TAB 3

A Review of Recent Cases

Timothy G. Youdan
Davies Ward Phillips & Vineberg LLP

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Continuing Professional Development

A REVIEW OF RECENT CASES*

Timothy G. Youdan**

I have grouped this review of recent cases into five groups: certain family law issues; procedural issues; limitations; obtaining information by beneficiaries; and interpretation of wills. I have also added a postscript, referring briefly to cases coming to my attention after the main part of this paper was written.

Certain Family Law Issues

The facts in *Belvedere* v. *Brittain Estate*[1] were summarized as follows by Armstrong J.A.[2]:

> "Laura Belevedere met Jeffrey Brittain on June 17, 2000. Three days later, they commenced living together until Mr. Brittain's untimely death in a farming accident on May 8, 2002. During the course of the relationship, Mr. Brittain expressed his intention that on his death he would transfer his five registered Retirement Savings Plans ("RRSPs") to Ms Belevedere, provided they were still living together. In order to accomplish this objective, he asked Ms Belevedere to sign a cohabitation agreement and he, in turn, would change his will.
>
> Unfortunately when Mr. Brittain died, no cohabitation agreement had been signed and his will had not been changed.
>
> Ms Belevedere commenced an action against the Canada Trust Company as the trustee of Mr. Brittain's estate. She claimed a broad spectrum of relief, including a claim for an interest in the assets of the Estate by reason of a constructive or resulting trust and damages for unjust enrichment.
>
> The trial judge issued a declaration that Ms Belevedere was entitled to a constructive trust in Mr. Brittain's RRSPs at the time of his death, to be satisfied by payment to Ms Belevedere of $1,750,000 ... ."

In determining that Mr. Brittain's estate was unjustly enriched, the trial judge considered that Mr. Brittain had been enriched by household services provided for the benefit of him and his young son, as well as by Air Canada health benefits and flying privileges afforded to them

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** Partner, Davies Ward Phillips & Vineberg LLP.

1 (2008) 44 ETR. (3d) 157 (Ont CA).

2 At 159.

through Ms Belevedere's employment with Air Canada. The trial judge further considered that Ms Belevedere suffered a corresponding depravation because, with Mr. Brittain's encouragement, she had sold her car and her home and had to incur financial cost to maintain her status and seniority with Air Canada. He further held that there was no juristic reason for the enrichment, even if Ms Belevedere's life style had arguably improved as a result of cohabiting with Mr. Brittain. Since there was, the trial judge said, no dispute that Mr. Brittain intended Ms Belevedere to receive his RRSPs, she was entitled to a constructive trust in the RRSPs at the time of Mr. Brittain's death. Since the applicable taxes had been paid and the RRSPs no longer existed, he fixed the award at $1,750,000.

The Court of Appeal held that the judge's findings on unjust enrichment were not supported by the evidence, noting in particular that although the provision of domestic services may form the basis of a claim in unjust enrichment,

> "It is equally clear that the conferring of a benefit does not, by itself, constitute unjust enrichment ... . Rather, what is required, and what the trial judge failed to do in this case, is to balance the benefits conferred and received by the parties to determine whether the claimant's contribution is sufficient to entitle her to compensation."[3]

The Court of Appeal further held that, even if unjust enrichment had been made out, a constructive trust would not have been an appropriate remedy since:

- a constructive trust is available as a remedy for unjust enrichment only where monetary damages are inadequate, and in this case the estate had more than adequate funds to compensate Ms Belvedere by the payment of monetary damages; and

- there must also be a link between the contribution that founds the action and the property in which the constructive trust is claimed – a link which was completely lacking between any contribution of Ms Belvedere and Mr. Brittain's RRSPs.

Vanasse v. *Seguin*[4] is another decision of the Ontario Court of Appeal dealing with unjust enrichment in a domestic relationship. The parties had cohabited for about 12 years. They had

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[3] At 166. For detailed consideration of the applicable principles in balancing benefits conferred by each of the parties, see *Wilson* v. *Fotsh* (2010) 57 ETR (2d) 159 (BCCA).

[4] (2009) 96 OR (3d) 321 (CA).

two children, and after the children were born Ms Vanasse devoted herself full-time to running the household and raising the children (having previously been employed by CSIS). Mr. Seguin built up a business, which he ultimately sold for $11,000,000 and the trial judge, Blishen J., had concluded that Mr. Seguin could not have done this but for Ms Vanasse's efforts. Consequently, she found that Mr. Seguin was unjustly enriched. She did not use the "value received" approach to quantification but instead determined the increase in value of Mr. Seguin's property during the period of unjust enrichment and awarded Ms Vanasse a monetary amount equal to half the increase in Mr. Seguin's assets during this period less the benefits received by Ms Vanasse as a result of the relationship. Accordingly, she ordered Mr. Seguin to pay Ms Vanasse $960,500 as compensation for unjust enrichment. Mr. Seguin did not appeal the unjust enrichment finding but he did appeal the quantification of the award.

In brief reasons for judgement, the Court of Appeal expressed disagreement with Blishen J.'s position that the Court of Appeal decisions in *Nasser* v. *Mayer-Nasser*[5] and *Yackobeck* v. *Hartwig*[6] had endorsed a blurring of the "value received" and "value survived" approaches to quantification of the remedy for unjust enrichment and asserted that the court, in *Bell* v. *Bailey*[7] and *Wylie* v. *Leclair*[8], had previously held that he approach adopted by Blishen J. was incorrect. The court ordered a new trial.

Unfortunately, the Court of Appeal did not provide any substantive explanation why the so-called "value received" approach was the only possible one and, with respect, the court's distinguishing of the *Nasser* and *Yackobeck* cases is unconvincing.

The source of the problem is an aspect of the judgement of McLachlin J. (as she then was) in *Peter* v. *Beblow*.[9] She expressed the view that two remedies are available for unjust enrichment:

> "An award of money on the basis of the value of the services rendered, ie, *quantum meruit*; and the one the trial judge awarded, title to the house based on constructive trust."[10]

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5 [2000] OJ No. 517.

6 [2000] OJ No. 4458.

7 [2001] OJ No. 3368.

8 (2003) 64 OR (3d) 782.

9 [1993] 1 SCR 980.

For an award of monetary compensation, she stated that,

> "[t]he "value received" approach is appropriate; the value conferred on the property is irrelevant."[11]

The proprietary remedy of constructive trust, on the other hand, was said to be based on the "value survived" approach, so that the claimant received an appropriate proportion of the particular property.

There is, in my view, no reason why the court's flexibility to remedy unjust enrichment should be restricted in the rather arbitrary way indicated by McLachlin J. In particular, there is no reason why a monetary award should be restricted to the "value received" measure of recovery. For example, where one party's contribution has enabled the other party to increase the value of his property in a way that would not have been possible without the first party's contribution, it is not apparent why a monetary award should not be assessed as a proportion of such increase in value. The fact that a constructive trust may not be the appropriate remedy, because a monetary award is sufficient, is surely irrelevant. In other words, the form of the remedy should not dictate the measure of recovery.[12]

In *Ranking* v. *Ranking*,[13] the Ontario Court of Appeal dealt with the effect of jointly owned property in the equalization of net family property on the death of a spouse under the *Family Law Act*. The issue arose because section 4(1) of the Act provides that the "valuation date" is,

> "5. The date before the date on which one of the spouses dies leaving the other spouse surviving."

Where there is a right of survivorship, the surviving spouse will become entitled to the whole of the property on the death of the other spouse, ie, after the valuation date. This gave rise to a concern that the surviving spouse would enjoy a windfall, on the basis that on the valuation date one-half of the value of the jointly held property would be included in the net family property of

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10 At 995.

11 At 999.

12 See the approach taken by the British Columbia Court of Appeal in *Clarkson v. McCrossen Estate* (1975), 7 ETR (2d) 125 and *Pickelein v. Gillmore* (1997) 16 ETR (2d) 1. *Vanasse* v. *Seguin* was appealed to the Supreme Court of Canada. The appeal was recently heard in conjunction with the British Columbia Court of Appeal decision in *Kerr* v. *Baranow* [2009] 9 WWR 285. Judgment was reserved in both appeals.

13 2010 Carswell Ont 2609.

each of the spouses, but the surviving spouse would in fact obtain the whole of the benefit from such property. This concern was considered by the Ontario Law Reform Commission, in its *Report on Family Property Law*,[14] and amendments were recently made to the *Family Law Act* which were designed to require the surviving spouse to give a credit against an equalization entitlement for the value of property obtained pursuant to the right of survivorship.

In the *Ranking* case, the Court of Appeal effectively held that the concern was not warranted, and the legislative change was not necessary.

At first instance,[15] Dunn J. dealt with the point as follows:

> "The applicant maintains that as a consequence of the *Act* and the requirement to value assets the day before death, that the respondent is therefore precluded from deducting from the assets of the deceased any value for assets *jointly held* by the deceased and the applicant. The issue arises as each of the parties had substantially [*sic.*] jointly held assets the day before the death of Rosella. These jointly held assets passed by right of survivorship. On the date of death of Rosella, of course the applicant then becomes the owner fully of the jointly held assets.
>
> The applicant urges an interpretation of the *Act* as requiring the payment to him of one-half the difference between two net family property statement [*sic.*] valued the day before death and the payment to him without deduction for jointly held assets which he receives the day later by operation of law ... .
>
> The intent of the legislation must be interpreted and there is little room for judicial flight of fancy. Joint ownership has been used exclusively as part of the Estate planning process. Here, it is only reasonable to interpret the *Family Law Act* as requiring a division of only one-half of those jointly held assets valued the day before death. To interpret the result otherwise would be to create unwanted mischief. For example, an estate that consisted solely of joint assets would result in the applicant not only receiving all of the assets on the day of death but having a claim against the Estate for half the like amount in the face of a will that disposed of assets otherwise. I conclude that the applicant has received by reason of the operation of the joint ownership provision the value of his wife's interest in those assets and that this sum should be credited to any amount due to him as equalization otherwise."

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14 (1993) at 105-110.

15 2009 Carswell Ont 6738.

The Court of Appeal dealt with this as follows:

> "In our view, the analysis and conclusion reached by Dunn J. are correct in law. The appellant made an election to take under the *Family Law Act* as opposed to the will. Having done so, while he is entitled to the benefits of this choice, he must bear its burdens. The result that flows is consistent with the underlying purpose of the equalization provisions of the *Family Law Act*. In so concluding, we are mindful that the legislation has been clarified and is consistent with this result."

Procedural Issues

J.B. Trust v. *B.J.*[16] deals with a request for an order for the sealing of a court file.

Trusts were established to hold funds provided from the Victim Compensation Fund for the benefit of two boys whose father was killed in the terrorist attack on the World Trade Center on September 11, 2001. The trustees moved for an order that their application to pass accounts be treated as confidential, the court file be sealed, and that all future proceedings for the passing of accounts for the trust be treated in the same way. The Office of the Children's Lawyer, which was acting as the litigation guardian for the two boys, consented to the order sought.

The order was supported by the position that it was necessary in order to protect the two boys "from publicity and financial or other harm in light of the notoriety of the events of September 11, 2001 and taking into account the sizable amounts awarded to them."

Brown J. held that the trustees had not discharged the onus of showing that a sealing order was necessary. Regarding the risk of financial harm, he was concerned that there was,

> "no principled basis upon which to distinguish the financial interests of the two boys in this case from those of other minors involved in other infant settlement or passing of account proceedings. To accede to the trustees' request in this case would risk creating such a low threshold for obtaining sealing orders that many of the proceedings this court currently deals with openly would move behind closed doors."[17]

As to the risk of publicity to the boys, Brown J. was concerned that there was no detail provided in the material before him to support this position and the court's public record should only be

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16 (2009) 50 ETR (3d) 50.

17 At 57.

sealed on the clearest of materials. Also, Brown J. considered that there were alternative measures available to address the risk of publicity by permitting the style of cause, the affidavit materials, and any accounts filed on the proposed application to pass accounts to use the initials of the trustees, the trusts, and the two minors instead of their full legal names.

In *Re Mitchell Estate*,[18] Brown J. dealt with the material required on an application to pass accounts which is unopposed, but in which a request is made for costs in excess of those provided in Tariff C.

As explained by Brown J., the relevant provisions of Rule 74.18 are deficient to dealt appropriately with this situation since:

- Rule 74.18(11.2) requires a hearing if a request for increase costs has been filed;
- Rule 74.18(9) requires a supplementary application record to be filed to obtain judgement on an unopposed application without hearing; but
- The Rules do not specify what must be filed where the application is unopposed but a hearing is required because of a request for increased costs.

Brown J. ordered that in such circumstances:

- A supplementary application containing the materials referred to in Rule 74.18(9) shall be filed; and
- Additional evidence shall also be filed, as follow:

> "Additional evidence – a simple affidavit either as part of the Rule 74.18(9) supplementary record or in a further record, depending on timing – which contains:
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> a. the request for increased costs in proper form;
>
> b. proof of service of the request on all affected parties;

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[18] (2010) 56 ETR (3d) 38 (Ont SC).

c. a statement explaining the responses of affected parties to the request for increased costs (eg. no response; consent; objection); and

d. the details of, and the reasons for, the request for the increased costs either through a detailed Bill of Costs or an easily understandable copy of the relevant document."[19]

In addition, Brown J. referred, as follows, to another omission in the Rules:

> "Although the Rules do not require that a person who objects to a request for increased costs file a notice of objection, common sense dictates that a notice of objection should be served and filed as far in advance of the hearing date as possible. Courts do not take kindly to parties lying in the weeds and then popping up at a hearing to give notice of an objection for the first time. Such tactics prevent pre-hearing discussions that may settle the objection, waste the time of the court, waste the time of the other parties, and could well attract cost sanctions from the court. Such an approach is to be very strongly discouraged."[20]

I have three comments on this. First, it should be noted that a request for increased costs will typically involve a portion of costs that can only be estimated since costs will be ordinarily be incurred after serving the request (at a minimum, the cost of attending the hearing).

Second, it may be questioned whether the court's approval should be needed – as the current Rules require – for increased costs where none of the interested parties have any objection. In general, trustees do not require a court order to approve their expenditures, including those for legal fees. When trustees properly bring court proceedings they are entitled to be reimbursed from the trust fund for the legal expenses properly incurred in such proceedings unless the court orders otherwise.[21]

Third, the Rules of Civil Procedure in dealing with estate matters, including those dealing with passing of accounts, have been designed to be comprehensive so that, in general, it is possible to determine the procedural requirements by a reading of the Rules. Admittedly, it is inevitable that there will be glosses on the Rules derived from practice and judicial decisions. However, to the extent possible, gaps such as those identified by Brown J. should be filled by explicit amendments to the Rules themselves.

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19 At 40.

20 At 41.

21 See *Merry Estate* (2002) 48 ETR (2d) 72 at 85-90.

Limitations

Bikur Cholin Jewish Volunteer Services v. *Langston*[22] deals with the complex inter-relationship among: section 38(3) *Trustee Act*; section 43 *Limitations Act*, RSO 1990 (the "old Act"); and the *Limitations Act, 2002* (the "new Act").

Lorraine Penna had been one of three executors of her husband, Paul Penna. It was alleged that one of the other executors, Barry Landen, had "looted" Paul Penna's estate, and it was also alleged that the other executors, including Lorraine Penna, had by their passivity enabled him to loot the estate. Lorraine Penna died on December 18, 2003. Her executor sought a declaration that any claim against her estate was statute-barred, no claim having been brought within the two years period after Lorraine Penna's death.

Section 38(3) *Trustee Act* provides that an action under section 38 "shall not be brought after the expiration of two years from the death of the deceased." Section 19 of the new Act provides for the continued applicability of section 38(3) *Trustee Act*. Section 43 of the old Act provides that the limitation period otherwise applicable to a claim against a trustee does not apply where the claim is "founded upon a fraud or fraudulent breach of trust to which the trustee was party or privy or is to recover trust property, or the proceeds thereof, still retained by the trustee."

The judge at first instance dismissed the motion for a declaration, holding that no limitation period was applicable to the claim. The Ontario Court of Appeal allowed the appeal, holding that section 38(3) *Trustee Act* barred the claim. The following are the main points:

(1) As indicated above, the new Act provided for the continued applicability of section 38(3).

(2) The claim in question was a claim within section 38 and, therefore, section 38(3) provided that it became statute-barred two years after Lorraine Penna's death.

(3) It was established by the Ontario Court of Appeal in *Waschkowski* v. *Hopkinson Estate*[23] that the reasonable discoverability exception did not apply to section 38(3).

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22 (2009) 48 ETR (3d) 22 (Ont CA).

23 (2000) 47 OR (3d) 370.

(4) Although the doctrine of fraudulent concealment could apply to section 38(3), "there was nothing to suggest that the doctrine had any application in this case."[24]

(5) "The doctrine of special circumstances" – under which the court may add parties to an existing action despite the expiration of the applicable limitation period – applies to section 38(3) and, in its application to section 38(3) it survives the new Act. However, the only existing action which had any relevance was an action begun on March 1, 2005 brought by two of Barry Landen's co-executors (and the holding company owned by his estate) and to which Lorraine Penna's estate had been added as a plaintiff. In the circumstances of the case it was not appropriate to add her estate as a defendant to these proceedings.

(6) Section 43 of the old Act had no application since there was no allegation that Lorraine Penna had committed any act of fraud or that she was in possession of any trust property. Additionally, as stated by Rosenberg J.A.,

> "if the exception in s.43 is to apply it must rest on the allegation that she was a party or privy to the fraud alleged against Landen. In my view, the allegations against Lorraine Penna do not fall within the exemption. It is alleged that she failed to review the activities of Landen, abdicated her duty, and breached her duty to the beneficiaries of the estate. In my view, this did not make her a party or privy to Landen's fraud within the meaning of the former s.43."[25]

Laljee v. *Peerwani Estate*[26] is another case dealing with section 34(3) of the *Trustee Act*. The deceased, Ms Peerwani, died on April 22, 2003. The plaintiff, Ms Peerwani's sister brought this action against the estate. Her,

> "claims arise from services that she says she provided to her sister during her sister's lifetime, caring for her sister and looking after the household while her sister was ill. She says that her sister told her that she would be properly compensated and receive a substantial benefit from the estate for all her work. The plaintiff claims that, in reliance on her sister's promises, she made

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24 At 31.

25 At 34.

26 (2009) 5 ETR (3d) 86 (Ont SC).

professional and personal sacrifices and expended years' worth of work to her detriment."[27]

The executor of the estate brought a motion for the dismissal of the action on the ground that it was statute-barred by section 38(3).

The plaintiff put forward two reasons why she did not bring the claim within the two years limitation period required by section 38(3): she was ill; and the executor of the estate had led her to believe that she would be taken care of so that there was no need for her to bring a claim.

Herman J. noted, referring to the *Bikur Cholin* case referred to above, that the discoverability rule does not apply to section 38(3) but that the doctrine of fraudulent concealment does. He set out the requirements of that latter doctrine as stated by Lederman J. in *Giroux Estate v. Trillium Health Centre*,[28] as follows:

(a) the defendant and plaintiff are engaged in a special relationship with another [*sic.*];

(b) given the special or confidential nature of their relationship, the defendant's conduct amounts to an unconscionable thing for the one to do towards the other;

(c) the defendant conceals the plaintiff's right of action (either actively or as a result of the manner in which the act that gave rise to the right of action is performed)."

Herman J. held that on the evidence before him he could not determine whether those requirements were satisfied. He determined, therefore, that there was a triable issue and the motion was dismissed.

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27 At 88.

28 (2004) 3 CPC (6th) 303 (Ont SC).

Obtaining Information by Beneficiaries

Re Martin Estate[29] deals with important questions about the rights of beneficiaries of a trust to obtain information about the administration of the trust where the assets of the trust include the shares of a corporation controlled by the trustees.

The topic was dealt with in an English Court of Appeal case – *Butt* v. *Kelson*;[30] and in a recent, important Privy Council Case – *Schmidt* v. *Rosewood Trust Ltd.*[31] in which the general topic of beneficiary's rights to information was carefully reviewed and restated. Neither of these cases appear to have been considered in Canadian case law until *Butt* v. *Kelson* was considered in the British Columbia family law case of *Lindholm* v. *Lindholm*[32] (which was referred to in the *Martin Estate* case) and both decisions were considered in the *Martin Estate* case.

The basis for trustees' obligations to provide information to beneficiaries has been expressed in two different ways.[33] On the one hand, it has been put on the proprietary basis that beneficiaries are entitled to inspect trust documents and obtain other information about the trust because they have a proprietary interest in such documents and information corresponding to their interest in the trust property. On the other hand, it has been put more generally on the basis that trustees are administering property for the benefit of others and as such are required to provide information and account for their dealings with the trust property. Whichever of these bases is the correct one is relevant in the determination of who is entitled to obtain trust information since the first basis, which can be described as the proprietary basis, might be argued to indicate that discretionary beneficiaries may not be entitled to such information.

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29 (2009) 53 ETR (3d) 142 (BCSC).

30 [1952] 1 All ER 167.

31 [2003] 2 AC 719.

32 (2000) 4 RFL (5th) 356 (BCSC). *Butt v. Kelson* was also referred to on another point in *Kordyban v. Kordyban* (2003) 50 ETR (2d) 116 (BCCA).

33 See Waters' *Law of Trusts in Canada*, 3rd ed. (2005) at 1063.

The Ontario decision of *Re Ballard Estate*[34] favoured the non-proprietary basis for the obligation to provide trust information. More recently, the issue was carefully reviewed in the *Schmidt* v. *Rosewood Trust Ltd.* case, where it was held that access by beneficiaries to information relating to the trust is within the discretion of the court and that it does not depend on any proprietary entitlement. Lord Walker stated as follows:

> "Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion. ...[35]
>
> However the recent cases also confirm ... that no beneficiary (and least of all a discretionary beneficiary) has any entitlement as of right to disclosure of anything which plausibly can be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves and third parties. Disclosure may have to be limited and safeguards may have to be put in place. The evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.[36]

In *Butt* v. *Kelson*, the English Court of Appeal adopted a discretionary approach to the disclosure of corporate information to beneficiaries of a trust which controls the trust, as summarized as follows in *Lewin on Trusts*:[37]

> "(1) The beneficiary must specify the company's documents which he wishes to see.
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> (2) The beneficiary must make out a proper case for seeing them.

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34 (1994) 20 OR (3d) 350 (Gen Div).

35 At 729.

36 At 734-735.

37 18th ed. (2008) at 824.

(3) There must be no valid objection by the other beneficiaries or by the directors from the point of view of the company.

(4) The beneficiary must give proper assurances that he will not disclose the documents to anybody but his legal advisors and no copies may be made save as properly advised by his advisors."

Under the approach adopted by the Privy Council in the *Schmidt* case, the court will control the production of information about the corporation and the appropriate disclosure will depend on the particular circumstances. The court will balance the beneficiary's need for disclosure in order properly to understand the administration of the trust property with any need to protect the confidentiality of the corporation's affairs. Where the underlying trust assets are held through a wholly-owned holding corporation, the interposition of the corporation will ordinarily not make any difference to the disclosure the beneficiary would have obtained in the absence of such a corporation.

In *Re Martin Estate*, charities were remainder beneficiaries of a trust holding all of the shares of a holding company which in turn owned the shares of wholly-owned subsidiary. They sought disclosure of certain particular information relating to the corporations. The trustees took the position that the charities were entitled only to information in the knowledge or possession of the trustees as trustees (ie, the information that was available to them as shareholders) and not to information in their knowledge or possession as directors.

Reg. Blok agreed with the charities' position. After reviewing *Butt* v. *Kelson* and *Schmidt* v. *Rosewood Trust Ltd.* he noted in particular that, unlike the situation in *Butt* v. *Kelson,* the trust in the *Martin* case was the sole shareholder, and he stated as follows:

> "This is a significant distinction. In *Butt* v. *Kelson* the court expressed concern that the shareholders who were not beneficiaries in the estate would not have access to documents or information that the beneficiaries would (or might) have given their enhanced rights as trust beneficiaries, yet the court still ordered disclosure on certain terms. In the present case that concern does not arise because there are no other shareholders. In my view complete ownership of the company by this estate militates in favour of greater disclosure in favour of the trust beneficiaries, (in these circumstance, probably the fullest reasonable disclosure) as part of the balancing of interests described by the authorities."[38]

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[38] At 149.

The trustees had not, moreover, provided any evidence – beyond their own assertions – that the information sought by the charities was commercially sensitive and that disclosure might result in adverse consequences to the companies. In any event, the charities were prepared to enter into confidentiality agreements. It was ordered, therefore, that the trustees must provide the requested information provided that the charities entered into confidential agreements satisfactory to the trustees.

Interpretation of Wills

The issue in *Re Roth Estate*[39] was set out, as follows, by Brown J.:

> "The Estate of the late Willi E. Roth, or Bill Roth, applies for a variation of the amount of monthly spousal support payable under the terms of a Separation Agreement between the deceased, Bill Roth, and his former wife, Joan Roth. The Estate contends that the Separation Agreement clearly contemplated a reduction in the monthly amounts to reflect the income tax consequences of Bill Roth's death. Ms Roth argues that the Estate's obligation to make monthly payments flows from Bill Roth's will, which their subsequent divorce did not revoke, and therefore no variation should be made to the payment."[40]

Section 17(2) of the *Succession Law Reform Act* provides as follows:

> "(2) Except when a contrary intention appears by the will, where, after the testator makes a will, his or her marriage is terminated by a judgment absolute of divorce or is declared a nullity, then
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> (a) a devise or bequest of a beneficial interest in property to his or her former spouse;
>
> (b) an appointment of his or her former spouse as executor or trustee; and
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> (c) the conferring of a general or special power of appointment on his or her former spouse,
>
> are revoked and the will shall be construed as if the former spouse had predeceased the testator."

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39 (2009) 51 ETR (3d) 290 (Ont SC).

40 At 293.

Bill Roth had made his will in 2004, and his marriage to Joan Roth was terminated by divorce in 2005. Therefore, gifts made by the will to Joan Roth were revoked unless " a contrary intention appears by the will." Brown J. held that such an intention did appear from the will, and the text of the will clearly justified this position. However, the interesting point about the case is that Brown J., on the basis of a reference to the judgment of Anderson J. in *Re Billard*,[41] considered that the statutory requirement that the contrary intention must be one which "appears by the will" means that the intention must appear "either by express provision or necessary implication, not from circumstances surrounding, or extrinsic to, the will."[42] In my view, this is not correct on the basis that the reference to "contrary intention appears by the will" means that the contrary intention can be found from the interpretation of the will in accordance with the normal principles applicable to such interpretation including the normal principles dealing with the materials which can be taken into account for this purpose. I have previously developed the arguments about this at some length in an annotation to the *Billard* case,[43] and I have taken the liberty of attaching a copy of that annotation to this paper.

Lipson v. *Lipson* [44]is one of several cases in recent years dealing with problems arising from deficient drafting of multiple wills.

Article I of the deceased's "Primary Estate Will" properly defined the "Primary Estate" as meaning property other than shares in, and debt owed by, private corporations (Article I(b)); provided for the revocation of prior wills (Article I(a)); and referred to the intention to execute a subsequent will dealing with shares in, and debt owed by, private corporations (Article I(c)). Unfortunately, Article I of the "Secondary Estate Will" also defined Secondary Estate as meaning property other than shares in, and debt owed by, private corporations (Article I(b)); also provided for the revocation of prior wills (Article I(a)); and also referred to the intention to execute a subsequent will dealing with shares in, and debt owed by, private corporations (Article I(c)).

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41 (1986) 50 RFL (2d) 99 (Ont SC).

42 At 297.

43 In the report to the *Billard* case at 22 ETR 150.

44 (2009) 52 ETR (3d) 44 (Ont SC).

Obviously, something had gone wrong. Patillo J. considered evidence about the circumstances in which the wills executed by the deceased had been prepared. Based on both the wording of the wills and the circumstances, he held that the court was able to correct the mistake which had been made,

> "by deleting [from the Secondary Estate Will] Article I(a) and (c) thereof and amending Article I(b) by deleting the words: 'the whole of my property of every nature and kind whatsoever situate, including any property over which I may have a general power of appointment, but excluding' such that Article I(b) will read:
>
> > "(b) The term 'my Secondary Estate' for all purposes in this my will shall mean all shares owned by me at my death in the capital of any private corporation and all amounts owing to me at my death by such private corporations."[45]

I have two comments on the reasons for judgment of Patillo J. First, although the decision is supported by the applicable authorities and carries out the obvious intention of the testator, the manner in which it is expressed is not orthodox. Under the orthodox law, the court can rectify a will by deleting words from the will of which the testator did not know and approve. The will, as admitted to probate (or, in Ontario, in respect of which a certificate of appointment of a state trustee with a will is issued) will omit the words deleted pursuant to such rectification. The court can also interpret a will (including a will which has been rectified as described above) as if particular words were omitted or added (and the authorities referred to by Patillo J. were ones dealing with this). Strictly, the court does not correct the mistake by amending the will; rather, it prevents there being a mistake by interpreting the will in a way that carries out the testator's intention.

The second point is that Patillo J. took the position that both wills should be considered together, stating as follows:

> "In my view, it is clearly apparent from a reading of the will as a whole that there are mistakes on its face in Article I of the Secondary Estate Will. While the mistakes are readily apparent when the Secondary Estate Will is read on its own, in my view, in the circumstances of the case, it is more appropriate when considering Mr. Lipson's will as a whole to read both the Primary Estate Will and the Secondary Estate Will together as one will.

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45 At 60.

> It is clear that in executing the two Wills, Mr. Lipson was purporting to deal with his entire Estate. The two Wills were executed one immediately after the other and at the same time. Further, Article I(c) of the Primary Estate Will specifically refers to the Secondary Estate Will by stating that subsequent to its execution the testator will execute a will dealing with his shares in and amounts owing by private corporations, which assets are defined as the 'Secondary Estate'."[46]

This makes perfect sense and can be explained either on the basis that each will is a surrounding circumstance in respect of which the other will is to be interpreted or, preferably, by the position that, although each will document is a separate will for certain purposes, they together constitute the whole will of the testator as to the disposition of his property on death, so that they should be interpreted as a single document.

Postscript

Smith Estate v. *Rotstein*.[47] Brown J. granted partial summary judgment to set aside a notice of objection based on alleged undue influence. The judgment applied to the Will and the earlier two of four codicils.

Kaptyn Estate v. *Kaptyn Estate*.[48] This is another decision of Brown J., which deals with various issues relating to the interpretation of dual wills. One point dealt with by Brown J. was the argument that a specific gift of certain property was ineffective since the testator owned the shares of corporations which owned such property and did not own the property. Brown J. rejected the argument, and stated as follows:

> "143. Nor is this a case, as submitted by Simon Kaptyn, where John Kaptyn did not own the assets in question so he could not deal with them. Of course he did. Who else did? Or, speaking more precisely, who else on the face of this earth could gift those assets through a will? No one, other than John Kaptyn. The fact that he owned and controlled those properties indirectly through two holding companies, Marktur and West Beaver Creek, rather than directly speaks not to whether he could transmit those properties to others upon his death – certainly he could – but whether he chose the right language in his will to give effect to his clear intent to transfer those specific assets to certain of his grandchildren on his death."

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46 At 55.

47 (2010) 56 ETR (3d) 216 (Ont SC).

48 [2010] OJ No 3347 (SC).

McCullough v. *Riffert*[49] deals with the duty of care of a lawyer to prepare a will in timely fashion. The lawyer met with the would-be testator; the lawyer mailed him a draft will three days later; and the would-be testator died ten days after the meeting without signing the will. Mulligan J. held that, in the circumstances (including the lawyer's lack of knowledge of circumstances indicating imminent death), the lawyer had met a reasonable standard of care.

Marino v. *Marino Estate*.[50] The issue in this case and its resolution are succinctly expressed as follows by Brown J.:

> "1. What is the appropriate test to apply when a beneficiary of an estate, who failed to file a notice of objection to accounts within the prescribed time, moves to set aside an unopposed judgment passing accounts obtained by the estate trustee? I conclude that the court should apply the principles which govern motions to set aside default judgments, and I grant the motion to set aside the unopposed judgment but on terms."

Abrams v. *Abrams*[51] is a very interesting review by Brown J. of the court's inherent jurisdiction to regulate its own process and procedures and, in particular, the justification for judges on the estate list to carry out "case management" even though Rule 77 is not applicable.

Robinson Estate v. *Robinson*.[52] is another case dealing with an apparent mistake relating to the terms of a will. The testator had a will, executed in Spain, dealing with property in Europe and subsequently made a will in Canada which purported to revoke all previous wills and to deal generally with the testator's property. Belobaba J. stated:

> "looking only at the affidavits, it appears likely that [the testator] wanted the Spanish and Canadian wills to co-exist – that the revocation clause would not apply to the Spanish Will."

Nevertheless, he held that it was not open to him to "rectify" the Canadian will to achieve this result. The decision has been appealed.

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49 [2010] OJ No. 2921 (SC).

50 [2010] OJ No. 4024 (SC).

51 [2010] OJ No. 1928 (SC).

52 [2010] OJ No. 2771 (SC).

Held - The gift to GAB was revoked on the making of the decree absolute of divorce.

The contrary intention referred to in s. 17(2) was required to appear by the will. The Court could not, consequently, take account of surrounding circumstances, and the testator's will did not disclose a contrary intention.

Annotation

THE MEANING OF "CONTRARY INTENTION APPEARS BY THE WILL"

Introduction

Section 17(2) of The Succession Law Reform Act[1] ("S.L.R.A.") introduced the rule into Ontario that a testamentary gift to a spouse of the testator is revoked by their divorce, "[e]xcept when a contrary intention appears by the will." In Re Billard Anderson J. held that evidence of circumstances surrounding the making of the will could not be taken into account in determining whether there was a contrary intention within s. 17(2). Two other recent cases have adopted similar positions. Re Hicknell; Perry v. Hicknell[2] was concerned with s. 32 of the S.L.R.A., which has the effect that where a testator gives land that is subject to a mortgage the donee takes the property subject to the mortgage unless the testator has "by will, deed or other document, signified a contrary or other intention." Griffiths J. said that the intention "must clearly be expressed in the document itself."[3] The relevant section in Mackie Estate v. Harris[4] was s. 23 of the S.L.R.A., which provides that where a gift lapses or fails for other reason it goes into residue "[e]xcept when a contrary intention appears by the will". Ewaschuk J. held that s. 23 did not apply but he said, on the authority of Re Billard, that if it had, "a testator's contrary intention to a lapse resulting from the prior death of a beneficiary must appear in the will itself."[5] These cases all hold that a special restrictive rule applies in the determination whether a contrary intention was shown by the will. In none of them were relevant authorities discussed; there was no consideration of the history of the provisions, in particular, of the phrase "a contrary intention appears by the will"; and there was no attempt to fit the provisions into the general context of interpretation of wills. I submit that a consideration of these matters suggests an answer different from that given in these recent cases. It should have been held that the general

principles dealing with the admissibility of evidence in the interpretation of wills apply in the determination whether a contrary intention was shown.[6]

These general principles are rather complex and in some respects they are obscure. They can, however, be simply and briefly stated for the purpose of bringing the point under consideration into focus. Extrinsic direct evidence of the testator's intention is generally inadmissible. It is, exceptionally, admissible in the case of what is sometimes called an equivocation. There are two requirements to this exception. First, there must be an ambiguity - or equivocation - so that the provision of the will under consideration applies equally to two or more persons or things.[7] Second, the equivocation must be latent so that it does not appear on the face of the provision.[8]

Indirect, circumstantial, evidence of the testator's intention is more generally admissible. This is generally referred to as evidence of surrounding circumstances. The principle is sometimes called the "armchair" rule: "You may place yourself, so to speak, in [the testator's] armchair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention".[9] This principle is in a state of flux. Undoubtedly the trend is in favour of an increasing scope for it[10] and the prevalent view in Canada today is probably that evidence of surrounding circumstances is always admissible at the outset of the process of interpretation and that the meaning of the will is to be determined in the light of such circumstances.[11]

The Historical Background

As my brief mention of Re Hicknell and Mackie Estate v. Harris shows, s. 17(2) is not the only provision in the S.L.R.A. to use the phrase "contrary intention appears by the will." This expression is also used in sections 20(2), 22, 23 (the one considered in Mackie Estate v. Harris), 24 25, 26 27, 28, 31 and 32 (the one considered in Re Hicknell which, it will be noted, has a wider application: "the deceased has not, by will, deed or other document, signified a contrary or other intention"). All of these provisions, except s. 17(2) and s. 20(2), are the successors to provisions introduced in the nineteenth century and most of them are copies of provisions first appearing in the English Wills Act, 1837.[12]

The expression "contrary intention appears by the will" originated, then, in English legislation of the first half of the nineteenth century. It seems that the expression was not considered at that time to introduce any special, restrictive rule about the admissibility of evidence. The statutory

provisions simply introduced statutory presumptions which prevailed unless the interpretation of the will showed a contrary intention. The normal rules for the admissibility of evidence in the interpretion of wills were more restrictive at this period than they are generally considered to be today and it was considered exceptional for any extrinsic evidence, whether surrounding circumstances or direct evidence of intention, to be admissible to determine the intention of the testator. Moreover, even when extrinsic evidence was admissible it was the prevalent view of the time that it was admitted merely to explain the objective meaning of the words of the will. The orthodox nineteenth century view is articulated in Sir James Wigram's Admission of Extrinsic Evidence in aid of the Interpretation of Wills. This book was first published in 1831 and had already had a second edition by the time of the passing of the Wills Act, 1837. It both reflected the nineteenth century view about the admissibility of evidence and it was extremely influential in the establishment of that view. The main question which Wigram posed for himself was:

> "Under what restrictions is the admission of extrinsic evidence, in aid of the exposition of a will, consistent with the provisions of a statute, which makes a writing indispensable to the purpose for which the instrument was made".[13]

The answer he gave was,

> ". . . that any evidence is admissible, which, in its nature and effect, simply explains what the testator <u>has</u> written; but no evidence can be admissible, which, in its nature or effect, is applicable to the purpose of shewing merely what he <u>intended</u> to have written".[14]

On the basis of this theory, the normal rules of interpretation allowed the Court to determine intention only from what appeared by the will.

The early nineteenth century understanding of the meaning of the phrase "contrary intention appears by the will", in the context of the Wills Act provisions, is clearly revealed by the Fourth Report of the Commissioners on the Law of Real Property.[15] This was published in 1833 and certain of its recommendations[16] formed the basis of provisions in the Wills Act, 1837, which contained the phrase under consideration.[17] Moreover, the Report uses the expression "intention to the contrary shall appear upon the will". Of most interest is the discussion in the Report of its proposal relating to the time as

of which a will speaks with reference to property. In order to bring this point out, some digression is necessary. Before the Wills Act, 1837, a will was capable of applying to personalty acquired after the making of the will; and as a matter of construction in some circumstances if was presumed that it did and in other circumstances it was presumed that it did not apply to such after-acquired property.[18] A will was not, however, even capable of applying to after - acquired realty.[19] The Real Property Commissioner's recommendation (Proposition 9) for changing these rules, which was passed into law as s. 24 of the Wills Act, 1837, - the predecessor of s. 22 of the S.L.R.A. - was as follows:

> "That any freehold or other property acquired by a Testator subsequently to the execution of his Will may pass by it, and a Will shall be considered with reference to the property comprised in it as speaking at the Testator's death, unless a contrary intention appears."[20]

The arguments leading to this conclusion are, I think, worth quoting at length.

> "The usual intention of the testator is to dispose not of the property which he has when he makes his will, but of the property which he may have at his death; and if Wills were to be construed with reference to the property comprised in them, both real and personal, as speaking at the Testator's death, unless a contrary intention appears, the rule would get rid of the greatest part of the intricate laws relating to revocation and republication.
>
> We therefore propose that a Will shall pass property of any description comprised in its terms, which a Testator may be entitled to at the time of his death, unless an intention to the contrary shall appear upon the Will. If this recommendation be adopted, the Law respecting the time from which a devise of Freehold or Copyhold Estates is to be considered to take effect, will be precisely similar to that which is at present in force as to Personal Estates; and there will be one uniform rule in this respect applicable to Wills of property of every description."[21]

It is clear from this that the Commissioners did not consider that they were recommending some special rule about the evidence admissible in determining whether a contrary intention was shown; rather, they were concerned to change the substantive rule about realty and to establish a rebuttable

presumption in the case of both realty and personalty in favour of the passing of after-acquired property.

Relevant Authorities

I am not aware of any cases (apart from Re Billard) dealing with the meaning of "contrary intention appears by the will" in the particular context of s. 17(2) of the S.L.R.A. There are, however, cases dealing with some of the other provisions in which the same expression is used.

As well as the statements in Re Hicknell and Mackie Estate v. Harris that I mentioned at the beginning of this annotation, there are statements in two other Ontario cases that might be argued to be contrary to my position. These cases were concerned with what is now s. 22 of the S.L.R.A, the successor to s. 24 of the Wills Act, 1837, and the Real Property Commissioners' Proposition 9. It provides as follows:

> "Except when a contrary intention appears by the will, a will speaks and takes effect as if it had been made immediately before the death of the testator with respect to,
>
> (a) the property of the testator . . ."

In Re Ingram[22] Middleton J. said:

> "Then it is sought to give evidence to shew that in 1916 the testatrix did not in fact intend this daughter to take this large sum, and did not think this was the effect of her will. Plainly this evidence cannot be given. The will must speak for itself, and the contrary intention must be shewn on the face of the will."

In Re Deans[23] Donohue J. quoted Middleton J.'s last quoted sentence with approval. But in neither case does it seem likely that the decision would have been different if the normal rules of interpretation had been applied. Direct evidence of intention would not have been admissible and, even if evidence of surrounding circumstances would have been admissible on the basis of the normal rules, it does not seem that there were sufficient circumstances to rebut the statutory presumption.

There are, on the other hand, authoritative statements that support my position. In Boyes v. Cook[24] the English Court of Appeal held that the Judge at first instance had wrongly taken account of circumstances occurring after the making of the will in holding that a will was a good execution

of a power so that a contrary intention was shown for the purpose of s. 27 of the Wills Act, 1837, (the equivalent to s. 25 of the S.L.R.A.). Two of the judgments were brief and equivocal (although Cotton L.J. may be argued to have taken a position contrary to mine.[25]) but James L.J. made clear his view that the decision depended on normal rules of interpretation:

> In In re Ruding's Settlement[26] the Vice-Chancellor held that the surrounding circumstances could be looked at in construing the will. But when it is said that surrounding circumstances may be looked at, that only means that the circumstances existing at the time when the testator made his will may be looked at. You may place yourself, so to speak, in his armchair, and consider the circumstances by which he was surrounded when he made his will to assist you at arriving at his intention. But to look at a settlement subsequently executed is not to look at the surrounding circumstances which existed when the will was made."[27]

The clearest statement is that of Windeyer J. in the High Court of Australia case of Pohlner v. Pfeiffer:[28]

> "The 'contrary intention' is, of course, an intention contrary to the rule that the will shall speak and take effect as if executed immediately before death, so as to carry after-acquired property. It has been suggested, in some of the cases, that such a contrary intention can never appear if the description in the will of the subject-matter of a devise or bequest is, in its literal terms, capable of denoting a thing a testator had at death . . . But the correct view is, I think, that whether or not a contrary intention appears depends upon the meaning of the will construed according to ordinary principles of construction, and in the light of any extrinsic evidence properly admissible of facts, known to the testator, that existed at the time he made his will . . . ."

Even the welcome sharp clarity of this statement is, it must be admitted, blurred by the fact that Kitto J., in the same case, seemed to take a contrary view, although his position is not clearly stated.[29]

Judicial statements on this point are, therefore, mixed but, on balance, the statements favouring my position seem to outweigh those apparently opposing it. There are, moreover, decisions which can only be explained on the basis of the Court's taking account of circumstances surrounding the

testator at the time when he made his will. The bulk of these decisions are on s. 22 of the S.L.R.A. or its equivalents. The Courts have generally, in determining whether a contrary intention appears by the will, taken account of the nature of the property owned by the testator at the date he made his will.[30] For example, in Re Gibson[31] the testator bequeathed "my one thousand North British Railway preference shares". In fact, at the date he made his will he did have one 1,000 guaranteed stock in the North British Railway. After he made his will he sold this stock but at his death he had, because of several subsequent purchases, more than the original 1,000 stock. Page Wood V.-C. held that there was a contrary intention; the stock identified by the gift in the will was that owned when the will was made; and that gift was adeemed. The fact that at the date when the will was made the testator owned stock answering the description in the bequest was crucial to the decision.

There is one decision on a different statutory provision: the Alberta "anti-lapse" provision,[32] which is the equivalent of s. 31 of the S.L.R.A. This is the recent Alberta case of Re Wudel Moore v. Moore[33] in which the Court took account of surrounding circumstances in finding a contrary intention. Cawsey J. said that, the "question for interpretation by this Court is whether such a contrary intention is expressed in [the testatrix's] last will and testament;"[34] he then summarized counsel's submission that the "armchair principle" applied; and he then proceeded to take account of the fact that at the date of the making of the will the testatrix knew that one of her daughters was dead. He held, partly because of these surrounding circumstances[35], that a contrary intention was shown.

The Argument for the Applicability of Normal Rules of Interpretation of Wills

In the absence of some compelling special consideration, the phrase "except when a contrary intention appears by the will" should be interpreted consistently throughout the S.L.R.A and, on balance, I submit, the weight of authority is in favour of the normal rules of admissibility of evidence being applied to determine whether a contrary intention is shown.

Of more importance, however, is the substance of the argument that taking account of extrinsic evidence, in accordance with the normal rules, is not in defiance of the statutory injunction that the contrary intention must "appear by the will". There are two aspects to the argument. The first relates to the status of s. 17(2), along with the other relevant provisions, as a rule of construction. Construction in this

context, is distinguished from interpretation. "[Interpretation] is the process of discovering the meaning or intention of the testator from permissible data. Construction, [in the sense in which it is now being used] consists of assigning meaning to the instrument when the testator's intention cannot be fully ascertained from proper sources."[36] Rules of construction create rebuttable presumptions about the testator's intention; but they will not apply when, in accordance with the admissible evidence, it is determined that the testator intended a different result. They act as "tie-breakers": a rule of construction dictates a certain result when the will fails to do so. Many such rules of construction exist at common law and the statutory provisions should be viewed as species of the same genus. Indeed, many of them were passed to reverse the effect of common law rules of construction. The point of this is that the rules of construction - including the statutory ones - were created to carry out the testator's assumed intention; they should not be used to frustrate his actual intention.[37]

The second aspect to the argument is that there is no inconsistency between the argument advanced and the words "appears by the will". This position is relatively easy to maintain if one accepts, as Wigram asserted,[38] an objective view of the interpretation of wills: the normal rules allow evidence to be admitted only to explain the meaning of the words used in the will. Such an extreme objective view is, however, difficult to reconcile with many of the cases. Moreover, there seems to be an increasing acceptance of the notion that the process of interpretation is to determine the subjective intention of the testator rather than to determine objectively the meaning of the words used by him.[39] Nevertheless, this subjective view does not undermine the argument being advanced. It does not allow the interpreter to determine the testator's intention in the abstract; the intention must be derived from the words in the will. It is subjective only in the sense that the interpreter must put upon the testator's words "the meaning which they bore to him".[40]

I opened this section by referring to the possibility that special considerations might compel a restrictive interpretation of the phrase "except when a contrary intention appears by the will" in one or other of the provisions of the S.L.R.A. Section 17(2) makes a policy choice in favour of the view that, generally, testators would wish gifts to their former spouses to be revoked on divorce. The Ontario Law Reform Commission (whose recommendations formed the basis of s. 17(2)) made the point that the law then existing assumed that "divorced testators would wish to continue to have their property pass to their ex-spouses."[41] This, the Commission thought, ran counter to the expections of most people and it recommended a

reversal of the assumption of the then existing law. But the Commission emphasized that it was recommending a rule of construction and that it should be subject to contrary provision.

> "We would stress that the reform we are recommending here is a rule of construction and that, as such, it is less preferable than a conscious consideration of the problem by testators themselves at the time of divorce . . . . [Most] testators do make wills after divorce, alerted by their lawyers who advise them of the need to reconsider former dispositions. Such new wills would remain unaffected by the reforms we are discussing here. Similarly it could happen that spouses might remain on fairly amicable terms following a divorce and might wish the other spouse to benefit under the will. To deal with this type of situation, we recommend that the proposed reforms should apply only in the absence of an express contrary provision in the will. This might take the form of a clause stating that the provisions in the will in favour of the spouse are to have effect, whether or not the spouses are married at the time of the testator's death, or might merely be by a post-divorce republication of the old will."42

This, I must admit, suggests the view that the contrary intention must be shown by an explicit provision in the will and that it should not be determined merely in accordance with the normal rules about interpretation of wills. The difficulty with this view is suggested by the Commissioner's own argument. If a testator knows about the statutory rule - if, for example, he receives advice from his solicitor about it - then he will clearly and explicitly exclude the operation of the statutory presumption whether or not the contrary intention could be shown in a more indirect fashion. The problem arises in the case of the testator who does wish a benefit to continue for his divorced spouse but who does not have the statutory rule in mind. There is no reason why he should think of including an appropriate express provision in the will; nevertheless, it may be apparent from an interpretation of the will in accordance with the normal rules that he did wish the benefit to the spouse to survive a divorce. It is true that my position may lead to less certainty of result and, further, that a contrary intention may be mistakenly held to exist. But these dangers exist generally in the interpretation of wills and, I submit, there is not sufficient reason in the context of s. 17(2) to prefer these values of certainty and accuracy of determination over the benefits obtained by applying the normal rules to try to determine the testator's intention.

The Decision in Re Billard

It remains to consider the actual decision in Re Billard: should it have been different if the normal rules of interpretation had been applied? The relevant facts can be briefly stated. The provision in the will benefitting the testator's spouse was in the following terms.

> "If my spouse Gertrude Alva Billard survives me for thirty (30) clear days to pay or transfer 10% of the reside of my estate to her for her own use absolutely."

The rest of the residue was given for the benefit of the testator's daughter. The testator and his wife had separated in May 1979; and they entered into a separation agreement in June 1979. The will was made in September 1979 (about eighteen months after s. 17(2) was introduced into Ontario law). The form of the provisions of the will quoted in the reasons for judgment suggests that the will was professionally drafted. The parties were divorced by a decree made absolute in March 1983. The testator died in January 1985. Anderson J. said that, if he had been allowed to take account of surrounding circumstances, he might have found that there was a contrary intention. Two arguments were advanced in favour of the view that the will showed a contrary intention when read in the light of the circumstances surrounding the testator when he made it. First, there was the fact that the will was made after the separation of the parties and after the execution of the separation agreement. Second, the fact that the provision in the will for the spouse was the small amount of 10 per cent of the residue suggested that the will was not made in anticipation of a reconciliation. On the other hand, the fact, if it be so, that the will was professionally drafted supports the view that the gift was, in accordance with the statutory presumption, intended to be revoked on divorce. In addition, the description of the testator's wife as "my spouse" appears consistent with an intention that the gift should remain only while she remained the testator's spouse. Of more importance, however, than these two points, the significance of which is debatable, is the weakness of the indications of contrary intention. Section 17(2) of the S.L.R.A. does, in effect, create a presumption in favour of revocation which must be rebutted. While the circumstances of the case are consistent with the argument that the testator intended the gift to survive the divorce, they are also consistent with the statutory presumption. It would be reasonable for a testator to intend some small provision for his separated spouse while

the relationship of spouse was legally maintained but also to intend that that provision would cease if their relationship was finally terminated by dissolution of the marriage. In conclusion, I think that the terms of the will, even when read in the light of the surrounding circumstances, do not show a contrary intention: they lead only to speculation that the testator may have had such an intention.[43]

Conclusions

The words "contrary intention appears by the will" both in s. 17(2) and in other sections of the S.L.R.A. do not modify the normal rules about the admissibility of evidence in the interpretation of wills. In particular, they do not forbid the consideration of extrinsic evidence relevant to the testator's intention where it is admissible under those normal rules. Section 17(2), like the other provisions in which the words under consideration appear, merely creates a rebuttable presumption as to the testator's intention. This presumption can be rebutted by evidence of the testator's intention, and the admissibility of this evidence is determined in accordance with the normal rules.

Consequently, Anderson J. was, I submit, incorrect in Re Billard in deciding that s. 17(2) of the S.L.R.A. required the exclusion of evidence of surrounding circumstances in the determination whether a contrary intention was shown. If, as is likely,[44] such evidence was admissible under the normal rules dealing with admissibility of evidence in the interpretation of wills so also it should have been admissible in determining whether a contrary intention was shown for the purpose of s. 17(2). Nevertheless, I suggest that the actual decision in Re Billard was correct since the terms of the will, even when read in the light of the surrounding circumstances, did not show that the testator intended his gift to his wife not to be revoked by their divorce.

T.G. Youdan
Osgoode Hall Law School

Endnotes

1. R.S.O. 1980, c. 488.
2. (1981), 34 O.R. (2d) 246, 10 E.T.R. 288, 128 D.L.R. (3d) 63 (Ont. H.C.).
3. Ibid., at 292.
4. (1986), 22 E.T.R. 66 (Ont. H.C.)
5. supra, p. 70

6. The best discussion of this point is by I.J. Hardingham, M.A. Neave and H.A.J. Ford, The Law of Wills (1977) at 164-166. See also Law Reform Commission of British Columbia, "Report on Interpretation of Wills," (1982) at 36-38; T.G. Feeney, The Canadian Law of Wills (2nd ed., 1982), vol. 2, p. 36, n. 35.
7. The classic discussion of this principle is contained in Doe d. Hiscocks v. Hiscocks (1839), 5 M. & W. 363, 151 E.R. 154. Its requirements seem to have been relaxed in more recent cases: see Re Ray, [1916] 1 Ch. 461; Re Carrick, 64 O.L.R. 39, [1929] 3 D.L.R. 373 (H.C.). The equivocation doctrine has also been applied to identify the instruments disposing of a testator's property: Re Smith, [1939] V.L.R. 213.
8. The classic case is Doe d. Gord v. Needs (1836), 2 M. & W. 129, 150 E.R. 698.
9. Boyes v. Cook (1880), 14 Ch. D. 53 (C.A.) at 56.
10. The strict view could be said to be represented by Higgins v. Dawson, [1902] A.C. 1 (H.L.). The strict position was softened in later cases, e.g., National Soc. for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children, [1915] A.C. 207 (H.L.) The liberal view is represented by Haidl v. Sacher, [1980] 1 W.W.R. 293, 7 E.T.R. 1, 2 Sask. R. 93, 106 D.L.R. (3d) 360 (Sask. C.A.).
11. This is the position adopted in Haidl v. Sacher supra. For a review of subsequent cases see A.H. Oosterhoff, Text, Commentary and Cases and Wills (2nd ed., 1985) at 539-540.
12. 7 Will. 4 & 1 Vict., c. 26.
13. (2nd ed., 1835), at 2.
14. Ibid., at 6-7.
15. Parliamentary Papers (1833), vol. 22 at 1.
16. Propositions 9, 47, 48.
17. Sections 24 (equivalent to S.L.R.A., s. 22), 25 (equivalent to S.L.R.A., s. 23), 32.
18. See early editions of Jarman on Wills, e.g., (2nd ed., 1855) at 263-269. See also Goodlad v. Burnett (1855), 1 K. & J. 341, 69 E.R. 489.
19. Various reasons which have been given for this rule were summarized by the Commissioner, Parliamentary Papers (1833), vol. 22 at 23-24. This rule of substantive law was in fact changed in Upper Canada prior to its change in England: An Act to amend the Law respecting Real Property (1834) 4 Will. IV, c. 1, s. 49.
20. Parliamentary Papers (1833), vol. 22, at 8.
21. Ibid., at 24.

22. (1918), 42 O.L.R. 95 at 98 (Ont. H.C.).
23. [1973] 3 O.R. 527, 37 D.L.R. (3d) 355 (Ont. H.C.).
24. (1880), 14 Ch. D. 53 (C.A.).
25. He said (ibid., at 57): "We have to look only at the will for contrary intention, and the distinction made by the settlement cannot be said to be a contrary intention appearing by the will." The settlement, I should add, was executed after the will.
26. (1872), L.R. 14 Eq. 266.
27. (1880), 14 Ch. D. 53 at 56 (C.A.).
28. (1964), 112 C.L.R. 52 at 77 (H.C. of Aus.).
29. Ibid., at 62: "Speculation, however reasonable it may seem, will not do. Only if an intention contrary to s. 27 actually appears from the words of the will can the gift be held to fail . . . ."
30. See, e.g., Re Georgetti (1900), 18 N.Z.L.R. 849; Re Evans; Evans v. Powell [1909] 1 Ch. 784; Re Sikes, [1927] 1 Ch. 364; Pohlner v. Pfeiffer (1964), 112 C.L.R. 52 (H.C. of Aus.).
31. (1866), L.R. 2 Eq. 669 at 672.
32. Wills Act, R.S.A. 1980, c. W-11, s. 35.
33. (1982), 22 Alta. L.R. (2d) 394, 13 E.T.R. 25 (Alta. Q.B.). Cf. Re McNeill; Chancey v. Chancey (1980), 6 E.T.R. 165, 25 Nfld. & P.E.I.R. 297, 68 A.P.R. 297, 109 D.L.R. (3d) 109 (Nfld. T.D.).
34. (1982), 13 E.T.R. 25 at 27.
35. Cawsey J. also took account of the scheme of distribution expressed in the will.
36. T.E. Atkinson, Handbook of the Law of Wills (2nd. ed., 1953) at 809-810.
37. See Prescott v. Barker (1874), L.R. 9 Ch. App. 174 at 186 per Lord Selbourne L.C. (C.A.); Re Portal and Lamb (1885), 30 Ch.D. 50 at 55 per Lindley L.J. (C.A.); Atkinson op. cit., at 817.
38. Supra, pp. 4-5.
39. See Haidl v. Sacher supra, note 10; T.G. Feeney, The Canadian Law of Wills (2nd. ed., 1982), vol. 2 at 1-4; Law Reform Commission of British Columbia, "Report on Interpretation of Wills" (1982) at 6-8. For a careful examination of the distinction between subjective and objective interpretation see Phipson, "Extrinsic Evidence in Aid of Interpretation" (1904), 20 L.Q.R. 245.
40. Re Rowland, [1963] 1 Ch. 1 at 10, [1962] 2 All E.R. 837 (C.A.), per Lord Denning M.R.
41. "Report on The Impact of Divorce on Existing Wills" (1977) at 3.
42. Ibid., at 9. See also Law Reform Commission of British Columbia, "Report on Statutory Succession Rights (1983) at 112.

43. Cf. case law dealing with the Court's power, in the process of interpretation, to supply words omitted by the testator. Although there are variations of emphasis, it is the accepted view that the Court should exercise this power with caution: it should only do so when it is clear both that something is omitted and what the omission consists of. See e.g., Re Craig (1978), 42 O.R. (2d) 567, 2 E.T.R. 257, 149 D.L.R. (3d) 483 (Ont. C.A.); Re Hicking; Central & Eastern Trust Co. v. Eaton (1979), 40 N.S.R. (2d) 491, 6 E.T.R. 251, 73 A.P.R. 491 (N.S. T.D.)); Re Miles (1981), 9 E.T.R. 113 (Ont. H.C.); Re Flinton; Can. Trust Co. v. Banks, [1981] 4 W.W.R. 549, 10 E.T.R. 236 (B.C. S.C.); Re Sherin (1985), 18 E.T.R. 177 (Ont. H.C.); Re Williams (1985), 18 E.T.R. 188 (Ont. H.C.).
44. See the text, supra, at note 11.

Statutes considered
Succession Law Reform Act, R.S.O. 1980, c. 488, s. 17(2).

Canadian Abridgment (2nd) Classification
Wills III. 1. e.

APPLICATION for directions of Court as to distribution of an estate.

Robert C. Taylor, for applicants.
S.J. McDonald, for respondent, Gertrude Alva Billard.
George Glass, for Official Guardian.

(RE 1440/85)

February 25, 1986. ANDERSON J.: - This is a motion for the opinion, advice and direction of the Court. It raises a question of the effect, in the circumstances, of s. 17(2) of the Succession Law Reform Act, R.S.O. 1980, c. 488. It was common ground among counsel that the section had not previously received judicial consideration. The following are the questions raised in the notice of motion:

> "(i) having regard to the provisions of the Will as a whole and the language of clause B of paragraph 3 of Part II thereof and having regard to the provisions of s. 17(2) of the Succession Law Reform Act, R.S.O. 1980, c. 488;
>
> Does the divorce of George Samuel Billard and Gertrude Alva Billard made absolute on the 15th day of March, 1983 revoke, pursuant to the provisions of s. 17(2) of the