Rectifying Wills: A Litigator's Guide

James D. Steele
Robertson Stromberg LLP, Saskatoon

Introduction

A carefully drawn will is crucial. Each year countless Canadians pass away, relying on a lawyer's draftsmanship in order to pass on the gifts they intend for their loved ones. But wills are drawn by humans, and some mistakes inevitably arise. Examples abound ranging from words inadvertently omitted or inserted, to errors of grammar or numbers to phrases misdescriptive of persons or property.[1]

However, rectification offers a powerful remedy when faced with such drafting mistakes in a testamentary instrument. Words inserted without the knowledge of a deceased can be corrected through this equitable tool. This article outlines how to rectify a will, offering guidance on procedure, the extent of a court's powers, and the type of evidence needed to convince a judge to change a will in the first place.

(i) Jurisdiction to rectify Wills:

Rectification is intended to prevent errors from defeating a testator's true intentions.[2] Not all errors can be rectified. You should begin by identifying the nature of the mistake you are dealing with. For example, if a testator knows the words used but was mistaken about their legal effect, rectification is not available.[3] However, where words are accidentally inserted by a solicitor's slip or misunderstanding, rectification can be used to meet the intentions of the testator.[4] In *Feeney's Canadian Law of Wills*, we find a good description of a common circumstance calling for rectification, being

> …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…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.[5]

Saskatchewan does not have an express rectification provision in our *Wills Act, 1996*.[6] As such, a party turns to the common law power to change a will. Rectifiable mistakes can be divided into two basic groups. First, there are mistakes apparent on the face of a document. Prior authority tells us that

> Where it is clear on the face of the will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context[.][7]

Secondly, there are mistakes which are not evident on the face of the will. Even for these, however, rectification is possible as long as the mistake falls within one of the below categories:

(a) An accidental slip or omission because of a typographical or clerical error;
(b) The testator's instructions have been misunderstood; or
(c) The testator's instructions have not been carried out.[8]

(ii) Powers of a Court to change a Will:

Having identified a mistake, what is the court then empowered to do? Can it simply delete wrongly inserted words, or may it go further and also insert words that the testator would have used had they considered the problem? On this point, Canadian cases are inconsistent. There is one line of decisions declaring that a court's powers are "confined to striking words inserted by mistake,"[9] and do not extend to the insertion of any words. However, other decisions have concluded that courts can in fact

add words so long as the surrounding language of the will necessarily implies them.[10] For instance, *Lipson v Lipson* held that a court could supply words so long as the evidence shows that:

(a) Upon a reading of the will as a whole, it is clear on its face that a mistake has occurred in the drafting of the will;
(b) That the mistake does not accurately or completely express the testator's intentions as determined from the will as a whole;
(c) That the testator's intention is revealed so strongly from the words of the will that no other contrary intention can be supposed; and
(d) That the proposed correction of the mistake gives effect to the testator's intention, as determined from a reading of the will in light of the surrounding circumstances.[11]

(iii) Determining the Deceased's Final Intentions

In applying for rectification, your goal is to convince the court of what the testator meant to say, and why they failed to do so.

In evidentiary terms, details on how the error arose will best come from an affidavit of the attending solicitor. Courts are "more comfortable admitting and considering extrinsic evidence" when it comes from the solicitor who drafted the will rather than "relying on affidavits (often self-serving) from putative beneficiaries who purport to know what the testator truly intended."

While courts were formerly reluctant to admit extrinsic evidence in interpreting testamentary documents, the admissibility of extrinsic evidence is increasingly accepted by Canadian courts.[13] This is especially so when the goal is to ascertain if "the testatrix knew and approved of certain language in her will,"[14] i.e. whether certain words had been included by mistake.

> **"While courts were formerly reluctant to admit extrinsic evidence in interpreting testamentary documents, the admissibility of extrinsic evidence is increasingly accepted by Canadian courts."**

In *Das Estate v Acevedo*, for instance, the Nova Scotia Supreme Court explained that the use of extrinsic evidence "has expanded in Canadian jurisprudence to the point that extrinsic evidence will generally be considered admissible to help determine the intention of the testator, even absent…a patent ambiguity."[15] The court further quoted from the text *Mistakes in Wills in Canada*, where the author described the insight offered by extrinsic evidence:

> Without a doubt, the most difficult cases for a court of construction are those in which a contention is raised that there has been an inadvertent omission of words in a will which could be cured, only if the court were willing to infer or add certain words to the document. In the majority of these cases, direct extrinsic evidence is usually available to explain how the mistake occurred and what particular words have been omitted. Armed with such knowledge and placed in the dilemma of possibly knowing by inadmissible external evidence the probable true intentions of the testator, judges are torn between their duty to apply the strict principles governing the interpretation of wills, and their sincere personal commitment to act justly, equitably and in accord with the testator's real intentions.[16]

A liberal approach to extrinsic evidence was displayed in the Alberta decision of *Conner v Bruketa* [17] where the court used the deceased's handwritten instructions to determine intent:

> 68 This [liberal] approach has been adopted in Alberta decisions and expanded upon…in the 2000 decision of *Sprung Estate v Sprung-Boyd*, 2000 ABCA 163, [2000] A.J. No. 668 (Alta. C.A.) at para. 32, the Court of Appeal of Alberta relied on the drafting lawyer's evidence concerning the instructions for the Will, his notes and the review of draft Wills with the testatrix to determine her intentions.

The court in *Conner* proceeded to then rely on the handwritten instructions of the testator as proof that there had been an omission.

As counsel, you should therefore carefully gather firsthand evidence surrounding the will you seek to rectify. Present the court with an affidavit clearly outlining:

(a) The original instructions of the deceased, and any contemporane-

ous evidence (i.e. telephone notes taken by the lawyer, emails, etc.);
(b) How the instructions were inadvertently not followed;
(c) Evidence making clear that the deceased had no opportunity to correct the mistake before their death;
(d) Evidence making clear that the current result flowing from the mistake in the will was not intended by the testator (whether such result is to force a gift into residue, go to an incorrect party, etc.).

Beyond extrinsic evidence, one should also see if internal signals of intent are offered within the four corners of the will. For instance, in the case of an accidentally omitted 10% gift, your goal will be to convince the court that the neglected 10% portion was not intended to simply fall to residue. To show this, you might carefully point to all the other gifts of residue, whose presence demonstrate that pains were taken to carefully dispose of all residual property, and the testator consequently could not have wished to simply leave this 10% to fall into the residue.

(iv) Ask the Court to Give Effect to the Deceased's Intentions

By this time you have shown the court:

(a) That a mistake occurred; and
(b) What the deceased's true intentions were.

As such, the court will hopefully now be prepared to correct the mistake by rectifying the will. Again, you must consider you are asking the court to add words, or, merely delete them. As noted above, one line of cases suggests that the judicial power is limited only to striking out words inserted by mistake, not substituting new ones.[18]

However, as will be shown below, numerous modern courts show a more liberal willingness to add omitted words where necessary.[19] An example is the Ontario decision of *Daradick v McKeand Estate*.[20] There, the solicitor forgot to include the matrimonial home in the most recent will. On the basis of the lawyer's unchallenged affidavit, the court held that the solicitor's error could and should be corrected. Consequently, the court added certain words as follows:

> 46 …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.

Similarly, in *Conner v Bruketa,*[21] the testator asked his lawyer to name a party the beneficiary of a pension plan and life insurance. Due to the lawyer's mistake, no beneficiary designation clause was inserted. This omission was not brought to the testator's attention before he signed the will.

In discovering what the testator meant,[22] the court in *Conner* placed emphasis on the extrinsic evidence contained in the attending solicitor's affidavit. Armed with clear evidence of what the deceased actually intended, the court in *Conner* completed the testator's will by adding the words which had been omitted.[23]

Closer to home, the Saskatchewan decision of *Heaton Estate*[24] involved a deceased who had provided the lawyer with a written memo setting out her intention to benefit certain southern Saskatchewan museums with a 20% share of her estate. By the solicitor's error, the ultimate will only provided 10% to the museums. With the remaining 10% at risk of falling into intestacy, the executor sought advice and direction as to the distribution of the estate. While the term "rectification" was not used in the decision, it is clear that this was what was sought in reality.

The Court of Queen's Bench concluded as a question of fact that the deceased had wanted "her generosity to be applied as per her memo" and therefore "the museums of southern Saskatchewan should have received 20% and not 10%."[25] The court was "not prepared to have the 10% fall into intestacy" and instead preferred "to have the intent and desire of the testator honored by the use of the extrinsic evidence provided."[26] As such, the court ordered that 20% – and not 10% – was to be distributed amongst the intended beneficiaries. In doing so, the court ended up "adding" the necessary words to the will.

Conclusion

Rectification is a tool which will retain its usefulness as long as wills are drafted by humans. With our tendency to err comes occasional typographical mistakes, misunderstandings, or failures of implementation. This article has outlined the means by which you can respond to such mistakes by invoking rectification's power to prevent "the defeat of the testamentary intentions due to errors or omissions by the drafter of the will,"[27] and thereby better ensure that justice prevails. ⚖

Rectifying Wills Footnotes continued from page 10

1 See for instance Stan J. Sokol, *Mistakes in Wills in Canada* (Toronto: Carswell, 1995) at xix.

2 *Robinson Estate v Robinson*, 2010 ONSC 3484 at para 25, [2010] OJ No 2771 (ON SCJ) [Robinson]

3 John G. Ross Martyn, Stuart Bridge & Mika Oldham, Theobald on Wills, 16th ed., (London: Sweet & Maxwell, 2001) at para 3.19. See also *Canning v Seaward*, 17 ACWS (3d) 969 at para 8, 79 Nfld & PEIR 23 (Nfld SCTD). The law makes clear that if the unfortunate word or phrase was "used knowingly by the testator, nothing can be done by the court…to correct the mistake," even if the testator was mistaken as to their legal effect. See *Robinson, supra* note 2 at para 30.

4 *Robinson, supra* note 2 at para 24.

5 James MacKenzie, Feeney's *Canadian Law of Wills*, loose-leaf, 4th ed. (Markham, Ont.: LexisNexis, 2000) at 3-21.

6 SS 1996, c W-14.1. By contrast, see s. 39 of the Alberta *Wills and Succession Act*, SA 2010, c W-12.2.

7 *Laws v Dobson Estate*, 2006 BCSC 1519, 27 ETR (3d) 147, quoting from R. Jenning, ed., Jarman On Wills, 7th ed., vol. 1 (London: Sweet and Maxwell Limited, 1951) at 556.

8 *Robinson, supra* note 2

9 *Ali Estate, Re*, 2011 BCSC 537 at para 32, [2011] BCWLD 4464 (BC SC).

10 See for instance *Rapp Estate, Re*, 28 ACWS (3d) 415, 42 ETR 222 (BC SC).

11 [2009] OJ No 5124 at para 42, 183 ACWS (3d) 302 (ON SCJ).

12 *McLaughlin Estate v McLaughlin*, 2014 ONSC 3162 para 54, 242 ACWS (3d) 1003, citing Robinson, supra note 2.

13 See *Robinson Estate v Robinson*, 2011 ONCA 493 at para 24, [2011] OJ No. 3084.

14 *Balaz Estate v Balaz*, [2009] OJ No 1573 at para 10, 176 ACWS (3d) 1204 (ON SCJ).

15 2012 NSSC 441, 324 NSR (2d) 305 [emphasis added].

16 *Ibid* at para 46, citing from *Sokol, supra* note 1 at 93 [emphasis added].

17 2010 ABQB 517, 4 Alta LR (5th) 324 [*Conner*].

18 See for instance *Krezanoski v Krezanoski*, [1992] AJ No. 1064 at paras 18-19, [1993] AWLD 028 (AB QB), and *Milwarde-Yates v Sipila*, 2009 BCSC 277 at para 47, [2009] BCWLD 3101.

19 See for instance *Wagg v Bradley*, [1996] BCWLD 722 at para 22, [1996] BCJ No. 165 (BC SC).

20 2012 ONSC 5622, [2012] OJ No 4766.

21 *Supra* note 17.

22 *Ibid*.

23 *Ibid* at para 71.

24 2012 SKQB 493, 407 Sask R 291.

25 *Ibid* at para 10.

26 *Ibid* at para 14.

27 *Ibid* at para 25.