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Proving, Rectifying and Interpreting a Will under the WESA

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PROVING, RECTIFYING AND INTERPRETING A WILL UNDER THE WESA

I. Introduction

The focus of this paper will be on the changes to both substantive law and procedure for proving contested wills, rectifying wills, and interpretation of wills brought forth by the *Wills, Estates and Succession Act* ("*WESA*") and Part 25 of the Supreme Court Civil Rules (the "Rules") both of which came into effect on March 31, 2014.

Although with the passage of two-and-a-half years, the changes to the Rules are perhaps not so new, I will refer to the current provisions as the new rules, to distinguish them from the former rules.

The main substantive change in the legislation that will affect disputes over the validity of a will is section 52 of the *WESA* which imports the presumption of undue influence that arises in respect of

gratuitous *inter vivos* transfers when the person receiving a benefit is in a relationship of dependence or dominance with the transferor.

Perhaps the most significant changes in procedure in estate litigation since the Rules were amended are those relating to contests about the validity of a will, including claims that the will-maker (as we now call the testator under the *WESA*) did not know of and approve of the contents of the will, that the will-maker did not have testamentary capacity, or that the will was procured by undue influence.

Although it has not had as much impact to date as section 58 of the *WESA* allowing the court to give effect to a record that does not comply with the formal requirements for a valid will, section 59 allowing the court to rectify a will represents a significant change to the law in British Columbia. In the absence of reported cases in British Columbia (at the time of writing), I will take a quick look at cases in Alberta and England, both of which have similar legislation. It is also useful to consider some of the Ontario cases, because the Ontario courts have developed jurisprudence allowing rectification of wills in a manner similar to that contemplated in section 59.

Some of the circumstances that in the past have required applications to interpret a will are likely to be dealt with as rectification applications. But we will continue to have interpretation applications where there is no question that the will-maker intended to use the words she did in the will, but there is a question of what those words mean. The one change to this area of law is evidentiary: section 4(2) of the WESA abolishes the common law distinction between patent and latent ambiguities for the purpose of allowing the court to consider extrinsic evidence of intention to interpret a will.

II. Disputes about the Validity of a Will

A. Substantive Change

The one substantive change brought by the *WESA* is section 52, which creates a presumption that a will or provision in it was obtained by undue influence in certain circumstances:

> Undue influence
>
> 52 In a proceeding, if a person claims that a will or any provision of it resulted from another person
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> (a) being in a position where the potential for dependence or domination of the will-maker was present, and
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> (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,
>
> and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.

The law in British Columbia prior to section 52 (and in cases where the will-maker died before March 31, 2014) was that the onus was on the party alleging that a will, or provision in a will, was procured by undue influence to prove undue influence. Madam Justice Dardi summarized the pre-*WESA* law in *Leung v. Chang*, 2013 BCSC 976, at paragraphs 34 and 35 as follows:

> [34] When undue influence or fraud is alleged, the party opposing probate always bears the legal burden of proving on a balance of probabilities the affirmative defence of undue influence: *Vout* [*v. Hay*, [1995] 2 S.C.R. 876] at para. 28. It is important to appreciate that in these circumstances, the doctrine of suspicious circumstances and the shifting of the burden of proof has no application.
>
> [35] In order to invalidate a will on the grounds of undue influence, the asserting party must prove that the influence exerted against the will-maker amounted to coercion, such that the will did not reflect the true intentions of a free will-maker and was not the product of the will-maker's own act. The undue influence must constitute coercion which could not be resisted by the will-maker and which destroyed his or her free agency. It is well-established on the authorities that if the will-maker remains able to act freely, the exercise of significant advice or persuasion on the will-maker or an attempt to appeal to the will-maker or the mere desire of the will-maker to gratify the wishes of another, will not amount to undue influence: *Maddess v. Racz*, 2008 BCSC 1550 (CanLII) at para. 324 aff'd 2009 BCCA 539 (CanLII); Freeman v. Freeman (1889), 19 O.R. 141 at 155 (C. A.); Scott at para. 112.

In practice, it was often very hard to prove undue influence, which tends to happen behind closed doors. Section 52 may make it easier to challenge a will on the basis of undue influence, if the party seeking to defeat the will, or a provision in it, is able to establish the potential for dependence or domination.

As an aside, the *WESA* does not contain any express provision applying the presumption to the designation of beneficiaries in benefit plans, nor does the *Insurance Act* contain an analogous provision for life insurance policies. Accordingly, the burden may still be on the person seeking to challenge a beneficiary designation to prove undue influence (see *Re Rogers: Rogers v. Rogers* (1963), 39 D.L.R. (2d) 141 and Fontana v. Fontana (1987), 28 C.C.L.I. 232).

I am not aware of any cases applying section 52, nor am I aware of analogous provisions in other jurisdictions.

The presumption likely derives from the equitable presumption of undue influence applicable to gratuitous *inter vivos* transfers. Madam Justice Satanov set out the presumption in respect of *inter vivos* transfers in *Ogilvie v. Ogilvie Estate*, 1996 CarswellBC 1637 (S.C.), appeal dismissed 1998 CarswellBC 717 (C.A.) as follows:

> 32 The law of undue influence seems well settled. The early English case of *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.) , set out the basic principles and their rationalization. The Supreme Court of Canada in *Goodman Estate v. Geffen* (1991), 81 D.L.R. (4th) 211 , confirmed that *Allcard v. Skinner* is still good law in Canada today.
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> 33 *Allcard v. Skinner* was the case of a woman who entered an Anglican religious order and gave up all her property and possessions in accordance with the Sisterhood's rules. She left the Anglican Church and joined a Roman Catholic convent. Some years later she attempted to recover what she had given to the Anglicans. The action was dismissed at trial because the trial judge found that she had the competent advice of her brother before she joined the Anglican Sisterhood. The Court of Appeal found undue influence but dismissed the appeal by reason of laches.
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> 34 The question before the court in *Allcard v. Skinner* was whether at the time the Plaintiff executed the transfer she was under such influence as to prevent the gift being considered as "that of one free to determine what should be done with her property". Cotton, L.J. referred to two classes of decisions where the Court of

Chancery had set aside voluntary gifts executed by parties who were under such influence as enabled the donor afterwards to set the gift aside.

> These decisions may be divided into two classes — First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused. (p. 171)

35 Lindley, L.J. in the same case described these two classes of decisions, as follows:

> First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some over-reaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor.
>
> . . . . .
>
> The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to shew that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made. (p. 181)

36 Presumptions are imposed by law to create evidentiary burdens. In criminal law there is a presumption of innocence which might result in a guilty man going free to ensure that an innocent man is not wrongly convicted. But with respect to undue influence it appears that the law has such an abhorrence for "coerced or fraudulently induced generosity" that it is prepared to confiscate what sometimes might be a valid gift to ensure that no one in a position of influence unduly benefits from his position. Thus the usual onus of proof is reversed, creating a presumption in favour of the plaintiff that the influence was undue, which the defendant must then rebut.

37 In the case of a gift of sufficient magnitude so as not to be accounted for by "ordinary motives on which ordinary men act", all that need be shown by the plaintiff to raise the presumption is some "special relationship". Courts have found the existence of a fiduciary relationship, or something less such as a confidential or advisory or guiding relationship, to be sufficiently influential to raise the presumption (*Goodman Estate v. Geffen* , *supra*, pp. 221-222). Wilson J.

in *Goodman Estate v. Geffen* suggested that a preferable way of describing the requisite relationship is where one person has the ability to dominate the will, i.e. exercise a persuasive influence over another, whether through manipulation, coercion or outright but subtle abuse of power. She set out the test for invoking the presumption at p. 227:

> What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.

38 Wilson, J. goes on to say that in situations where consideration is not an issue, such as with gifts and bequests, the Plaintiff needn't prove undue disadvantage or benefit.

> ... In these situations the concern of the court is that such acts of beneficence not be tainted. It is enough, therefore, to establish the presence of a dominant relationship.

39 Therefore, it appears that once the plaintiff has established that the nature of the relationship between the donor and the recipient was such that the potential for influence existed, the onus shifts to the defendant to rebut it. The defendant must show that the donor entered into the transaction as a result of his or her own "full, free and informed thought". This may entail establishing that no actual influence was deployed in the particular transaction and that the donor had independent advice. (*Zamet v. Hyman*, [1961] 3 All E.R. 933 (C.A.)). It may also involve an examination of the magnitude of the benefit.

Mr. Justice Punnett summarized the factors the courts have considered when determining if the presumption of undue influence once applied has been rebutted in *Stewart v. McLean* as follows:

> 97 To rebut the presumption of undue influence, the defendant must show that the donor gave the gift as a result of her own "full, free and informed thought": *Geffen* at 379. A defendant could establish this by showing:
>
> a. no actual influence was used in the particular transaction or the lack of opportunity to influence the donor (*Geffen* at 379; *Longmuir [v. Holland*, 2000 BCCA 538] at para. 121);
>
> b. the donor had independent advice or the opportunity to obtain independent advice (*Geffen* at 379; *Longmuir* at para. 121);
>
> c. the donor had the ability to resist any such influence (*Calbick v. Wolgram Estate*, 2009 BCSC 1222 (B.C. S.C.) at para. 64);
>
> d. the donor knew and appreciated what she was doing (*Vout v. Hay*, [1995] 2 S.C.R. 876 (S.C.C.) at para. 29, (1995), 125 D.L.R. (4th) 431 (S.C.C.)); or
>
> e. undue delay in prosecuting the claim, acquiescence or confirmation by the deceased (*Longmuir* at para. 76).
>
> Another relevant factor may be the magnitude of the benefit or disadvantage (*Geffen* at 379; *Longmuir* at para. 121).

> 98 The adequacy of independent legal advice was considered in *Coish v. Walsh*, 2001 NFCA 41, 203 Nfld. & P.E.I.R. 226 (Nfld. C.A.) at para. 23, which accepted the factors from *Fowler Estate v. Barnes* (1996), 142 Nfld. & P.E.I.R. 223, 13 E.T.R. (2d) 150 (Nfld. T.D.) at para. 24):
>
> > 1. Whether the party benefiting from the transaction is also present at the time the advice is given and/or at the time the documents are executed.
> >
> > 2. Whether, though technically acting for the grantor, the lawyer was engaged by and took instructions from the person alleged to be exercising the influence.
> >
> > 3. In a situation where the proposed transaction involves the transfer of all or substantially all of a person's assets, whether the lawyer was aware of that fact and discussed the financial implications with the grantor.
> >
> > 4. Whether the lawyer enquired as to whether the donor discussed the proposed transaction with other family members who might otherwise have benefited if the transaction did not take place.
> >
> > 5. Whether the solicitor discussed with the grantor other options whereby she could achieve her objective with less risk to her.
> >
> > [Citations omitted.]

Your client may make a claim that a particular gift in a will was obtained by undue influence in a proof in solemn form proceeding, without challenging the validity of the will as a whole. If so, and if successful, the relevant provision may be severed from the otherwise valid will. Similarly, and relevant to the discussion of rectification below, the court may determine that the will-maker did not know and approve of specific words or provisions in a will, while admitting the granting of probate of the balance of the will.

If your client is seeking to rely on the presumption under section 52, expressly plead the material facts to establish the potential for dependence or domination of the will-maker and refer to section 52 as part of the legal basis. If you just plead undue influence, the party seeking to uphold the will may reasonably take the position that your client needs to provide actual undue influence, which is more difficult, and may require particulars. The reversal of the onus does not apply to all cases where undue influence is alleged, but only to those where the party making the allegation establishes the potential for dependence or domination of the will-maker.

III. Procedure

A. Notice Requirements for Estate Grants

The new rules give more information to interested parties about their rights to contest a will or apply to vary it.

An applicant for an estate grant must first give notice to the beneficiaries and those who would be entitled on intestacy, as well as certain other interested parties as set out in Rule 25-2 (2), (8) through(12).

The requirements that notice be given to beneficiaries and intestate heirs is not new, but what is new is that the notice must be delivered at least 21 days before the application is filed. This provides

a greater opportunity for an interested person wishing to contest a will to file a notice of dispute before the court issues a grant. Under the former procedure, notices could be mailed just before the applicant filed the application.

The form of notice itself, Form P1, sets out a summary of some of the rights of the person receiving notice. For example, the form contains the following:

> (2) You have a right to oppose, by filing a notice of dispute in accordance with Rule 25-10 (1),
>
> > (a) if the intended application is for an estate grant, the granting of either or both of an authorization to obtain estate information and the estate grant, or
> >
> > (b) if the intended application is for a resealing, the granting of either or both of an authorization to obtain resealing information and the resealing.
>
> (3) You may or may not be entitled to claim against the estate for relief, including a claim under
>
> > (a) the Family Law Act, or
> >
> > (b) Division 6 of Part 4 of the Wills, Estates and Succession Act.

B. Notice of Dispute

If the court has not issued an estate grant, then "a person to whom documents have been or are to be delivered under Rule 25-2 (2)" may file a notice of dispute. The procedure is set out in Rule 25-10. A notice of dispute is analogous to a caveat under the former rules, but there are important differences.

One difference is that the words in Rule 25-10 (1) "a person to whom documents have been or are to be delivered under Rule 25-2 (2)" may limit the ambit of those with standing to file a notice of dispute. Rule 25-2 (2) requires the applicant for an estate grant to deliver his or her notice of the intended application to executors and alternate executors with an equal or prior right to apply, the beneficiaries of the will, and those who would have been an intestate heir if the deceased had died without a valid will.

What if your client is a beneficiary of a previous will, but is excluded from the will she wishes to contest, and would not receive a share of the estate on an intestacy? Does she have standing to file a notice of dispute? One solution is to make an application for an order pursuant to Rule 25-2 (14) (a) requiring the applicant to give notice of the intended application to your client. This sub-rule provides,

> (14) On application, the court may do one or both of the following to avoid any prejudice that would otherwise result to the intended applicant, to another person or to the estate:
>
> > (a) vary the classes of persons to whom documents referred to in subrule (1) are to be delivered….

In Re Dow Estate, 2015 BCSC 292, Master Harper granted an order adding a person who was a beneficiary under a previous will to the class of persons to whom the applicant for an estate grant is required to give notice in order to allow her to file a notice of dispute. Master Harper found that she, the beneficiary under the previous will, would be prejudiced if she were not given notice and permitted to file a notice of dispute.

The rationale for the restrictive language in 25-10 (1) is unclear. It would be preferable to allow anyone with an interest in opposing an estate grant to file a notice of dispute.

A second difference is that, in contrast to caveats, you may only file one notice of dispute, but it remains in effect for one year (rather than 6 months) unless removed. You may also apply to court to renew the notice of dispute under Rule 25-10 (7).

The Registrar may not issue an estate grant, an authorization to obtain estate information, or reseal a foreign grant while a notice of dispute is in effect.

The "disputant" may withdraw a notice of dispute by filing a withdrawal in form P 30.

Any person interested in the estate may apply under Rule 25-10 (10) to court to remove a notice of dispute, and the court may do so "if the court determines that the filing is not in the best interests of the estate." See Rule 25-10 (11).

Mr. Justice Steeves, in *Re Richardson Estate*, 2014 BCSC 2162, held that the language of Rule 25 – 10 (11) is broader than that of the analogous former Rule for striking a caveat, and has a substantially different objective. In his Lordship's words, "[i]nstead of a focus on the nature of the pleadings under the previous Rule, the focus now is on the estate and what is in its best interest." He wrote further at paragraph 62,

> … the best interests of the estate are an economic issue, one requiring the weighing of the value of a decision or issue in dispute with the overall value of the estate. I conclude that this approach has some merit in interpreting Rule 25-10(11) in this case. I hasten to add that non-economic issues can be important to the best interests of the estate such as, for example, situations involving personal items or even real property that has unique value.

In *Re Richardson Estate*, the applicant for an order removing the notice of dispute claimed that she was the deceased common law spouse, and therefore the intestate heir. The disputant was the deceased's brother who denied that the applicant was the deceased's common law spouse. Mr. Justice Steeves found sufficient evidence to summarily find that the applicant met the criteria for a common law spouse, and in view of the relatively modest size of the estate, held that it was in the best interest of the estate to remove the notice of dispute.

I am not aware (as at the date of writing) of any decisions applying *Re Richardson Estate* to a notice of dispute filed to dispute the validity of a will, but the reasoning should apply. A person seeking to uphold the validity of a will might successfully seek a summary determination of the validity of the will in an application to remove the notice of dispute, if there is sufficient evidence to support the will, and the estate is modest.

C. Revocation of Grant

If the Court has already issued a grant, it will be too late to file a notice of dispute. Pursuant to Rule 25-14 (1) (c), the person disputing the validity of the will may apply by a notice of application under Part 8 of the Supreme Court Civil Rules to revoke the grant. The notice of application is made in the proceeding, and filed in the court file, in which the grant was issued.

Serve all personal representatives and any other person who would be affected by an order revoking the grant with the notice of application (Rule 25-14 (4) and (5)).

Though not specified in the Rules, the persons affected include those who are beneficiaries under the will, those who are beneficiaries under a previous will that may be probated if the will being challenged is found to be invalid, and the intestate heirs if there is no previous valid will.

D. Proving the Will in Solemn Form

If the validity of the will is contested, the person seeking a grant may apply to prove the will in solemn form.

The procedure used to be that you commenced an action to prove a will in solemn form, or to revoke a grant, by filing a notice of civil claim. Although the former rules did contemplate a procedure to prove the will in solemn form by petition (former Rule 21-5 (13)), this came under non-contentious business, and probate actions came under former Rule 21-4 (3), requiring a notice of civil claim.

As an action brought by notice of civil claim, the parties to a proof in solemn form had the full rights to document disclosure, examinations for discovery, and a trial as provided in the Rules.

Now, under Rule 25-14 (4) if there is an existing proceeding within which it is appropriate to bring the application, a person seeking to prove the will in solemn form must do so by notice of application.

What is an existing proceeding? New Rule 2-1 (2.1) says:

> (2.1) Without limiting any other provision of this Rule, a proceeding to which Part 25 applies may be started by
>
> (a) the filing of a submission for estate grant under Rule 25-3 (2),
>
> (b) the filing of a submission for resealing under Rule 25-6 (2),
>
> (c) the filing of a requisition under Rule 25-12 (2) or 25-14 (1) or (2), or
>
> (d) the filing of a petition under Rule 25-14 (4).

If there is no existing proceeding, then the person seeking to prove the will in solemn form must commence the proceeding by petition under Rule 16-1. Proceedings commenced by petition are not "actions," in which the parties have the right to document disclosure and examinations for discovery without leave of the court. The Rules contemplate that petitions are heard summarily in chambers on affidavit evidence.

E. Applications for Directions

The changes in procedure for applications to revoke an estate grant or to prove a will in solemn form could create a significant barrier for those challenging the validity of the will. Those who challenge wills often need the full arsenal of pre-trial discovery to obtain the evidence necessary to build their case, including document production from examination of adverse parties, non-party documents such as the solicitor's will file, clinical records from physicians and health care providers, and examinations of non-parties. The named personal representative will often have more evidence of what has occurred and a greater ability to obtain non-party evidence.

However, all is not lost from the challenger's perspective. Rule 25-14 (8) gives the court broad authority to determine procedure:

> (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:
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> (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 16-1 (18) governing petitions also allows the court to apply the other rules to a petition:

> 18) Without limiting the court's right under Rule 22-1 (7) (d) to transfer the proceeding referred to in this rule to the trial list, the court may, whether or not on the application of a party, apply any other of these Supreme Court Civil Rules to a proceeding referred to in this rule.

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.

Accordingly, a party can get discovery and trial, but will have to apply to court first. In many cases—one may hope—counsel will agree on consent orders allowing for reasonable discovery, and for a trial if there are *bona fide* issues requiring a trial.

From the perspective of those seeking to uphold the validity of a will, the new rules may facilitate a summary disposal of the proceeding, particularly if the challengers are not able to establish a prima facie case. Parties seeking to uphold the will may be able to successfully resist orders for discovery, and then proceed to have the proceeding decided in a chambers application, thereby saving considerable legal expense.

F. Filing of Grant in Revocation Proceeding

A person who has possession or control of an estate grant must file it within seven days of being served with an application to revoke a grant, and the person to whom the grant was made may not act on it without leave of the registrar. An application for leave may be made by requisition with supporting affidavit evidence. The registrar may grant leave if "satisfied that the harm that will occur if the leave is granted is less than the harm that will occur if leave is not granted."

The relevant rules are 25-5 (5) and (6).

G. Settlement of Proof in Solemn Form Proceedings

The former Rule 21-4 (12) requiring leave of the court to compromise a probate action has been repealed, and has not been replaced in Part 25.

Rule 21-4 (10), which provided that the rules allowing for discontinuance without leave do not apply to a probate action, has also been repealed, and has also not been replaced. Accordingly, you can file a discontinuance in a proof in solemn form proceeding.

Although the changes may facilitate settlements of proof in solemn form proceedings without requiring an application to court in some cases, a personal representative will often be well advised to proceed with a chambers application for an order proving the will in solemn form if the validity of the will has been disputed.

H. Further Reading

For a further discussion of proving wills in solemn form, I recommend Claire Wilson's paper *Challenges to the Validity of a Will*, in "Estate Litigation Basics-2016 Update," and M. Scott Kerwin, *Probate Actions*, in the CLE course, "Estate Litigation Basics—2010 update". Although written before *WESA* and the new Rules, most of Mr. Kerwin's paper remains relevant for his thorough discussion of the substantive law. Madam Justice Ballance's reasons for judgment in *Laszlo v. Lawton*, 2013 BCSC 305, contains a very helpful analysis of the law on testamentary capacity.

I also recommend John E.S. Poyser's Canadian textbook *Capacity and Undue Influence*, 2014, Carswell. When reading Mr. Poyser's book, it is important to bear in mind that section 52 of the WESA has changed the law in respect in respect of proving that a will or a provision in a will was procured by undue influence.

IV. Rectification of Wills

As part of its comprehensive report (the "BCLI Report") on succession law, *Wills, Estates and Succession: A Modern Framework*, the British Columbia Law Institute recommended that British Columbia adopt a provision allowing the Court to rectify a will, and in doing so, consider extrinsic evidence of the will-maker's intent.

The difficulties applicants faced in trying to correct drafting errors were summarized on page 37 of the BCLI Report,

> 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.

(For those interested in a fuller 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.)

The Government followed the British Columbia Law Institute's recommendation on this point, and included a power to rectify a will in paragraph 59 of *WESA*:

> Rectification of will
>
> 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.

The distinction between a court of probate and a court of construction does not appear to be relevant to an application for rectification. As the British Columbia Law Institute noted, the will is probated first, and then the court of construction may interpret it.

As at the time of writing, I am not aware of any cases considering section 59 of the *WESA*. It will be helpful to look at the cases in other jurisdictions.

A. Alberta

The Alberta *Wills and Succession Act*, which came into effect on February 1, 2012 has a similar rectification provision, and there have been a few reported cases in Alberta.

In *Fuchs v. Fuchs*, 2013 ABQB 76, 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*, 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 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.'"

B. 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—
>
> of a clerical error; or
>
> 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 recently 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 straightforward enough, but with one problem: the husband signed 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.

C. 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 3484, 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."

D. 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.

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…'

If British Columbia courts follow Mr. Justice Balboa's interpretation of the limits of section 59, then the power to rectify a will is arguably narrower than the equitable power to rectify contractual documents or *inter vivos* trusts, and may also limit the ability to use section 59 to rectify provisions of a will that have unintended tax consequences (unless it can be shown that there was an error falling within one of the categories in s. 59 (1)). A discussion of rectification of contractual documents and *inter vivos* trusts is beyond the scope of this paper; for analysis of rectification of trusts, I recommend Ian Worland and Amy D. Francis, *Rectification of Trusts and Wills*, in the CLE course "Estate Litigation, 2014 Update," and David G. Thompson, *Rectification, Variation, Amendment – How to Fix a Faulty Trust,* in the CLE course "Trusts: The Multi-Faceted Estate Planning Tool, 2012."

E. Rectifying Non-Compliant Documents

May the court rectify a non-compliant record given effect under section 58 under section 59?

On the one hand, in order for the court to give effect to a document (or other record) 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.

I 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.

F. Procedure

The Supreme Court Civil Rule 25-14 (2) provides that to commence an application to rectify a will

> "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 that will 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 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.

Although Ms. Clough was writing about section 58, in my view her comments on the inadequacy of using requisitions to commence a proceeding under section 58 apply to proceedings under section 59. All persons with an interest in the outcome of an application to rectify a will should be given notice, and an opportunity to give evidence and make submissions.

If the personal representative wishes to apply 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.

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.

As with proof in solemn form proceedings discussed above, the court has broad powers to make orders as to procedure, including discovery and trial, pursuant to Rule 25-14 (8).

V. Applications for Interpretation of a Will

Although "interpretation" and "construction" are often used interchangeably, as Ed Macaulay explained in his paper *Interpretation of Wills*, for the Continuing Legal Education course "Estate Litigation Basics—2010 Update," there is a distinction. When the court interprets a will, the court attempts to find the will-maker's subjective intention in using the words she did. Construction is the application of various rules and presumptions that the court may apply if the court is unable to find the will-maker's intention without resort to these rules and presumptions. An example of a rule of construction is that if there are two possible meanings, one of which will leave part of the estate intestate, the court may apply the presumption that the will-maker did not intend an intestacy and give effect to the alternative possible meaning.

I have used the term "interpretation" in this paper, but as you will see shortly, the term "construction" is used in the *WESA*.

There are other distinctions that are perhaps of greater significance to the interpretation of wills. "Extrinsic evidence" refers to any evidence apart from the will itself, and should be distinguished from direct "extrinsic evidence of intent." The courts will often admit extrinsic evidence of the will-

maker's surrounding circumstances, and indeed I would argue that probably all applications to interpret a will involve some extrinsic evidence to at least identify the parties and their relationships to the will-maker and the will. It is, however, only in much more limited circumstances that the court may consider direct extrinsic evidence of intent, which is evidence along the lines of "He told me what he meant was to give his house to his sister Theresa." The rules governing the admissibility of direct extrinsic evidence of intent are stricter than those governing the admissibility of extrinsic evidence of surrounding circumstances. (See Madam Justice Dardi's decision in *Thiemer Estate*, 2012 BCSC 629, paragraphs 44 through 51, for a summary of the principles for interpreting the wills, including the admissibility of extrinsic evidence of surrounding circumstances.)

The one change in the law in the *WESA* is in section 4 which sets out evidentiary rules for the interpretation of wills.

> Construction of instruments
>
> 4 (1) If this Act provides that a provision of this Act is subject to a contrary intention appearing in an instrument, that contrary intention must appear in the instrument or arise from a necessary implication of the instrument.
>
> (2) Extrinsic evidence of testamentary intent, including a statement made by the will-maker, is not admissible to assist in the construction of a testamentary instrument unless
>
> (a) a provision of the will is meaningless,
>
> (b) a provision of the testamentary instrument is ambiguous
>
> (i) on its face, or
>
> (ii) in light of evidence, other than evidence of the will-maker's intention, demonstrating that the language used in the testamentary instrument is ambiguous having regard to surrounding circumstances, or
>
> (c) extrinsic evidence is expressly permitted by this Act.

Although the language of subsection 4(2) is restrictive, it is intended to broaden the approach a little to allow extrinsic evidence of intent, including direct evidence of intent (such as the will-maker's instructions to her solicitor) where the will is ambiguous by abolishing the distinction between patent and latent ambiguities. Section 4(2) follows the BCLI's recommendations in the BCLI Report. I can do no better in explaining the issues than the authors of that report. I have edited the following quotation by replacing the references to sections numbers in BCLI draft legislation to the section numbers in the *WESA* and I have omitted footnotes.

> Comment: Section [4(2)] is a new provision that simplifies the principles governing the admission of extrinsic evidence of testamentary intent in the interpretation of wills and the type of extrinsic evidence that can be considered. "Extrinsic evidence" in this context means evidence other than the contents of the will.
>
> The basic rule (applicable to the interpretation of other documents as well as wills) is that evidence other than the contents of the document may only be introduced as an aid to interpretation when the meaning cannot be determined from the language used. Present law permits evidence of surrounding circumstances known to the testator at the time the will was made to be introduced in order to shed light on the meaning of an ambiguous or apparently meaningless term, or to identify an ambiguity. This is known as the "armchair" rule because the court puts itself notionally in the testator's position when making the will in order to better determine the meaning of the words the testator used. Evidence of the testator's dispositive intent is not admissible to identify an ambiguity in a term or to interpret one that is apparent on the face of the will (patent ambiguity). Evidence of intent may be introduced to aid in interpreting a "latent ambiguity," namely ambiguity which does

> not appear on the face of the will but only when the terms of the will are considered in light of surrounding circumstances. An example of latent ambiguity would be a gift to "my nephew James Scott" if the testator actually had two nephews, each having James as a middle name. In such a case evidence tending to show that the testator intended to benefit one and not the other nephew could be admitted.
>
> The view that has prevailed in the Succession Law Reform Project is that removing all restrictions on admission of extrinsic evidence of intent would allow excessive scope for attempts to secure an interpretation contradicting the actual terms of the will. Fabrications or fantasies of the "he really meant me" or "he always said I would get the house" variety could be advanced much more easily than they can be under the present law.
>
> When genuine ambiguity is present, however, it makes little sense to exclude other evidence that could shed light on the testator's actual meaning. The distinction made between latent and patent ambiguity in the test for admissibility of extrinsic evidence is essentially one of legal form, not one that serves a practical purpose.
>
> Section [4(2)] dispenses with the distinction between patent and latent ambiguity for the purpose of admission of extrinsic evidence. It allows extrinsic evidence of surrounding circumstances, but not evidence of the testator's intention, to be admitted for the purpose of showing an ambiguity exists. Thus evidence of intent cannot be introduced to identify an ambiguity, but may be used to interpret an ambiguity once one has been identified by reading the will in light of the factual matrix in which the testator made it.
>
> The kind of exception contemplated by paragraph (c) is found in section [59], which expressly permits the admission of extrinsic evidence in relation to an application for rectification of a will

In view of the court's powers in section 59 to rectify a will, and allow direct evidence of intention in an application to rectify, will we still have applications to interpret a will? I think so. It is a prerequisite to show that a drafting error was made to rectify a will under section 59. Words may then be added or omitted. But in cases where there is no error, and the will-maker intended the words he or she used, there may still be a dispute about what the will-maker meant. In such a case, the common law evidentiary rules, as relaxed in section 4 (2) will apply.

Applications for interpretation of a will are not limited by the 180-day time limit from the estate grant for rectifying a will under section 59 (which may be extended with leave).

A. Procedure

You will continue to make applications for interpretation of a will by petition and supporting affidavits. Rule 2-1(2) (c) provides that a person must file a petition, or if Rule 17-1 applies (all parties consent or no notice is required), a requisition, if "the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document…" Rule 17-1 is unlikely to apply to an interpretation application.

VI. Final Thoughts

Although the *WESA* has now been in effect for over two years, there remains a dearth of reported case law applying many of the substantive changes including the change in onus for undue influence where the potential dependence or domination of the will-maker was present in section 52, and

applications to rectify a will under section 59. But I anticipate that we will begin to see reported decisions soon.

Section 52 appears to be unique in its application of the presumption to wills. The courts might adopt the jurisprudence developed in the context of *inter vivos* transfers to will challenges British Columbia where the presumption of undue influence applies.

With respect to section 59, our courts may look to reported decisions in Alberta and England, and though it doesn't 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 extrinsic evidence of intention in most cases.

The new Rules already require reform. Apart from more fundamental questions such as whether it is appropriate to mandate that proof in solemn form proceedings be commenced by a summary process, there are a number of discrete matters that ought to be reviewed soon. I have noted a couple: the restriction on the class of persons who may file a notice of dispute to those entitled to notice of the application for an estate grant, and the provisions requiring that proceedings under section 59, as well as other types of proceedings, be commenced by requisition if there is no existing proceeding in which it is appropriate to bring a notice of application.