithful recording in an instrument has led to an undesirable or otherwise unexpected outcome.

XIII. Rectifying Non-compliant Documents

May the court give effect to a non-compliant document under section 58, and apply section 59 to rectify the document?

On the one hand, in order for the court to give effect to a document that does not comply with the formal requirements, the court must find that it represents the deceased's "deliberate or fixed and final intention." An argument could be made that, if a document needs to be rectified, it does not reflect the deceased's testamentary intentions, and should not be given effect under section 58 in the first place.

We think the better view is that in some circumstances a non-compliant document may be given effect under section 58, and also rectified under section 59. It is conceivable that a person may make a non-compliant document with the intention that it operate as her will, but make a drafting error. The court could find the document as a whole represents the deceased's testamentary intentions, while rectifying the error.

Although section 59 speaks of "rectification of a will," section 58 (3) allows the court to order that the record or document "be fully effective as though it had been made … as the will or part of the will of the deceased person…." If the non-compliant document is "fully effective" as the will, all of the provisions of the *WESA* applicable to wills, including section 59, should apply.

XIV. Procedure for Both Section 58 and 59 Applications

The Supreme Court Civil Rule 25-14 (2) provides that to commence an application for an order under section 58 or 59,

> "a person
>
> > (e) may, if there is an existing proceeding within which, under these Supreme Court Civil Rules, it is appropriate to seek that order, apply for that order in accordance with Part 8 by notice of application in Form P42 in that proceeding, or
> >
> > (f) must, if there is no existing proceeding within which it is appropriate to seek that order, apply by requisition in Form P43."

Form P42 contemplates that it will be accompanied by affidavit evidence. Form P43 provides that a draft order is attached, and indicates the evidence to be relied on, most likely affidavit evidence.

Despite the requirement that the application be commenced by a requisition if there is no existing proceeding, doing so is problematic.

Emily Clough, in her paper, *Section 58 & 59 of WESA: A Practical Guide to Curing Deficiencies and Rectify Mistakes*, in the CLE BC course "Estate Litigation Basics—2016 Update," wrote in respect of commencing applications under section 58 to cure deficiencies:

> A requisition has no notice requirements and does not afford the applicant an opportunity to provide a thorough legal and evidentiary basis. Additionally, there is no oral hearing should interested parties wish to support or oppose the application. The Vancouver Probate Registry has advised the author that applications under s. 58 of the WESA should not be made by way of requisition. The Kamloops Registry has similarly advised that applications under s. 58 should not be made by way of requisition.

If the personal representative wishes to apply to cure deficiencies or to rectify the will, he or she may file the notice of application with or just after filing the estate submission. If the person wishing to apply is not the personal representative, he or she may file the application once someone has applied for an estate grant.

There are circumstances when your client will not want to apply for probate before the court determines whether to give effect to a non-compliant document. For example, your client may be the named personal representative in the non-compliant document, but someone else is

named in a prior compliant will. Logically, it would make sense to file a petition to apply to rectify a will if there is no estate file opened yet. Petitions may be used both to prove a will in solemn form, and to construe a will. Yet, the use of the word "must" in Rule 25-14(2)(f) implies that you may only use a requisition to commence a proceeding if there is no existing proceeding in which to file a notice of application.

Some practitioners file a petition anyway, and it does not appear to cause a problem. For example, *Re Bailey Estate*, 2016 BCSC 1226, was commenced by Petition.

Counsel in *Estate of Young*, John Bilawich, found a creative way around the problem. He filed a requisition asking the court registry to open an estate file, and then he proceeding by a notice of application in the estate file as permitted by the *Rules*.

Although the application is commenced as a chambers proceeding, the Court has broad powers to give directions including, for example, ordering production of documents, discoveries, and ordering a trial.

Rule 25-14 (8) provides:

> (8) Without limiting any other power of the court under this or any other Part of these Supreme Court Civil Rules, the court may, on its own motion or on application, give directions concerning the procedure to be followed in any matter under this Part and, without limiting this, may give directions respecting any of the following:
>
> (a) the issues to be decided;
>
> (b) who the parties will be, including directions for the addition or substitution of a party;
>
> (c) how evidence may or must be presented;
>
> (d) summary disposition of any or all issues in the matter;
>
> (e) the trial of any or all of the issues in the matter;
>
> (f) pleadings;
>
> (g) examinations for discovery and discovery of documents;
>
> (h) service or delivery of a notice, process, order or document on any person;
>
> (i) dispensing with service or delivery;
>
> (j) representation of any person or interest.

Rule 22-1 (7) (d) allows the court in a chambers proceeding to:

> (d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

The test for converting a chambers proceeding to a trial is not stringent. As set out in *British Columbia (Milk Marketing Board) v. Saputo Products G.P. /Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247, chambers proceedings (in that case the Court referred to proceedings

brought by petition), "should be referred to the trial list when there are disputes of fact or law, unless the party requesting the trial is bound to lose…."

In *Estate of Palmer*, 2017 BCSC 1430, Mr. Justice Kent found that the affidavit evidence before him was insufficient to decide the applications under section 58 and 59 in that case. The decision provides a useful precedent for applications to have the issues determined by trial. Mr. Justice Kent wrote:

> 32 Rule 22-1(7)(d) permits the court to order a trial of any chambers proceeding and to give directions respecting the filing of pleadings and the further conduct of the matter. The legal test for converting a chambers proceeding into a trial was recently reviewed by the Court of Appeal in *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 (B.C. C.A.). It is akin to the test applicable for summary judgment under Rule 9-6, i.e., whether a bona fide triable issue arises on the evidence before the court which warrants determination at a trial. The threshold is relatively low in that regard.
>
> Decision and Orders Made
>
> 33 In my view, there is a bona fide triable issue between the parties whether the handwritten amendments to Ms. Palmer's will record a fixed and final expression of intention to make Mr. Homeniuk the sole beneficiary of her estate, an issue which cannot be satisfactorily resolved based solely on the affidavit evidence adduced to date. Accordingly, I make the following orders:
>
> the within chambers proceeding will proceed to a trial;
>
> 1. since Mr. Homeniuk is the applicant and bears the onus of proof, he will be the plaintiff and within 60 days he will issue a Notice of Civil Claim respecting the matters in dispute;
> 2. the persons to be named as defendants in and served with the re-framed proceeding will be Ms. Tina Perret and all of Sean, Daryl, Dolores, Bradley and Brent Palmer;
> 3. diligent efforts must be made to locate and serve the Notice of Civil Claim upon Dolores, Bradley and Brent Palmer before resorting to any form of substitutional service contemplated by Rule 4-4;
> 4. all of the defendants must also be provided a copy of these reasons for judgment;
> 5. discovery of documents and any examination for discovery of the parties may proceed in the conventional manner and the matter will thereafter proceed to trial in accordance with the Supreme Court Civil Rules;
> 6. the conversion of the chambers proceeding in into a trial process will not prevent any of the parties from seeking to have the matters in dispute determined summarily pursuant to Rule 9-7; and

7. costs of the proceedings to date are adjourned to and shall be determined by the court before whom the matter is tried.

XV. Further Reading

Other papers that discuss section 58 or section 59 include:

(1) Emily Clough, Section 58 & 59 of WESA: A Practical Guide to Curing Deficiencies and Rectify Mistakes, Estate Litigation Basics—2016 Update—CLEBC

(2) Kimberly A. Kuntz, Curing Deficiencies: Section 58 and 59 of WESA – 2018 Estate Litigation Basics CLEBC, April 2018

(3) Andrew S. MacKay, Finding the Will Maker's (Hidden) Intention, – WESA: One Year (And A Few Months) Later – CLEBC

(4) Alison Oxtoby, The Identifiable Testamentary Intention: Holograph Wills and Other s. 58 Records, – WESA: One Year (And a Few Months) Later – CLEBC, June 2015

(5) Ian Worland and Amy D. Francis, Rectification of Trusts and Wills[4] – Estate Litigation – 2014 Update – CLEBC

XVI. Final Thoughts

Before the WESA came into effect, one of us (Stan Rule), expressed the view that section 58 would not open the floodgates of litigation. This highlights the danger of making predictions. There are countless section 58 applications, most of which are unreported. On the other hand, many of them are uncontested, and most are dealt with summarily.

The principles applied in British Columbia were established early on in the case of *Estate of Young,* which adopted the reasoning of the Manitoba Court of Appeal in the *George* case. At its highest level of generality, the issue is whether the document represents the deceased's "deliberate or fixed and final intention" in respect of her testamentary wishes. Easy to state; but not always easy to apply.

The legislation is more modern than in many other jurisdictions, and expressly contemplates the inclusion of electronic records. How far does this go? Could the court give effect to a video recording of the deceased's oral wishes, as in South Australia and New South Wales? There are significant differences in the definition of "record" in our legislation and "document" in those two Australian jurisdictions, which makes it less likely that the courts in British Columbia will apply the Australian authorities, and it does appear to be a stretch to include a video recording as a "record" under section 58(1). But it is possible.

In writing about section 59, we encountered the opposite challenge from commenting on section 58. If there appear to be too many cases on section 58, there is very little jurisprudence on section 59 in British Columbia. Our courts may look to reported decisions in Alberta and

4 This paper predates the Supreme Court of Canada decision in *Fairmont Hotels,* which overruled some of the earlier jurisprudence discussed in the paper.

England, and though it does not have an analogous provision, Ontario. Section 59 does offer a smoother way to correct errors in will drafting, freed from the constraints against a court of probate adding words, and against a court of construction considering direct extrinsic evidence of intention in most cases.

The wording of section 59 should be looked at carefully when considering rectification. The aim of the legislation appears to be to correct what we describe as pure drafting errors, as opposed to fixing a misapprehension of the legal effect of the clauses in the will, although the line may not always be a bright one. It is worth considering the Supreme Court of Canada decision in *Fairmont Hotels*, which heralds a more conservative approach to equitable rectification in other instruments than was previously the case.

The *Supreme Court Civil Rules* contemplate a summary process for an application under either section 58 or section 59, but this may be easily converted into a trial where warranted. The *Rules* are in need of reform to permit applications to be made by petition, rather than requisition.

On the other hand, there are many applications involving relatively minor changes to wills, such as memoranda for distribution of personal effects, which could perhaps be dealt with by desk order with the consent of all of those whose interests are affected. Applications for a desk order by consent would appropriately be brought by a requisition.

XVII. Appendix A

Name of Case	Document in Question	Valid/Invalid
British Columbia v Sheaffer, 2015 BCSC 1306	Unsigned, dated will, dated after signed will	Invalid
Beck Estate, Re, 2015 BCAC 676	Handwritten codicil	Valid
Lane Estate, Re, 2015 BCSC 2162	7 handwritten notes on scrap paper	Invalid
Gowan Estate (Re), 2015 BCSC 795	Handwritten holograph will with handwritten changes regarding disposition of property	Valid
Yaremkewich Estate, Re, 2015 BCSC 1124	Personal bequest list and charitable bequest list included in envelope with will	Valid
Young Estate, Re, 2015 BCSC 182	Two-page memorandum with specific bequests, signed after will was valid Unsigned one-page memorandum of bequests not valid	Valid
Cates v Quinn, 2016 BCSC 1226	Unsigned draft will	Invalid
Smith Estate, Re, 2016 BCSC 350	Two handwritten records signed by the deceased	Valid
Hadley Estate, Re, 2017 BCCA 311, 2016 BCSC 765	Journal entry in the personal journal of a 93-year-old woman, headed "This is my last Will" disposing of her estate	Invalid
Horton v Bruce, 2017 BCSC 712	Draft will of the deceased signed but not properly witnessed, revoking all previous wills	Valid, Partially
Keil v Curet, 2017 BCSC 318	Unsigned draft will prepared by solicitor	Invalid
Litke Estate, Re, 2017 BCSC 1079	Single piece of paper with writing on both sides, signed and dated at the end titled "My Will and Testament", disposing of assets and appointing executors	Valid
Riguidel Estate (Re), 2017 BCSC 1667	Handwritten document signed by deceased and typed copy also signed by deceased both titled The Will of	Valid

	Larry Glen Riguidel	
Skopyk Estate, 2017 BCSC 2335	Unsigned, handwritten document refers to the last signed will and purported to change the distribution of the residue	Valid
Quinn Estate, 2018 BCSC 365	Invalid pour-over clause in will	Invalid
Mace Estate (Re), 2018 BCSC 1284	Handwritten, signed and dated document, setting out new executrix, and new dispositions of certain properties	Valid
Poulk Estate, 2018 BCSC 1321	"Fill in the blanks" will, filled out by someone other than deceased, and unsigned by the deceased	Invalid