dentons.com

DENTONS

The Insertion of an Omitted Bequest: *Mckeand Estate* and Recent Developments in Law of Will Rectification

Personal Tax and Estate Planning, Vol. IV No. 2 (p. 174)

2012

Contact

Brian Cohen
Dentons Canada LLP
Partner, Toronto
D +1 416 361 2316
brian.cohen@dentons.com

Rebecca Studin
Dentons Canada LLP
Associate, Toronto
D +1 416 863 4368
rebecca.studin@dentons.com

In what situations will the Court invoke its equitable jurisdiction to rectify a last will and testament by the addition of words that were mistakenly omitted from the executed document? This issue was recently considered by the Honourable Mr. Justice Matheson in *Daradick v. McKeand Estate* ("*McKeand Estate*"),[1] in which His Honour ordered the rectification of a will by the insertion therein of a specific bequest that had been mistakenly omitted through solicitor error. This paper will discuss the implications of the decision in *McKeand Estate* in terms of the nature of the evidence the Court will consider where rectification of a will is sought, and the remedies available to the Court in such cases.

The *McKeand Estate* Decision

The Background

The testator died on December 11, 2010 at the age of 92. She was predeceased by her husband, who died in 1997. There were five children of the marriage, one of whom died in 2005. The testator's husband had executed a last will and testament in 1992, which left the family home (the "Property") to his only daughter, in the event that his wife, the testator, predeceased him. The testator had executed two previous wills in 1992 and 2005, both of which left the Property to her daughter (the former in the event her husband predeceased her).

In May 2010, the testator met with her solicitor as she wished to make certain changes to her will in light of the death of one of her sons. During this meeting, the testator instructed her solicitor that the Property was to be gifted to her daughter, which bequest the solicitor recorded in his notes, but on the reverse side of the page. Unfortunately, the solicitor's secretary did not see this note and she prepared the will without reference to this bequest.

The solicitor did not attend the signing of the will at the testator's residence, but sent a law clerk to attend in his place. The law clerk reviewed the will with the testator paragraph by paragraph and compared it with the testator's previous will. The bequest of the Property was not discussed during this meeting. The testator then executed the will.

The error was not discovered until after the testator's death, and was acknowledged by the drafting solicitor. As a result of the error, the will was silent as to the disposition of the Property, which fell into the residue of the estate, in which the daughter had a one-fifth interest.

The daughter applied to the Court for rectification of the will to include a paragraph in the will gifting the Property to her. The Application was opposed by two of her brothers, one of whom was the estate executor.

The Evidence Considered by the Court

The daughter filed affidavit evidence describing her relationship with her mother, the care she had provided to her over the years, and the amount of money she had spent on repair and maintenance of the Property, in which she had been living with her family at the testator's behest and with her blessing.

The drafting solicitor provided affidavit evidence of his recollections of the instructions he was given by the testator as to the disposition of the Property in the will, and how the drafting error occurred.

[1] 2012 ONSC 5622, 2012 CarswellOnt 12438.

The evidence of the daughter and the drafting solicitor was unchallenged by the Respondents, who filed no responding evidence and conducted no cross-examinations. Rather, the Respondents challenged the Application on the basis that the Court lacked authority to rectify a will by adding words, and as such, the relief sought by the daughter could not be granted.

The Decision

In considering whether the remedy of rectification is available where the testator's instructions have not been carried out, Justice Matheson commented that although the law of rectification is changing,[2] the Court must be vigilant when it comes to considering rectification for obvious reasons: the testator is dead and the evidence before the Court may be tainted by self-interest.[3]

Justice Matheson acknowledged conflicting authority from Alberta and British Columbia, and academic commentary relied upon by the Respondents, which held that while the Court could delete words from a will, there was no power to add language.[4]

Ultimately, Justice Matheson relied upon the decision of the Honourable Mr. Justice Belobaba in *Robinson Estate v. Robinson* ("*Robinson Estate*"),[5] upheld by the Court of Appeal for Ontario,[6] as authority for the circumstances in which a will can be rectified:

> 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.[7]

As for whether the Court has authority to add words to a will, Justice Matheson cited the Honourable Mr. Justice Pattillo's decision in *Lipson* (*Re*) ("*Lipson*"),[8] in which he stated the following in obiter:

> 32 It has long been established in Ontario that the court has the power to delete or add words to a will by necessary implication.

---

[2] *Ibid*, at para. 31.
[3] *Ibid*, at para. 32.
[4] *Clark v. Nash*, [1987] BCWLD 983, [1987] BCJ no. 304, 1987 CarswellBC 1415; James MacKenzie, Feeney's Canadian Law of Wills, 4th ed, loose-leaf (Markham Canada 2000: Lexis Nexis) at 3.26.
[5] 2010 ONSC 3484, [2010] O.J. No. 2771.
[6] *Robinson Estate v. Robinson*, 2011 ONCA 493, 106 OR (3d) 321, 2011 CarswellOnt 5819.
[7] *McKeand Estate*, *supra* note 1 at para. 38.
[8] ETR (3d) 44, [2009] OJ no. 5124, 2009 CarswellOnt 7474.

…

42 In my view the above principles concerning when a court can delete or add words to a will apply not only in circumstances where a word or words are omitted but also where an incorrect word or words are contained therein. In either case, before a court can delete or insert words to correct an error in a will, the Court must be satisfied that:

(i) Upon a reading of the will as a whole, it is clear on its face that a mistake has occurred in the drafting of the will;

(ii) The mistake does not accurately or completely express the testator's intentions as determined from the will as a whole;

(iii) The testator's intention must be revealed so strongly from the words of the will that no other contrary intention can be supposed; and

(iv) The proposed correction of the mistake, by the deletion of words, the addition of words or both must give effect to the testator's intention, as determined from a reading of the will as a whole and in light of the surrounding circumstances.[9]

In light of the aforementioned authorities, and the unchallenged evidence of the daughter and the drafting lawyer, Justice Matheson found he had the authority to rectify the will by adding the omitted bequest:

> 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.[10]
>
> I find that the error of [the drafting lawyer] 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.[11]

Justice Matheson therefore ordered that the Will be rectified by the addition of a paragraph bequeathing the Property to the daughter.[12]

Comment

There appears to be no other reported decision in Ontario in which a court rectified a will through the insertion of, not merely missing language but, an entire bequest that had been accidentally omitted. The *McKeand Estate* decision, however, is the latest example of a development in the will rectification jurisprudence in Ontario in which the Court, in certain circumstances, has shown more flexibility in terms of (1) the evidence it will consider when interpreting a will; and (2) the remedy available if it is satisfied that a mistake has occurred.

[9] *McKeand Estate*, *supra* note 1 at para. 40.
[10] *Ibid* at para. 44.
[11] *Ibid* at para. 45.
[12] *Ibid* at para. 46.

Admissibility of Evidence

In *McKeand Estate*, the Court did not consider the evidence of what the testator *intended* when she drafted the will. The Court of Appeal for Ontario in *Robinson Estate* made clear that third party evidence of testamentary intention is inadmissible.[13]

The Court did consider, however, the daughter's evidence of the circumstances surrounding the making of the will, the testator's previous wills, the use of the Property, as well as the drafting solicitor's evidence of the instructions he was given but failed to carry out in drafting the will. The Court considered this evidence despite the fact that on its face, the will was unambiguous and contained no obvious error.

The admissibility of such evidence, despite a lack of ambiguity, is consistent with the approach the Court has taken when determining whether an error has occurred in the drafting of a will.

In *Barylak v. Figol*,[14] the Court considered whether a mistake had occurred in relation to the inclusion of an entire residuary clause that had not been authorized by the testator. Madam Justice Greer admitted various forms of evidence, including the drafting lawyer's evidence as to his recollection of his dealings with the testator and his drafting of the will, previous wills, and the evidence of various witnesses, including family members, as to the testator's intentions. On the basis of that evidence, Justice Greer concluded that the clause in question did not conform to the testator's intentions, and that, although the will might have been explained to the testator, he was effectively unaware of the problem.[15]

In *Binkley Estate v. Lang* ("*Binkley Estate*"), [16] Justice Harris considered the affidavit evidence of the drafting lawyer and concluded that the signed will contained a typographical error in respect of the amount left to certain legatees, in that a bequest of $25,000 ought to have been expressed as a bequest of $2,500.

In *Balaz Estate v. Balaz* ("*Balaz*"),[17] Justice Brown relied upon the affidavit evidence of the drafting lawyer in concluding that a mistake had occurred in the drafting of the will, such that he inadvertently drafted clauses which could have the effect of benefitting someone other than the testator's spouse.

The above approach was confirmed by Justice Belobaba in *Robinson Estate*:

> 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…
>
> 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

[13] *Robinson Estate*, *supra* note at para. 27.
[14] (1995), 9 ETR (2d) 305, 59 ACWS (3d) 350, [1995] OJ no. 3623.
[15] *Ibid* at para. 29.
[16] (2009), 50 ETR (3d) 44, [2009] OJ no 2167, 2009 CarswellOnt 3029.
[17] (2009), 176 ACWS (3d) 1204, [2009] OJ no. 1573.

> 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.[18]

The Court of Appeal in *Robinson Estate* similarly held that:

> Extrinsic evidence is admissible to aid the construction of the will. The trend in Canadian jurisprudence is that extrinsic evidence of the testator's circumstances and those surrounding the making of the will may be considered, even if the language of the will appears clear and unambiguous on first reading. Indeed, it may be that the existence of an ambiguity is only apparent in the light of the surrounding circumstances.[19]

McKeand Estate is yet another example of the Court taking extrinsic evidence into account (of instructions and surrounding circumstances) in order to determine whether an error occurred in the drafting of a will.

Manner of Rectification

The insertion of the omitted bequest in *McKeand Estate* is also consistent with the trend in will rectification cases in Ontario in which the Court has confirmed its ability to not only delete, but also add words to the document.

In *Binkley Estate*, Justice Harris ordered that the will be rectified so as to reflect the intention of the testator, such that the sum left to certain beneficiaries would be corrected by the deletion from the will of the words "twenty-five thousand dollars" and that necessary replacements of the comma and decimals in $25,000 be added to reflect the correct sum of $2,500.[20]

In *Lipson*, replied upon by Justice Matheson in *McKeand Estate*, an Application was brought before the Court with respect to when and to what extent the Court can delete and add words to the will of a testator. The testator executed both a Primary Will and a Secondary Will, with the Applicants as beneficiaries. Both wills contained a paragraph whereby the testator deliberately omitted bequests to the Respondents. The testator subsequently executed an incorrect draft of the Secondary Will, wherein Article I proposed that a further will would be executed to deal with the Secondary Will assets. As no further will was executed, it was submitted by the Respondents that the Secondary Will assets should be dealt with through intestacy. Justice Pattillo held that it was "perfectly clear that the mistakes do not accurately reflect" the testator's intention, and although the "court has the power to delete or add words to a will by necessary implication," effect could be given to the testator's intention by deleting the words in Article I rather than adding words.[21]

In *Re Eve Bongard Estate*,[22] the Honourable Mr. Justice Whitaker approved an application, brought on consent, to rectify a will which, due to a drafting error in clause 11(d), provided only for the disposition of a portion of the residue of the estate in the event the testator were to be predeceased by her husband. However, the will was silent as to the disposition of that portion of the residue in the event that the testator were to predecease her husband, which in fact occurred. Clause 11(d) of the

---

[18] *Robinson Estate, supra* note at para. 26.
[19] *Robinson Estate, supra* not at para. 24.
[20] *Binkley Estate*, *supra* note 16 at para. 33.
[21] *Lipson*, *supra* note at paras. 54 and 32.
[22] (21 June 2012), Toronto [Court File No. 01-1461/11] (S.C.J.).

will was rectified in order to give effect to the testator's intentions. The necessary rectification involved a renumbering and reformatting of paragraphs, which could not have been achieved by simply striking out paragraphs of the will, indicating that the Court's power of rectification extends beyond the mere deletion of words.

McKeand Estate appears to have taken the addition remedy one step further, as an entire bequest was inserted into a will that had no error on its face and which error was only apparent in light of the surrounding circumstances. However, the decision can be reconciled with the *Lipson* requirement that the error be clear on the face of the will before the Court can add words[23] in light of the Court of Appeal for Ontario's comments in *Robinson Estate* that extrinsic evidence may be considered in order to ascertain whether the will in fact contains an ambiguity.[24]

Implications

The decision in *McKeand Estate* demonstrates that the Court's willingness to exercise its equitable jurisdiction to rectify a will may extend to the addition of words, and even the insertion of a bequest. The decision has yet to be followed in support for the granting of a similar remedy. It remains to be seen whether the Court will be inclined to add words to a will, or grant any form of rectification for that matter, without solicitor evidence of a drafting error, or where there is conflicting evidence of the surrounding circumstances.[25] As such, the authority of the *McKeand Estate* decision may be confined to cases where (1) the drafting solicitor is able to provide evidence as to the instructions the testator gave, and how the drafting error occurred (thus permitting the case to fall into one of the situations where rectification is available according to *Robinson Estate*); and (2) where the evidence before the Court is unchallenged.

[23] *Lipson*, *supra* note 8 at para. 42.
[24] *Robinson Estate*, *supra* note 6 at para. 24
[25] See for example *Cunningham v. Quadrus Charitable Giving Program*, 2012 ONSC 5836, 2012 CarswellOnt 15663.

Dentons Canada LLP

T +1 416 361 2381
F +1 416 863 4592
dentons.com