THE JUDICIAL RECONSTRUCTION OF WILLS IN MANITOBA

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Abstract

This thesis studies the problem of the judicial reconstruction of wills in Manitoba. It examines the way courts re-make a deceased's will in three separate contexts: at the time a will is submitted for probate, when a probated will is construed by the court, and when a court entertains an application for support, not provided for in the will, under dependants' relief legislation.

The thesis relies on legislation, case law, and law reform commission reports from Manitoba, Canada, other Commonwealth nations and North Dakota in order to support the conclusion that the courts do re-make a deceased's will, in order to effect the intentions of the deceased as expressed in their will or to provide financial protection for a deceased's family. The thesis concludes its analysis by offering proposals for legislative reform, which are designed to clarify the existing legal framework and make the outcome of such judicial proceedings in Manitoba more predictable and equitable.

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INTRODUCTION

The law of succession in contemporary Manitoba is characterised by the interaction of two fundamental but competing principles, namely, freedom of testation and family provision. Freedom of testation means that a testatrix is free to dispose of her property as she chooses, while family provision constrains testamentary freedom by obligating a testatrix to take reasonable steps to protect her family financially upon her death. Both testamentary freedom and family provision are creatures of statute. The Wills Act contains the framework for the creation of a written will, which is the primary legal instrument utilised by testators in Manitoba to exercise their testamentary freedom.[1] A will is a document which enables a testatrix to direct how her property will be used and enjoyed after her death. The Dependants Relief Act provides a mechanism for an application to the court for reasonable provision out of a deceased's estate for maintenance and support.[2] It defines a specified class of dependants who are granted standing to apply for maintenance and support by virtue of their status, either as surviving members of the deceased's family or as a co-habitee of the deceased. Both The Wills Act and The Dependants Relief Act are enactments of the legislature designed to govern the law of succession in Manitoba. The Wills Act reflects principles of law which support the volition of the individual, whereas The Dependants Relief Act creates a legal regime which restricts individual freedom through the exercise of judicial discretion.[3]

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[1] The Wills Act, Revised Statutes of Manitoba 1988, Chapter W150.
[2] The Dependants Relief Act, Statutes of Manitoba 1989-90, Chapter 42- Cap. D37.
[3] The Marital Property Act, Revised Statutes of Manitoba 1987, Chapter F20 and The Homesteads Act, Statutes of Manitoba 1992, Chapter 46-Cap. H80 also constrain testamentary freedom through the operation of a fixed statutory formula, not by judicial discretion.

On its face, the law of testamentary succession offers a simple statutory regime. The preparation and execution of a will by a testator is circumscribed by provisions contained within The Wills Act, while the primary basis upon which a court exercises its jurisdiction to grant reasonable maintenance and support is stipulated in The Dependants Relief Act. The problem, however, is that the case law surrounding both Acts demonstrates that the outcome of judicial proceedings under either piece of legislation is not always predictable. This uncertainty in outcome becomes particularly pronounced when a court endeavours to re-make a will for a deceased testator.

Freedom of testation implies that a court has no business re-making anyone's will. If the principle of testamentary freedom is to possess any legitimacy in Manitoba, then the courts ought to respect the right of a testator to dictate how his private property will be disposed of after death. Respect for private proprietary rights and individual liberty has characterized judicial policy in the law of succession in England and Canada during and since the nineteenth century. This does not, however, accurately describe the conduct of the Manitoba courts at the close of the twentieth century. A series of judicial decisions related to the rectification of wills at probate, to the construction of probated wills, and to applications for reasonable provision under The Dependants Relief Act, support the position that the Manitoba courts possess jurisdiction which enables them to re-make a will for a testator, in order to effect testamentary intention or to protect a testator's family. Courts re-make wills by deleting words at probate, reading a will in construction as if words had been inserted or deleted, and by ordering reasonable provision for certain dependants out of the estate of a deceased person despite expressed provisions contained in a will. The existence of this judicial activism in Manitoba specifically, and within the

common law system generally, raises two important issues: whether the existing legal framework in Manitoba adequately coincides with prevailing social reality and individual needs; and, if not, how the laws of Manitoba may be reformed in a rational, logical and predictable manner that serves such realities.

The problem of judicial activism in the testation process may be captured by a simple anecdote. Consider a middle aged married testator who instructs his solicitor to prepare his Last Will and Testament. The testator instructs his solicitor that he has three children, all under the age of majority, whom he wishes to treat equally, along with a wife whom he despises and wishes to disinherit. The testator is a wealthy businessman and the sole provider for the family. In the course of drafting the will, the solicitor, by inadvertent error, fails to provide for one of the children and misnames the second child. The solicitor also, by design, makes no provision for the wife within the dispositive clauses of the will. The testator duly executes the will in accordance with the requirements of The Wills Act and dies one month later.

These facts present a myriad of problems for the executor named in the will, the nominated beneficiaries, and for the testator's disinherited spouse. An application may be made at probate to rectify the will by inserting a bequest for the child whose name was omitted as a result of the solicitor's omission. A Manitoba court, however, may hold that it does not possess jurisdiction to add words to a will. If the will as drawn is admitted to probate, a court of construction may rule that the will is not latently ambiguous and, therefore, extrinsic direct evidence of the testator's intention to benefit all of his children is inadmissible. However, extrinsic indirect evidence of surrounding circumstances may be admissible in construing the meaning of the words contained within the four corners of

the probated will. Moreover, the wife may apply for reasonable support under The Dependants Relief Act, and a court may grant her a variety of remedies, including periodic payments or a lump sum payment of maintenance, or a property allocation which of course would be carved out of the bequests and devises designated in the testator's will. These proceedings will require a court to strike a balance between the two fundamental but competing interests, namely, the protection of testamentary freedom and the enforcement of the testator's obligation to make reasonable provision for his family. In striking a balance between these competing interests, a court may be required to re-make the testator's will through exercise of its judicial discretion conferred by common law in the context of probate and construction, and by statute under The Dependants Relief Act.

The re-making of a will by a court has significant social policy implications for the law of succession in Manitoba. On a macro-political level, the remaking of a will by a court defines the limits of individual freedom and the scope of state authority. On a micro-level, judicial will-making cuts across a range of competing interests, including generational and intra – familial disputes between parents, children, grandchildren and siblings, as well as social disputes between donors and donees. At the end of the day, the judicial reconstruction of a will by a court, either at probate, in construction, or under The Dependants Relief Act, effects a redistribution of property, from one beneficiary or class of beneficiaries under a will to another, from beneficiaries under a will to those who would take under an intestacy, or from those designated by will to those who will take by virtue of their status under The Dependants Relief Act. The exercise of judicial discretion places into issue the contemporary concept of proprietary rights, because a

nominated beneficiary's entitlement to property given by a will may be directly contingent upon the manner in which a court exercises its discretion in rectifying, construing or granting reasonable support, for example, for an un-nominated beneficiary. In light of the nature and scope of the issues, the importance of rationalising the law related to judicial will-making is immediately apparent.

This thesis will study the process of judicial will-making in contemporary Manitoba. There are three stages which will be examined. First, the jurisdiction of the Manitoba Court of Queen's Bench to rectify a will at probate will be explored. Second, the jurisdiction of the Manitoba Court of Queen's Bench to interpret a will as if words have been added or deleted will be reviewed. Third, the jurisdiction of the Manitoba Court of Queen's Bench under The Dependants Relief Act to make reasonable provision out of a testator's estate will be analysed. The thesis will place the process of judicial will-making within the broader context of the common law system. This will necessitate consideration of judicial will-making on the micro-levels within the law of probate, wills construction and family provision, as well as on the macro-levels of the rectification of contracts, the parole evidence rule, and the scheme of social welfare legislation currently in force in Manitoba, which provides a safety net for the family.

The thesis will offer three chapters. Chapter one will discuss the rectification of wills at probate, and Chapter two will address wills construction. Chapter Three will examine the re-making of wills by the courts under the The Dependants Relief Act. The Conclusion will provide a rationale for judicial will-making within the context of probate, construction and dependants relief legislation. This will necessitate comparing the judicial reconstruction of wills with the remedies which might otherwise be available to a

prospective beneficiary, including actions by beneficiaries against solicitors for professional negligence in the course of drawing the will, or applications by disinherited beneficiaries for social assistance.

The analytical framework will have several components. First, each chapter will provide a comparative historical analysis of the approach taken by English and Canadian courts in the nineteenth and early twentieth centuries with the current state of the law in Manitoba and the English common law generally. This analysis will refer briefly to historical origins of the concepts and structures of the Manitoba succession law regime. The law from late nineteenth and early twentieth century England and Canada has immediate relevance because it was during this time that their courts crystallized the approach which has directed all subsequent Canadian jurisprudence and legislation related to rectification, construction and family provision.

Once the comparative historical analysis is presented within each chapter, I will then identify specific deficiencies contained within the current Manitoba legal framework related to rectification, construction and family provision. The gaps within the existing legal framework will be exemplified by reference to existing statutory provisions and cases decided in Manitoba and Canada within the past twenty years, to demonstrate the difficulties the courts encounter in adjudicating these issues. Each chapter then utilises a comparative law analysis to examine whether any legislative or law reform commission developments from jurisdictions outside of Manitoba may present appropriate responses to problems identified in this thesis. The alternative approaches will be assessed according to three criteria. First, any proposal for law reform must reflect the higher moral priority that a testatrix should be free to dispose of her property after death,

provided reasonable provision for her family is made. Second, any legislative reform must yield predictable results for an ordinary client and her solicitor. A testatrix or a beneficiary who relies upon her solicitor for advice related to her will must possess a significant degree of confidence in that opinion, as to what a court will likely do in the face of any application for rectification, construction or family provision. In order for a solicitor to be able to provide a legal opinion with the degree of confidence expected by a client, she must be able to rely upon a rational, logical and coherent set of principles defined in the legislation. Third, the reforming legislation proposed must be cost effective to administer. The thesis will offer recommendations for such legislative reforms and will provide a draft of the proposed legislation, in order to demonstrate how the reforms proposed may be implemented by the Manitoba legislature within the context of its Wills Act and Dependants Relief Act.

CHAPTER ONE: THE RE-MAKING OF A WILL AT PROBATE BY THE RECTIFICATION PROCESS

A. The Historical Significance of Formal Statutory Requirements

The law of succession, including the English Wills Act of 1837, was received from England as appropriate for the requirements of Rupertsland as it developed up to 1870 when the province of Manitoba was created.[4] Provisions of that English Wills Act[5] were formally adopted by the Manitoba legislature in 1871[6] and with few exceptions remain in force to this day.[7] In order to understand attitudes of nineteenth century English courts towards the rectification of wills, it is necessary to consider the historical development of requirements related to the execution of wills and testaments, as codified in 1837. This thesis cannot provide a comprehensive historical review of all events leading to the enactment of that Wills Act. However several important historical features related to the law of wills and testaments will contextualise the current statutory regime in Manitoba and the case law which surrounds it.

Before the Norman Conquest of England in 1066 A.D., Anglo – Saxon folk law, through the post-obit or bedside gift, permitted testators to dispose freely of both land and chattels after death.[8] The Christian Church modelled the form of these testamentary dispositions on the Roman testament, and these dispositions were often made orally

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[4] An Act Respecting the Court of Queen's Bench in Manitoba, (1874), 38 Victoria, Chapter 12, Section 1.
[5] An Act for the Amendment of Laws with Respect to Wills, (1837), 1 Victoria, Chapter 26, 4 Chitty, Collection of All the Statutes (928).
[6] An Act Relating to Wills (1871), 34 Victoria, Chapter 4.
[7] Manitoba, Report of the Law Reform Commission on "The Wills Act" and the Doctrine of Substantial Compliance (Winnipeg: Queen's Printer Office, 1980)(Clifford H.C. Edwards, Q.C., Chairman), at 2.
[8] Michael M. Sheehan, The Will in Medieval England (Toronto: Pontifical Institute of Mediaeval Studies, 1963), at 83.

(nuncupatory) by a deceased person from the deathbed in order to protect his soul.[9] Following the Norman Conquest, the Christian Church retained control over the testate distribution of chattels by testament, as well as over the intestate dispositions of chattels, but the disposition of land after death was rule governed by the royal courts. The Normans imposed a feudal order on Anglo-Saxon society which abolished the ability to leave land by will. Land was the most valuable commodity in feudal society, reciprocally binding donors and donees, and the Normans could not allow a person to freely dispose of his land after death thereby allowing the donee arbitrarily to destroy the feudal bond, outside of the control of the donor (mainly the crown). Norman feudalism was a legal system which provided for the disposition of land after death according to rigid rules which applied by operation of law as opposed to testamentary volition. Land would retain its unitary integrity because it devolved upon the eldest child, according to the rule of primogeniture. This rule of inheritance, in conjunction with the doctrine of livery of seisin which required a public physical delivery of land by a transferor to a transferee made it impossible for land to be left by will by a testator.

With the right to freely dispose of land by will abolished, the Normans could not eradicate the desire of a testator to dictate how his property should be used and enjoyed after his death.[10] This motivation, to dispose of the most valuable property a testator possessed, led to the development of the cestui que use in the thirteenth century.[11] The use separated the legal title to the land from its beneficial ownership and enjoyment. The royal courts enforced the rules of feudalism and did not recognise the use, but it was

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[9] Ibid., 3, 16, 119-120.
[10] Alison Reppy and Leslie J. Tompkins, Historical and Statutory Background of the Law of Wills (Chicago: Callaghan and Company, 1928), at 4.

recognised and granted protection by the court of Chancery. A testator could effectively dispose of all benefits such as rents, leases or crops from his property after death through a series of successive uses and in this way circumvent the common law rules enforced by the king's Courts. The incidents of feudal tenure could not attach to the interests of the cestui que use. As a result, royal coffers were radically depleted,[12] because all fees related to land transfers after death stopped flowing, defeated by the use. In the face of this financial crisis, the Statute of Uses was passed, and the legal estate was transferred to the equitable estate.[13] This meant that if a grantor conveyed land to "A" to the use of "B" the legal estate would pass from "A" to "B" and the seisin in the land would be transferred from "A" to "B".[14] As a result the royal courts re-assumed control over dispositions of land after death, and the individual's ability to dispose of land after death was effectively abolished.

The inability to dispose of land after death caused significant unhappiness within England following the Statute of Uses, and in response, just five years later, the Statute of Wills (1540)[15] was passed. For the first time following the Norman Conquest a testator was permitted by legislation to dictate how his land would be used and enjoyed after his death.[16] The statute not only provided a legal regime based on individual freedom, as opposed to common law rules; it also served as the foundation for the statutory requirements which circumscribe the will-making process in late twentieth century Manitoba.

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[11] Edward Jenks, A Short History of English Law, 2nd ed. (London: Methuen & Co. Ltd., 1920), at 96.
[12] Desmond H. Brown, "Historical Perpectives on The Statute of Uses", (1979) 4 Manitoba Law Journal 409 at 428.
[13] Statute of Uses, 1535. 27 Henry VIII, Chapter 10 (United Kingdom), 3 Statutes of the Realm (539).
[14] E.H. Burn, Cheshire's Modern Law of Real Property, 12th ed. (London: Butterworths, 1976), at 54-55.

The Statute of Wills, 1540 required that all wills of land had to be in writing, albeit not necessarily in the hand of the testator or even signed by him, but a written document was required. The statute provided that all land held in socage tenure could be left by will and two thirds of one's land held in knight service could be disposed of by will. When knight service was abolished 120 years later, the statute applied to all land held by a testator in fee simple.[17]

The requirement that a will be in writing initiated what Professor Langbein has called the "channelling" function.[18] In other words, the statute provided a mechanism for channelling property from a testator to his designated beneficiaries after his death. The Statute of Wills (1540) was deficient, however, in that it did not address what Professor Langbein has described as the "evidentiary", "cautionary" and "protective" functions.[19] A will could be drawn by a drafter for a testator, but because the will was not in the testator's own handwriting nor signed by him with attesting witnesses, there was no way of establishing the authenticity of the document. In addition, a testator might wish to execute his own will, but because there was no requirement that it be witnessed by impartial witnesses, there was no mechanism for protecting a testator who might be susceptible to undue influence at the time the will was made. Moreover, a testator might wish to make a will, acting impulsively without the cautionary deliberation that comes from the ritual of placing his signature upon the will and an attestation by several witnesses to his signing.

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[15] Statute of Wills, 1540, 32 Henry VIII, Chapter 1 (United Kingdom), 3 Statutes of the Realm (744).
[16] Ibid.
[17] Tenures Abolition Act, 1660, 12 Charles II, Chapter 24 (United Kingdom), 5 Statutes of the Realm (259).

In the face of these limitations created by the Statute of Wills (1540), the Statute of Frauds (1670) was passed.[20] It tightened the formal requirements for will-making. It required that a will of land had to be in writing, signed by the testator or another in his presence and at his direction, and be attested by three witnesses who would subscribe their name to the document. The Statute of Frauds was enacted to reduce the propensity for fraud and enhance the security of land acquisition. The three requirements of writing, signature by the testator and attestation by witnesses are still a requirement of the law of wills in Manitoba, and constitute one of the reasons that courts of probate and construction have been reluctant to re-make wills.[21]

Although the Statute of Frauds was designed to enhance security in acquisitions, the case law arising out of it increased the complexities in the law of wills and testamentary dispositions.[22] Requirements for wills as legislated in 1540 and 1677 instrumentally developed a system for dispositions after death based on volition as opposed to rules; but the rules related to execution contained in the statutes themselves became complex and required simplification. The Wills Act of 1837 merged the substantive law of wills and testaments and thereby resulted in a uniform method of disposing of both land and chattels after death. It refined and simplified the requirements for wills by providing that a will had to be in writing, signed by the testator or by others in his presence and at his direction and witnessed by two witnesses (instead of three

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[18] John H. Langbein, "Substantial Compliance with the Wills Act" (1975) 88 Harvard Law Review 489, at 492 – 496.
[19] Ibid.
[20] Statute of Frauds, 1677, 29 Charles II, Chapter 3 (United Kingdom), 5 Statutes of the Realm (839).
[21] Supra, TheWills Act, note 1, Sections 3, 4(a), (b), and (c). The witnesses do not need to actually read the will, but are only required to witness the testator sign it; Smith v. Smith (1866), Law Reports 1 Probate & Divorce 143 (Probate Court).
[22] Supra, Manitoba, note 7, at 2.

witnesses) who were competent to witness the execution of the will when it was executed. The will could also dispose of property acquired by the testator after the will was made. By the mid-nineteenth century, the requirements of the English will completely circumvented the rigid rules of the feudal order and subject to the rights of dower, replaced the rules of Norman feudalism with a legal system based on testamentary freedom.[23]

The concept of testamentary freedom was not, however, absolute. The requirements of will-making provided testators with a channel or mechanism through which they could select their beneficiaries, but not the manner by which a will might be drawn. A testator's freedom remained limited to the extent that he was still required to conform to strict statutory requirements in the course of making his will. These requirements were justified, in part by the fact that society required uniformity in will-making if only because it was not cost effective or practical to conduct an oral hearing each time a will was submitted for probate. Therefore, the Wills Act (1837) formed the basis for a new set of rigid rules, to govern and regulate the formal execution, probate and construction of wills. These rules constrained the ability of the nineteenth century English common law courts to re-make wills for a testator, either at probate or in construction.

B. The Nineteenth Century Approach to the Rectification of Wills

After 1837, and even before, the court of probate was concerned with two questions. First, which documents and words constituted the last will and testament of a

[23] Indeed, the feudal order formally died in 1660 when the Tenures Abolition Act, supra was passed, and it had little life for a century-plus before that, after the Statute of Wills (1540), supra was enacted.

testatrix? Second, once that language was ascertained, the court of probate then ensured that the testatrix knew and approved the contents of the will.

Several different types of problems might surface when a will was submitted for probate to necessitate its rectification. The problems at probate which will be addressed in this thesis are primarily problems made by solicitors or testators in the course of drafting a will.

The traditional position taken by English courts in the nineteenth century was that the three requirements in the Wills Act, 1837 limited the extent to which a court could rectify a will in the event of mistake. The leading English decision during the nineteenth century was Guardhouse v. Blackburn.[24] There the testatrix had arranged to have her will professionally prepared. It provided for disposition of certain lands and charged several legacies against the land. She subsequently executed a codicil which purported to revoke the earlier legacies provided by her will, replacing them with legacies which would be paid out of her personalty. The solicitor made a drafting error in preparing the codicil, however, in that it provided that all legacies "therein", meaning those referred to in the will as well as those referred to in the codicil, were to be paid out of the personalty. The solicitor read the codicil to the testatrix who signed it. When the testatrix died, application was made to delete the word "therein" which was erroneously inserted in the codicil. The probate court declined to remove the word , on the theory that as the will and later codicil had been read to the testatrix before she signed it, that constitued "conclusive evidence" that she had known and approved its contents.[25]

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[24]Guardhouse v. Blackburn (1866), Law Reports 1 Probate & Divorce 109 (Probate Court).
[25] Ibid., 116.

Guardhouse v. Blackburn represents an extremely formal response to the rectification of wills at probate. It reflected a strict approach that wills might only be altered if there has been compliance with statutory requirements. The nineteenth century and early twentieth century English courts did admit several exceptions to this rule. In Rhodes v. Rhodes[26], the testator instructed his solicitor to create an interest for a specified beneficiary which would vest immediately on the death of the testator. By inadvertence, the solicitor used language which created a postponement of the interest at the testator's death. The evidence placed before the court indicated that this was in fact the opposite of the result intended by the testator. The court found that the deceased had executed the will in compliance with the Wills Act (1837) and that the deceased was not influenced by any fraudulent conduct. The court stated that there was jurisdiction in the court of probate to delete words from a will which had been inserted by fraud or inadvertence, if it was "sufficiently proved" that the document did not comprise the testator's will.[27] The court limited the scope of its jurisdiction to rectify to deleting language in a will only if the deletion did not reduce or alter the interests under the will that remained. The court refused to rectify the will because converting a postponed gift into an interest which vested in possession at death would diminish the amount of property which remained in the estate.

C. Relaxation of the Strict Approach to Rectification in the Twentieth Century

The extreme formalism of nineteenth century English courts was tempered with a more liberal approach in both Canada and England in the twentieth century. The motivation behind this was that the strict approach, based upon "conclusive evidence",

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[26] Rhodes v. Rhodes (1882), 7 Appeal Cases 192 (Privy Council).

was logically inconsistent. If a testator did not know and approve of a document purporting to be his last will and testament, then the document was not his will. Therefore, even if a testator signed his will, if at the time of execution he did not understand it, then logically, he could not be considered to truly know and approve of its contents. The mere execution of the will was conclusive of nothing more than the fact that the testator signed his will. Accordingly, if language was inserted in a will in error, those words should be omitted by a court of probate, so that only a testator's true intentions would be effected.

This modern approach to rectification at probate may be exemplified by two English decisions. In Re Morris, a testatrix read a codicil to her will "in the sense of casting her eye over it" before executing it.[28] Clauses 3 and 7(iv) of the will had provided a legacy to an employee and the testatrix instructed her solicitor to prepare a codicil changing those clauses. The solicitor revoked the totality of those clauses in error and substituted other gifts in their place. The error was not discovered until after the testatrix died. The court held that the deletion of clause 7 in its entirety was an inadvertent mistake made by the solicitor which neither the solicitor, nor the testatrix were aware of. Therefore, the court could not impute to the testatrix knowledge and approval of the solicitor which the solicitor himself did not possess. The court stated that it could rectify the will by deleting the numeral "7", not by adding the numeral "iv" after the numeral "7", in order to effect the testatrix's dispositive intentions.

The court in Re Morris traced the evolution of the law related to rectification from Guardhouse v. Blackburn to the present. The court began its analysis by stating that even

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[27] Ibid., 198.

in the absence of knowledge and approval, a court did not have the power to rectify by adding words to a will. The court noted that there were two rules which had to be considered in any application to rectify a will. First, there was a rule of evidence which provided that, where a competent testatrix had read, or had read over to her, the will she has executed, she was deemed to know its meaning in the absence of fraud. Second, there was a rule of law that where a testatrix had requested that her solicitor draw the will for her, and the testatrix executed a document drawn by the solicitor, the testatrix was bound by any error the solicitor made. The court reviewed Guardhouse v. Blackburn and two other cases decided in the nineteenth century and concluded that the nineteenth century cases represent the "high water mark" of the rule of evidence.[29] The court stated:

> Presumably there were good reasons in the interests of justice nearly 100 years ago which impelled the court to fetter its own power to get at the true facts. But has not the more modern trend in many fields been to strike such fetters off, so that the court can make the best use of all materials available to ascertain the truth? At any rate, in this field there has been, in my opinion, a progressive erosion of the rigidity of the rule.[30]

The court thought that the current law is correctly stated by Sachs, J. in an unreported 1956 case, Crerar v. Crerar:

> The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive nor do they raise any presumption of law.[31]

The court found that an effective reading, or reading over of the will, constituted more than a mere physical act of reading. The testatrix must conciously understand the contents of the will. The court found that although the testatrix duly executed the will,

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[28] Re Morris, [1970] 1 All England Reports 1057 at 1061 (Chancery Division).
[29] Ibid., 1063.
[30] Ibid., 1063.
[31] Ibid., 1065.

she did not know and approve its contents. The court then turned to the question of whether the testatrix could be bound by the solicitor's error of which she was not aware.

Counsel for the plaintiff bank put forward an attractive argument that if a drafter inserts words in a will which are outside the testator's instructions, he is acting outside the scope of his authority and a testator should not be bound by the error unless it is brought to his attention and he adopts it.[32] The court cited Mortimer on Law and Practice Relating to Probate, and stated that it did not need to decide between the plaintiff's argument and the position expressed in Mortimer because the error had occurred by inadvertence. The court concluded that if a drafter inserts words intentionally because he misunderstands a testator's instructions, and a testator executes the will, the testator is bound by the error unless there is fraud. However, if a drafter inserts words by inadvertence, and a testator without notice of the error executes the will, the testator is not bound by the words introduced by inadvertent error.[33]

The court stated that, although a testatrix could not delegate to another her decision of how she wished to dispose of her property after death, she could arrange for a drafter to draw a will designed to carry out her intentions. The drafter of a will was nothing more than an agent of the testatrix, and if something was inadvertently inserted or left out of a will contrary to the testatrix's intentions, then the drafter has acted outside of the scope of his authority. In such case, the testatrix should not be bound by the error, unless she was made aware of it or expressly adopted it.

The court concluded its analysis by stating:

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[32] Ibid., 1066.

> In my judgment, wherever the line is drawn, this case on its facts falls into the category where the court has the power to do what it can by omission. The introduction of the words 'clause 7' instead of clause 7(iv) was per incuriam. The solicitor's mind was never applied to it, and never adverted to the significance and effect. It was a mere clerical error on his part, a slip. He knew what the testatrix's instructions and intentions were, and what he did was outside the scope of his authority. And he did it, of course, without knowing and approving what he himself was doing. How can one impute to the principal the agent's knowledge and approval which the agent has not got? Accordingly, I hold that the testatrix was not bound by the mistake of the draftsman which was never brought to her notice. The discrepancy between her instructions and what was in the codicil was to all intents and purposes total and was never within her cognisance.[34]

In Re Reynette- James a testatrix attended at a solicitor's office to have her will prepared, and the solicitor's secretary by inadvertence omitted thirty three words from the main dispositive clause.[35] The omitted words contained a gift of capital to the testatrix's son in the event that he survived her sister and a friend. The will as executed provided that upon the death of the testatrix's sister and friend, the capital was to devolve upon her son's wife and children. The testatrix had in fact intended that the capital devolve upon her son first, with remainder over to his wife and children in the event of his demise. The court found that the testatrix never intended the wife and children of the testatrix's son to take, on the death of her sister and friend, if her son was still alive. The words were inserted without the knowledge and approval of the testatrix and the relevant portion of the gift was deleted. As a result, the capital was disposed of as if on an intestacy, and the son took a share of the capital on the basis of a partial intestacy.

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[33] Ibid., 1067. See also Clifford Mortimer and Hamish H.H.Coates, The Law and Practice of the Probate Division of the High Court of Justice, 2nd ed. (London: Sweet & Maxwell Ltd.; Stevens & Sons, Ltd., 1927), pp. 91-92.

[34] Ibid., 1067.

[35] Re Reynette-James, [1976] 1 Weekly Law Reports 161 (Chancery Division).

The decisions in Re Morris and Re Reynette – James arose as a result of drafting errors. In both cases the court was prepared to delete words but refused to add words to the body of a will. In Re Thorleifson is a Manitoba decision which reflects a more liberalised attitude in the context of the execution of the wrong document.[36] There the testator and his spouse attended upon their solicitor to have mutual wills prepared, and by mistake signed each other's will. The testator died. His wife applied to the court of probate to determine whether the will, as executed by the deceased, could be admitted to probate and construed. The court granted the testator's wife the relief she was seeking and rectified the will by deleting words contained within the body of the document, and by reading and construing the will as if new words were inserted in its place, as opposed to adding new words to the will. The decision in In Re Thorleifson followed the earlier British Columbia decision in Re Brander, where a court, in confronting mutual wills signed in error, rectified the will by both deleting and substituting words in the will sought to be admitted to probate.[37] Although at a superficial glance these cases represent a radical departure from the approaches set out in Re Morris and Re Reynette James, all the courts did was to provide a correction to the name of the testator and principal beneficiary. They did not create, add to, or cut down any gift contained in the will, or add to or change any designated beneficiary.

D. Recent Canadian Judicial Experience

The decisions in Re Brander and In Re Thorleifson were limited by their facts to

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[36] In Re Thorleifson Estate (1954), 13 Western Weekly Reports (New Series) 515 (Manitoba Surrogate Court).

[37] Re Brander, [1952] 6 Western Weekly Reports (New Series) 702 (British Columbia Supreme Court).

the execution of wrong documents in the context of mutual wills, and as a result the problem of wills rectification at probate still has not been substantially resolved in Canada. Re Morris stands for the proposition that, despite lack of knowledge and approval, and despite inadvertent error, the courts will not exercise their discretion to add language to the body of a will in order to effect a testator's intention. In addition, although Re Morris provides that a court should correct inadvertent errors by deletion, it is difficult to predict when a court will exercise that discretion to rectify a will by deleting words inserted in error. This presents three problems for an ordinary client. First, if a testator executes a will containing inadvertent errors, and a court refuses to grant rectification at probate by adding words into a will, the intentions of the testator may be defeated and the gift in favour of the beneficiary may fail. Secondly, if a court of probate refuses to rectify a will, and a testator's intention is defeated, the only recourse available to a disinherited beneficiary may be an action in negligence against the solicitor who drafted the will or, if possible, an application under The Dependants Relief Act. These are usually costly and lengthy proceedings, with uncertain outcomes. Thirdly, if a beneficiary or an executor consults a solicitor respecting a will which does contain an error, it may be difficult for the solicitor to predict with any degree of confidence the outcome of an application to rectify the will. The scope of these problems are exemplified by several recently decided cases.

In Re Rapp Estate, a 1991 decision of the British Columbia Supreme Court rendered before probate, the executor sought to rectify a will which contained two errors.[38] First, the shares of the residue were made contingent on the sister of the testatrix

[38] Re Rapp Estate (1991), 42 Estates and Trusts Reports 222 (British Columbia Supreme Court).

predeceasing her. Secondly, the will referred to the number "18" to describe the shares of the residue, when in fact there were only sixteen. The court allowed extrinsic evidence to be admitted to prove the nature of the mistake and, relying on Re Morris, indicated that the court could delete words inserted in a will in error. The court did not follow the decision in Re Morris, however, in relation to the substitution of words in the will. Donald, J. stated:

> Where I depart from the view expressed by Latey J. in Re Morris is in the ability of the court to fill the void left by the deletion of words included by mistake. I am unable to see any reason in principle why words cannot be inserted in each of the cases where the words are simply left out by the draftsman and where words are taken out by the court to correct a mistake, if in each case the surrounding language of the will necessarily implies the additional words....
>
> I am concious of the fundamental principle that the court should not remake the will or write a new one for the testatrix; however, the circumstances and the text of the instrument plainly show that she did not want an intestacy for the residue if her sister survived her, nor did she desire the same result for two of the shares distributed by para. 4, which would occur if the number 18 remained in the clause.[39]

The court deleted reference to the residuary bequest depending on the sister predeceasing the testatrix, and substituted the number "16" for "18" as the number of residual beneficiaries.

Re Rapp Estate is important because it demonstrated the willingness of the court to deviate from the strict approach of nineteenth century English courts, by adding words to a properly executed will where the content of the missing words was clear from its surrounding language. The difficulty, however, is that the liberal approach adopted by Donald, J. in Re Rapp has not been consistently followed in subsequent Canadian judicial decisions.

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[39] Ibid., 227.

In Wagg v. Bradley (1996), presumably a construction decision, the same court considered the principles of law related to rectification enunciated in Re Rapp Estate in the course of construing a will for which letters of administration with will annexed were issued. This demonstrates the confusion in the jurisprudence between approaches taken at probate and in construction because there are different operative principles in probate as opposed to construction matters. Here a testatrix used a printed will form and filled in the name of a beneficiary after the words "I give, devise and bequeath unto" and crossed out the rest of the printed lines contained in the text.[40] The court held that, with the aid of the printed will form's instruction sheet, the inference was overwhelming that the testatrix clearly meant that the beneficiary was to take the whole of the estate. The court exercised its discretion and added the words "all my estate" to the will after the name of the beneficiary in the course of construing the document. Although on the face of the decision the insertion of language in Wagg v. Bradley is similar to that in Re Rapp Estate the decision in Wagg v. Bradley is problematic because the court failed to distinguish between approaches at probate and in construction.

In Owen v. Owen, another 1996 probate decision of the same court, a will created a life interest for a widow without providing for a disposition of the capital upon the widow's death.[41] The court reviewed the will and stated that the testator:

> executed a stationers form of Last Will and Testament and inserted after the printed words, 'I give, devise and bequeath unto' the following:... my wife, Edith, all my property, both real and personal, for her use and benefit during her lifetime.[42]

The testator also provided that in the event his wife predeceased him that:

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[40] Wagg v. Bradley (1996), 11 Estates and Trusts Reports (2d) 313 (British Columbia Supreme Court).
[41] Owen v. Owen (1996), 14 Estates and Trusts Reports (2d) 108 (British Columbia Supreme Court).
[42] Ibid., 109.

> "all my property, both real and personal, shall be divided equally between my children...."[43]

The testator and his widow had no children of their marriage, and she made application for rectification of the will by deletion of the words "during her lifetime" from her gift. The court stated that, in order to arrive at the conclusion that the testator wished to provide for the widow only, and that only in the event that the widow predeceased him should any children take under the will, the court would have to be satisfied that the words "during her lifetime" were inserted by the testator in error. The court reviewed the will and stated that the gift to the widow "for her use and benefit during her lifetime" was clear and unequivocal language.[44] There was no extrinsic evidence introduced which demonstrated error on the part of the testator. Therefore, the application to rectify was dismissed.

The decision in Owen v. Owen is not surprising because deleting the words "during her lifetime" would give the widow a complete interest as opposed to a life interest. Owen v. Owen is problematic, however, in that the court did not clarify the principles of rectification applicable in such cases. For example, the court did not indicate what kind of evidence could have been introduced at the hearing to raise the presumption of error, or how the court arrived at the conclusion that the language of the will was clear and unequivocal on its face. The reader is left to wonder whether the threshold question in an application to rectify a will is the construction of the will itself, based on the contents of the four corners of the document. This issue is compounded by the statement of Melvin, J. who stated that:

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[43] Ibid., 109.

> the jurisdiction of this court sitting in probate at this stage to rectify the wording of a will in accord with what the court determines to have been in fact the testator's will is limited to deleting words contained in the Last Will and Testament. In this sense, the court is not construing the will.[45]

Melvin, J.'s approach appears to be at variance with the earlier decision in Re Rapp Estate regarding the jurisdiction of the court to insert language into a will at probate; and he did construe the will at probate, despite his expressed statement to the contrary that a court does not construe a will at probate.

In the 1998 decision of Alexander Estate v. Adams, the British Columbia Supreme Court had the opportunity to revisit the issue of rectification of wills at probate.[46] There the executrix of a will applied for a court order to rectify the will by deleting a phrase and adding words to it. Burnyeat, J. considered the decision of Donald, J. in Re Rapp Estate and noted that Latey J.'s decision in Re Morris was correct, insofar as it provided that a court of probate was unable to rectify a will by adding words in the absence of legislation or a decision of a higher court. Burnyeat, J. noted that, following the Nineteenth Report of the Law Reform Committee on Interpretation of Wills, 1973, Section 20(1) of the English Administration of Justice Act (1982) was enacted which, effective 1 January 1983, provided the court with jurisdiction to rectify a will which fails to carry out a testator's intention, due to a clerical error or a failure to understand instructions. Because the British Columbia legislature had not followed England in adopting similar legislation, Burnyeat, J. concluded that English judicial precedents pre-dating 1983, and Canadian judicial decisions, continued to apply. The court held that the

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[44] Ibid., 109.
[45] Ibid., 109.
[46] Alexander Estate v. Adams (1998), 20 Estates and Trusts Reports (2d) 294 (British Columbia Supreme Court).

offending words could be deleted from the will, but that the words requested as part of the rectification process could not be added.

The decision in Alexander Estate v. Adams highlights the confusion inherent in the law of wills rectification in Canada at present. Burnyeat, J.'s decision completely contradicted Re Rapp Estate. The decision in Alexander Estate v. Adams is closest to the law in Manitoba at the present time. Like British Columbia, Manitoba has not enacted any legislation similar to that in England which expressly confers on the court the power to rectify a will. In the absence of remedial legislation of that nature, the statutory requirements contained in The Wills Act as interpreted by Re Morris will likely govern. This would mean however that, if Re Rapp Estate was decided in Manitoba, the interests of the beneficiaries who sought relief would be defeated. In Re Rapp Estate, a notary, not a solicitor, drew the will and the beneficiary might have had an action in negligence against the notary; but because the will in Wagg v. Bradley was home-drawn, the beneficiary might well have been without recourse.[47] Therefore, the law regarding wills rectification at probate should be clarified to distinguish it from construction and to provide consistent and coherent rules which enable a court, on application, to rectify wills, if a court is satisfied that its jurisdiction to do so should be invoked.

E. Rectification of Wills within the Broader Context of the Legal System

The Wills Act provides a mechanism for testators to dictate how their property will be used and enjoyed after death; and a primary objective of the legislation and the courts in both probate and construction is to give effect to the intentions of a testator. The

[47] In Manitoba, a Notary Public is authorised to draw a will only if they are a Barrister, Solicitor or Attorney at Law; Manitoba Evidence Act, Revised Statutes of Manitoba 1987, Chapter E150, Sections 80-81; The Law Society Act, Revised Statutes of Manitoba 1987, Chapter c.L100, Section 56(2)(a)(iv).

statutory requirements governing the execution of wills contained in The Wills Act have historically been unforgiving and harsh. Many cases demonstrate the serious consequences which have occurred in the absence of judicial dispensation legislation if the strict requirements of The Wills Act were not fulfilled. Before passage of such legislation in Manitoba, if a testator did not make or acknowledge his signature in the presence of both witnesses[48], or forgot to sign a will[49], the will would be declared void. If only one witness to a will signed the will,[50] or if the deceased was too sick to watch the witnesses sign,[51] or was not able to sign,[52] the will would also be rendered void. A will had to be signed at its end;[53] and a holograph will, partly in the handwriting of the testator, and partly in printed form would only be valid to the extent that the printed form was used by the testator as a guide.[54] If a will was executed and subsequently altered, the alterations had to be signed by the testator and witnessed by both witnesses.[55] Concerning the selection of witnesses, a gift to a beneficiary or the spouse of a beneficiary who also witnessed that will would be void.[56]

The statutory requirements related to formal execution of wills developed to enable courts to determine whether the testator intended to make a will and, if so, on what terms. These statutory requirements eventually evolved into a rigid set of rules and by the twentieth century the relentless formalism of the law of wills led to results which

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[48] Re Brown, [1954] Ontario Weekly Notes 301 (Surrogate Court).
[49] Re Bean, [1944] 2 All England Reports 348 (Probate Division).
[50] Re Solicitor, Ex Parte Fitzpatrick, [1924] 1 Dominion Law Reports 981 (Ontario Supreme Court, Appellate Division).
[51] Re Wozciechowicz, [1931] 3 Western Weekly Reports 283 (Alberta Supreme Court, Appellate Division).
[52] Peden v. Abraham, [1912] 3 Western Weekly Reports 265 (British Columbia Supreme Court).
[53] Re Beadle, [1974] 1 All England Reports 493 (Chancery Division).
[54] Re Phillip, [1979] 3 Western Weekly Reports 555 (Manitoba Court of Appeal).
[55] Re McVay Estate, [1955] 16 Western Weekly Reports 200 (Alberta Supreme Court).

could defeat testamentary intention and restrict the freedom that the statutory requirements were initially designed to protect.

In the face of this anomalous situation, in 1983 the Manitoba legislature enacted judicial dispensation legislation. This conferred jurisdiction on the court to admit to probate documents which do not meet the strict requirements for execution provided by The Wills Act. The legislation initially required some minimal compliance with the statutory requirements; but as a result of an amendment to the enactment in 1995, the court now possesses a broad discretion to admit any document to probate, provided the document evinces a fixed and final expression of intention by the testator to dispose of property after death and complies with all other requirements of a valid will.[57] Since 1983, the courts have accorded Section 23 of The Wills Act a broad and liberal interpretation. Wills that have been altered without compliance with the formal statutory requirements have been admitted to probate.[58] Wills signed at the beginning, and not the end, have been admitted to probate,[59] as have holograph wills which have not been signed at all.[60] A will containing only one witness has been admitted to probate,[61] but the witnesses must attest that they witnessed the testator sign the document, rather than simply subscribe their signature to the foot of the will.[62] There must be some

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[56] Whittingham v. Crease & Company, [1978] 5 Western Weekly Reports 45 (British Columbia Supreme Court).
[57] George v. Daily (1997), 115 Manitoba Reports (2d) 27 (Manitoba Court of Appeal).
[58] Re Pouliott; National Trust Company Limited v. Sutton, [1984] 5 Western Weekly Reports 765 (Manitoba Court of Queen's Bench).
[59] Re Briggs Estate (1985), 37 Manitoba Reports (2d) 172 (Manitoba Court of Queen's Bench).
[60] Re Myers Estate (1993), 87 Manitoba Reports (2d) 200 (Manitoba Court of Queen's Bench).
[61] Re Shorrock Estate (1996), 109 Manitoba Reports (2d) 104 (Manitoba Court of Queen's Bench).
[62] Re Chersak Estate (1995), 99 Manitoba Reports (2d) 169 (Manitoba Court of Queen's Bench). In the subsequent decision of George v. Daily, supra, the Manitoba Court of Appeal concluded that Re Chersack Estate was wrongly decided.

compliance, however, so an unsigned, undated memorandum clipped to a printed will form would not be admitted to probate.[63]

Enactment of Section 23 of The Wills Act and the case law which surrounds it indicates that the trend in Manitoba at the end of the twentieth century is to retreat from rigid formalism and focus instead on the substance of what the testator intended, in order to give effect to and not defeat the testamentary intention.[64] Apart from these developments within the law of wills, the legal framework related to rectification exists outside of the law of wills.

Rectification remains a discretionary equitable remedy which is only sparingly invoked by the courts, to ascertain the true intention and agreement of the surviving parties. If they have reached agreement, and in the course of reducing their agreement to writing have prepared a document in error which does not accord with their true understanding, then a court may invoke its equitable jurisdiction so that the document will reflect the true agreement of the parties. Rectification will not be granted if there are other remedies available, or if the problem may be cured simply by construing the document.

The courts are extremely cautious in exercising their jurisdiction to rectify an agreement. As Professor Fridman has argued, an applicant seeking to rectify a contract

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[63] Montreal Trust Co. of Canada v. Andrejewski Estate (1994), 98 Manitoba Reports (2d) 218 (Manitoba Court of Queen's Bench).

[64] There are similar legislative enactments contained in the Civil Code of Quebec. Articles 712 through 714 provide that "the only forms of will which may be made are the notarial will, the holograph will and the will made in the presence of witnesses. The formalities governing the various kinds of will 'shall be observed on pain of nullity'. However, if a will made in one form does not meet the requirements of that form of will, it is valid as a will made in another form if it meets the requirements for validity of that form. A holograph will or a will made in the presence of witnesses that does not meet all the requirements of that form is valid nevertheless if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased"; Article 712-714, Code Civil Quebec.

must discharge a heavy onus of proof in order to persuade a court to exercise its discretion.[65] In Hart v. Boutilier, the court held that it must have no "fair and reasonable doubt" that the document placed before it on an application for rectification does not represent the agreement reached by the parties.[66] However, the courts have recently indicated that the standard of proof beyond a reasonable doubt would not be appropriate in rectification cases.[67] Rectification is not a remedy to be invoked for breach of contract; rather, it is designed to assist a court to determine the content of the contract allegedly made and it requires that parole evidence be admissible to explain the agreement.

Strong parallels may be drawn between the problems confronted by a court on an application to rectify a contract and an application to rectify a will. The law of contract and the law of wills facilitate the acquisition and disposition of property during life and after death, respectively. In both contracts and wills, rectification is an equitable remedy designed to correct a mistake contained in a document which does not reflect the true intention of its maker(s). Rectification does not enable the courts to vary the intention of either a contracting party or a testator, and will no more allow a contracting party out of a bad bargain than it will remake a will simply because a beneficiary is displeased with his entitlement. In both the law of contract and the law of wills, extrinsic evidence is admissible in order to explain the agreement or intentions of the testator. In the law of contract, the evidence consists of parole evidence surrounding the making of the contract,

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[65] G.H.L. Fridman, The Law of Contract in Canada, 3rd ed. (Scarborough: Carswell, 1994), pp. 822-823.
[66] Hart v. Boutilier (1916), 56 Dominion Law Reports 620 at 630 (Supreme Court of Canada).
[67] Peter Pan Drive-In Ltd. v. Flambro Realty Ltd. (1978), 93 Dominion Law Reports (3d) 221 (Ontario High Court of Justice), affirmed 106 Dominion Law Reports (3d) 576 (Ontario Court of Appeal), leave to appeal refused [1980] 1 Supreme Court Reports xi (Supreme Court of Canada). See also S.M. Waddams, The Law of Contracts, 4th ed. (Toronto: Canada Law Book Inc., 1999), at p. 238, where Professor Waddams stated that "the need for a special onus of proof seems doubtful."

whereas in the law of wills, the evidence includes both direct evidence of the testator as well as evidence of surrounding circumstances.

The law of wills rectification should be brought into harmony with judicial dispensation legislation. At the close of the twentieth century, it is anomalous for the law of wills to permit the judicial dispensation of statutory requirements at probate in relation to wills execution, while maintaining strict statutory requirements in the context of wills rectification. The law of wills should be prepared for the twenty-first century by recognising the trend in the law towards relaxation of statutory requirements and by bringing the law of rectification of wills at probate into harmony with the legislative scheme related to judicial dispensation. In judicial dispensation cases, it is usually clear what the substance of a testator's will is, and it is only the form of will which contains a defect. In rectification cases, by contrast, the substance of a will is placed into issue, while the will itself has usually been executed in compliance with strict statutory requirements. The channelling, cautionary, and protective functions have usually been served in the rectification cases, but the evidentiary function may be placed into jeopardy. An applicant who seeks rectification is applying to have certain words added or deleted from a properly executed will. If a court grants the application, it will either delete words or add language which has not been written, attested and signed by the testator and the witnesses. In order to ensure that the authentication function is fulfilled and the truth related to a testator's intentions is arrived at, direct extrinsic evidence of testamentary intention, as well as evidence of surrounding circumstances, must be admissible. Without it, the mistake alleged cannot be proved. The courts must have the jurisdiction to admit

all relevant extrinsic evidence related to a testator's intention, and then to weigh the evidence in an appropriate manner, so that proper findings of fact are made.

It is important to distinguish between weighing extrinsic evidence of intention, and the standard of proof which must be met in the course of a proceeding. Professors Langbein and Waggoner have argued in favour of the admissibility of extrinsic evidence despite statutory requirements of writing, signature and attestation. They have recommended implementation of a higher standard of proof than on a balance of probabilities.[68] This would result, however, in a higher standard of proof being applied in wills rectification than in other areas of the law of wills. Consistency in the law, however, supports the position that it would not be appropriate to test the extrinsic evidence of intention, or of surrounding circumstances, against a higher standard of proof in wills rectification cases than in other areas of the law of wills, such as judicial dispensation regarding strict compliance with due execution, when the doctrine of suspicion is applicable,[69] or to prove the contents of a lost will.[70] Establishment of a different standard of proof in rectification cases would increase complexity in the law of evidence related to wills and make it difficult for an ordinary client to predict the outcome of a rectification proceeding. The standard of proof used in relation to an application under Section 23 of The Wills Act is the ordinary standard applicable in civil

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[68] J. Langbein and L. Waggoner, "Reformation of Wills on the Ground of Mistake: Changing Direction in American Law" (1982) 130 University of Pennsylvania Law Review 521, at 528, 578-579.
[69] Vout v. Hay, [1995] 2 Supreme Court Reports 876 (Supreme Court of Canada).
[70] Albert H. Oosterhoff, Oosterhoff on Wills and Succession, Text, Commentary and Cases, 4th ed. (Scarborough: Carswell, 1995), at p. 316.

proceedings, namely, on a balance of probabilities.[71] The courts are just as capable of admitting and weighing evidence in wills rectification cases as in any other area of the law of wills. The focus of law reform should be upon the admissibility and weighing of extrinsic evidence, not on increasing the standard of proof in the course of a proceeding.

F. Alternative Approaches to Reform

I. The English Law Reform Committee, Nineteenth Report

In 1973 the Committee released its report on the Interpretation of Wills,[72] identifying five different situations which might give rise to rectification. These included: "clerical error", "misunderstanding of the testator's instructions", "failure of the testator to appreciate the effect of words used", "uncertainty" and a "lacuna".[73] The Committee found that, where there was a clerical error and where the will failed to fulfill the testator's instructions and it was clear what those instructions were, the court should have jurisdiction to rectify that will. Concerning the remaining cases, the Committee concluded that a failure to appreciate the effect of words used would raise a construction issue more than a rectification issue, and that uncertainty and lack of intention should be excluded, because in those cases rectification would constitute making a new will for the testator. The Committee recommended "convincing proof" as a standard of proof and did not impose any restriction on the scope of admissible evidence.[74] The Committee did not offer any draft legislation in its report.

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[71] Re Langseth Estate (1990), 68 Manitoba Reports (2d) 289 (Manitoba Court of Appeal).
[72] England, Nineteenth Report of the English Law Reform Committee on the Interpretation of Wills (London: Her Majesty's Statior ary Office, 1973)(The Right Honourable Lord Pearson, C.B.E.).
[73] Ibid., 8-9.
[74] Ibid., 9-12.

II. Section 20 of the U.K. Administration of Justice Act, 1982

This came into force on 1 January 1983,[75] and provides that:

> 20(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence
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> (a) of a clerical error; or
> (b) of a failure to understand his instructions,
>
> it may order that the will shall be rectified so as to carry out his intentions.

Section 20(1)(a) has recently been considered in two cases. In Wordingham v. Royal Exchange Trust Co. Ltd. a solicitor failed to include in a new will a clause exercising a testamentary power of appointment in favour of the testatrix's husband, which had been conferred on her by her father.[76] The relevant clause had been included in two previous wills. The court found that the failure to include the clause in the new will constituted an error in recording the intended words of the testatrix and fell within the ambit of a clerical error, as referred to in section 20(1)(a) of the Act. The court rectified the will by inserting a clause providing for a power of appointment.

In Re Segelman (deceased), the English Court of Chancery again considered an application to rectify a will which contained a clerical error.[77] There the testator provided a schedule to his solicitor in which he had intended that all persons named in the schedule, along with their issue, be eligible to benefit under the terms of a trust throughout a twenty-one year period. The solicitor, in direct contravention of the testator's instructions, erroneously inserted a provision in the will which did not give

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[75] Administration of Justice Act, 1982, Chapter 53, Section 20 (United Kingdom).
[76] Wordingham v. Royal Exchange Trust Co. Ltd., [1992] 3 All England Reports 204 (Chancery Division).

effect to the testator's intention because it restricted the class of persons eligible to benefit during the twenty-one year period to the named individuals and excluded their issue. The solicitor failed to delete the provision: and beneficiaries under the will applied to the court, seeking rectification of the will by deletion of the provision. The court stated that the jurisdiction of Section 20(1)(a) should not be limited to cases "in which the intended words of the testator can be identified with precision".[78] The court held that the statute might be extended to cases where the draftsman had not applied his mind to the significance of the effect of the words inserted or deleted from a will. The court regarded the failure to delete the provision as a clerical error for purposes of the enactment, and thus allowed the claim for rectification to succeed.

Section 20(1)(a) of the Administration of Justice Act provides only a partial response to the problem of will rectification at probate. The enactment reflects the Report of the English Law Reform Committee, in that it permits rectification of wills in the event of clerical errors or in the event that the testator's instructions have been misunderstood. It is limited in that it does not extend rectification to the failure of a testatrix to understand the meaning of words used in a will. This is problematic, for a testatrix may instruct her solicitor to give certain property to specified beneficiaries and fail to recognize an error in the body of the will in relation to the dispositive language used. The legislation should be sufficiently broad so as to encompass all mistakes related to the intention of a testatrix, including errors of the solicitor as well as misapprehensions of the testatrix, failing which the intentions of a testatrix may be defeated.

Despite the recommendations contained in the English Law Reform

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[77] Re Segelman, [1995] 3 All England Reports 676 (Chancery Division).

Committee Report, section 20(1)(a) did not implement "convincing proof" as a standard of proof and in neither case was a standard of proof higher than the civil standard used. This supports the proposition that in proposing law reform in the context of wills rectification, the real issues centre on admissibility and weighing of extrinsic evidence according to the ordinary civil standard, as opposed to implementing legislation which raises the standard of proof to be employed.

III. Section 12A of the Australian Capital Territory Wills Act 1968

This provides in part that:

(1) If the court is satisfied that the probate copy of the will of a testator is so expressed that it fails to carry out his or her intentions, it may order that will be rectified so as to carry out the testator's intentions.

(2) If the court is satisfied that circumstances or events existed or occurred before, at or after the execution by a testator of his or her last will, being circumstances or events

(a) that were not known to, or anticipated by, the testator;
(b) the effects of which were not fully appreciated by the testator; or
(c) that occurred at or after the death of the testator; in consequence of which the provisions of the will applied according to their tenor would fail to accord with the probable intention of the testator had he or she known of, anticipated or fully appreciated the effects of those circumstances or events, the court may, if it is satisfied that it is desirable in all the circumstances to do so, order that the probate copy of the will be rectified so as to give effect to that probate intention.[79]

Section 12A of the Australian Capital Territory Wills Act contains provisions which encompass not only direct evidence of testamentary intention and circumstances surrounding the making of the will, but also evidence of circumstances that occur at or

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[78] Ibid., 686.
[79] Wills Act 1968, Australian Capital Territory, Sections 12A(1), (2).

after the death of the testator. This provision is logically inconsistent with the policy thrust of its own Wills Act in that the latter is designed to effect the intentions of the testator, and section 12A admits evidence going beyond his intentions. This enactment introduces more uncertainty than it alleviates, for the probable intention of a testator contemplated by the enactment would be a matter of pure conjecture. Neither a beneficiary, his solicitor nor the testator himself, if he were alive, would be able to predict with any degree of confidence what a court would conclude the "probable intention" of a testator was, because the finding of probable intention may be based, at least in part, on evidence of circumstances arising after the testator's death. A more conservative approach to legislative reform is therefore warranted.

IV. The New South Wales Law Reform Commission, Report 85

This proposal for law reform provides that:

> (1) The court may make an order to rectify a will to carry out the intentions of the testator if the Court is satisfied that the will does not carry out the testator's intentions because:
>
> (a) a clerical error was made, or
>
> (b) the will does not give effect to the testator's instructions.[80]

The New South Wales approach enables the court to effect the intentions of a testator, in a cost effective manner while ensuring that ordinary clients and their solicitors are able to predict the outcome of an application to court. In contrast to the uncertainty inherent in Section 12A of the Australian Capital Territory Wills Act, and the limited scope of the English Law Reform Commission in restricting rectification to clerical errors

or failure to understand instructions, the New South Wales proposal contemplates circumstances where the will contains an error caused by other than clerical errors or misunderstood instructions. The New South Wales proposal is deficient, however, in that it does not permit rectification where the cause of the error stems from a source other than a testator's instructions or a clerical error.

G. Recommendations for Reform

The Manitoba legislature should enact an amendment to its Wills Act which will provide that a court may rectify a will if it is satisfied that there has been a clerical error, or that the will does not give effect to a testator's intentions. None of the Commonwealth jurisdictions which have implemented such rectification legislation have adopted a standard of proof which is higher than the ordinary balance of probabilities, and consistency mandates that the ordinary standard of proof in civil proceedings should apply in rectification proceedings as well.

Rectification of a will at probate is required when a testator, or his solicitor, does not accurately reduce into writing the intentions of a deceased, and the will either contains words which were inserted in error, or omits words left out by inadvertence. This problem may arise even where a testator reads over and ostensibly approves of the contents of a will, because in practical terms, many ordinary clients may not understand the language contained in a will and may carelessly read in what they think should be there. The parties potentially affected by this problem include the testator, his spouse, his children, his collateral relatives and any beneficiary who is not a family member. The

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[10] New South Wales, Report of the Law Reform Commission on Uniform Succession Laws (Sydney, New South Wales Law Reform Commission, 1998)(The Honourable Justice David Hodgson, Commissioner-in-Charge), at 104-108.

rectification of a will, when viewed from the context of the broader reaches of the law, addresses the simple problem of whether legislation should enable a court to correct a mistake in a document, where a word was inserted or left out in error in order to effect the intention of the document's maker. On a superficial level, the statutory requirements of writing, signature and attestation constitute the greatest obstacle to reform. However, the real issue is not strict compliance with these statutory provisions, but rather with developing a predictable mechanism which will enable a court to add and delete words from a will in order to arrive at the truth of what a testator intended, to safeguard the evidentiary function which the requirements of writing, signature and attestation were initially designed to preserve.

Rectification permits a court to alter the language contained within a will and to redistribute property from one beneficiary to another, or from a beneficiary who would take on an intestacy to one designated by will. Any rules which give a court the power to rectify wills must reflect the impact that those rules will have on the scope of proprietary rights in realty and personalty. The existence of a prospective beneficiary's proprietary rights under a will or an intestacy may hinge directly on the scope of the jurisdiction vested in a court to rectify a will. The solution to the problem is to statutorily delegate increased discretionary power to a court; but legal certainty requires that the rules circumscribing the exercise of discretion be clear, coherent and predictable. Legislation should be drafted in Manitoba which enables a court to add and delete words to a will on the basis of weight accorded to admissible extrinsic evidence, so that a court may effect the intentions of a testator and permit an ordinary client and his solicitor to reasonably predict with confidence the outcome of a rectification proceeding.

The proposed legislative reform might be drafted as follows:

The court may order rectification by adding to, varying or deleting the words contained in a will in order to give effect to the intentions of a testator, provided the court is satisfied on a balance of probabilities that the will does not give effect to the intentions of the testator because:

(a) a clerical error was made, or

(b) the will does not reflect the testator's intentions at the time the will was made.

For the purposes of determining the testator's intentions at the time the will was made,the court shall consider both direct and indirect evidence of the testator's intentions.

CHAPTER TWO: THE RE-MAKING OF A WILL BY A COURT IN THE COURSE OF WILLS CONSTRUCTION

A. Introduction

When the wording of a will is not clear, as a matter of construction, there is a multitude of rules and presumptions available to assist a court in determining the intention of a testator. Courts are inclined to determine the intention from within the four corners of the document, because looking outside the will undermines the statutory requirements that a will must be in writing, signed and attested. However, there are rules and presumptions of construction which enable courts to look to surrounding circumstances, including the direct evidence of a testator, in the course of construing a will. When the courts apply these rules and presumptions, they are not formally rectifying a will, but only reading the will as if words have been added or deleted. In essence, the courts are creating a fiction and reading the probated will as if it contained different language than it contained after probate. This process, which is similar to rectification at probate, constitutes re-making a will through the exercise of judicial discretion. The problem, however, is that the exercise of judicial discretion in wills construction has neither been consistent, nor clear, nor principled; and it is difficult for an ordinary client or her solicitor to predict the outcome of an application in a particular case.

There is a close relationship between the process of rectification at probate and the subsequent construction of a probated will. If the Manitoba Court of Queen's Bench at probate court deletes words from a will and an ambiguity results, the Court of Queen's Bench sitting as a court of construction may only admit direct evidence of testamentary

intention to resolve a latent ambiguity, that is, an equivocation.[81] If the ambiguity is patent, however, only indirect evidence of surrounding circumstances is admissible to assist the Court of Queen's Bench in construing testamentary intention.[82] This may result in an anomalous situation, because a provision contained in a will may be declared void for uncertainty in construction, even though evidence has been presented to the court of probate of the testator's intentions. In Manitoba, the Court of Queen's Bench has jurisdiction in both probate and construction matters, and a court of construction will sit in the "testatrix's armchair to understand her reasons for making certain dispositions" and construe "the words used to express her intention".[83]

Consider the case of a testator who leaves the residue of his estate "to my children of my first marriage". At probate, direct evidence of testamentary intention may be adduced to show that the testator had been married a second time, had other children both born in and outside of wedlock, and had intended to benefit the children of his second marriage only. A probate court may be persuaded to admit the direct evidence of testamentary intention, and rectify the mistake contained in the will by deleting the words "of my first marriage". It is then left to a court of construction to construe the words "to my children" as meaning the children of the second marriage only. A court of construction, however, may not be entitled to consider direct evidence of testamentary intention in the course of construing the will, because the remaining words contained in the impugned provision, namely, " to my children" may be construed as neither patently

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[81] Sparks Estate v. Wenham (1993), 1 Estates and Trusts Reports (2d) 212 (Manitoba Court of Queen's Bench).
[82] Bergey v. Cassel (1995), 8 Estates and Trusts Reports (2d) 161 (Manitoba Court of Queen's Bench).
[83] Mulligan Estate v. Minaker (1995), 102 Manitoba Reports (2d) 283 (Manitoba Court of Appeal), at 286. The Court of Queen's Bench Surrogate Practices Act Revised Statutes of Manitoba 1987, Chapter 290,

ambiguous on their face, nor latently ambiguous in the context of the surrounding circumstances. Even if extrinsic evidence of surrounding circumstances is admitted, a court of construction may well be persuaded that the plain meaning of the words "to my children" mean all children of the testator, without qualification or condition. This may result in the anomalous situation where the court of probate may have received evidence of direct testamentary intention and been persuaded as to what the testator truly intended. The court of construction, however, is precluded from receiving the direct evidence of intention admitted by the court of probate, because the exclusionary rule of evidence, which has developed in construction, prohibits the admissibility of extrinsic evidence in the absence of ambiguity. The intention of the testator would therefore be defeated, and all of his children, as opposed to only the children of his second marriage, would take under the will.

This problem is particularly pronounced in places such as Manitoba, where the superior trial court, in the Court of Queen's Bench, sits both in probate and construction matters. The same judge may be sitting in both probate and construction courts, and be required to engage in construction in the intellectual exercise of disabusing her mind of evidence which she has already received in rectifying the will at probate. The duality of jurisdiction of the Manitoba Court of Queen's Bench, and the rigid approach to construction dictated by statutory requirements, may bring the administration of justice into disrepute. In order to understand how this situation arose, it is necessary to compare the approach to wills construction taken by the courts in nineteenth and early twentieth

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section 6 vests jurisdiction for both probate and construction matters in the Manitoba Court of Queen's Bench.

century England and Canada, with the approach taken by a Canadian court to construction at the present time.

B. Approaches to Wills Construction in England and Canada during the Nineteenth and Early Twentieth Centuries

Wills construction has undergone radical transformations over the past century. A strong parallel may be drawn between developments in the law of rectification and in the law of wills construction, in that courts have increasingly shed the shackles of extreme formalism which characterised wills construction in the nineteenth century, and embraced the more liberal approach to wills construction in the twentieth century.

The nineteenth century approach was exemplified by the House of Lords in Higgins v. Dawson.[84] There the testator owned land, chattels and two mortgages worth 13,000 pounds. His will provided for a specific devise of the land and bequest of the chattels, with a further list of pecuniary gifts in the sum of 10,000 pounds. The residue clause of the will transferred "all the residue and remainder" of the mortgage debts, after payment of his just debts, testamentary and funeral expenses to charity.[85] The problem was that the testator had no assets from which to fund the payment of the pecuniary gifts, other than the mortgages. Evidence was led to show that the words "residue and remainder" of the mortgage debt should be construed to mean "residue and remainder after paying the debts and legacies". The House of Lords adopted a strict, literalist construction of the will. Based on the language contained within the four corners of the will, the court concluded that it was clear that "residue and remainder" referred to the

[84] Higgins v. Dawson, [1902] Appeal Cases 1 (House of Lords).
[85] Ibid., 3.

balance remaining after paying the just debts and funeral expenses, and the court refused to admit extrinsic evidence of intention.

Higgins v. Dawson reflected the approach whereby the court first read the will to determine literally whether the subjects and objects referred to in the will could be ascertained on the basis of their plain meaning. If, on review of the plain meaning of the words contained in the will, there was an ambiguity, then the court would sit in the "armchair" of the testator in order to consider the meaning of the words. If the ambiguity was patent on its face, indirect extrinsic evidence of surrounding circumstances would be admissible to construe the will. If, however, there was a latent ambiguity or equivocation, then direct evidence of testamentary intention would be admissible in the course of will construction. If, despite the admissibility of extrinsic evidence, the ambiguity could not be resolved, the gift would fail for uncertainty.

C. The Current Approach to Wills Construction in Canada

The strict, objective approach to wills construction set out in Higgins v. Dawson was rejected by majority decision of the Supreme Court of Canada in Marks v. Marks which, in place of extreme formalism, opted instead for an approach to wills construction based on subjective intention.[86] In Marks v. Marks, Idington, J. stated that indirect extrinsic evidence was admissible in the event of a patent ambiguity or in any other instance. The significance of this decision was that the majority decision in Marks v. Marks was applied in 1980 by the Saskatchewan Court of Appeal in Haidl v. Sacher.[87] Although the approach to wills construction currently followed by Canadian courts is far

[86] Marks v. Marks (1908), 40 Supreme Court Reports 210 at 212 (Supreme Court of Canada).
[87] Haidl v. Sacher (1979), 7 Estates and Trusts Reports 1 (Saskatchewan Court of Appeal).

from consistent, clear or predictable, Haidl v. Sacher has been increasingly followed by most courts in recent years as a starting point.

In Haidl v. Sacher the testator divided the residue of his estate into seven equal shares by referring to seven designated beneficiaries in seven separate paragraphs, and then to "the children of Herbert Haidl that may be living at the date of my death" in an eighth paragraph. The four children of Herbert Haidl made application to determine whether a one eighth share of the estate would be divided equally among them, that is, per stirpes, or whether they would receive a one eleventh share of the residue, that is, a per capita distribution. Bayda, J.A. rejected the analytical approach of Higgins v. Dawson stating that the court might admit extrinsic evidence at the commencement of the construction process and that the will did not have to contain an ambiguity for extrinsic evidence of surrounding circumstances to be admissible. The Court of Appeal concluded that the Court of Queen's Bench did not err in admitting evidence of the testator's relationship to the beneficiaries named in his will, as part of the surrounding circumstances, and in that context the Court of Appeal attempted to construe the language of the will based on the plain meaning of the words used.

The approach of the court in Haidl v. Sacher focused on the subjective intention of the testator and enabled a court to interpret a will as if the words were omitted or added, without formally rectifying the document at construction. Although the court couched the language in terms of "construction", and did not refer to the process of rectification, in reality, by reading the will as if words were added or omitted, the court was in essence re-making the will for a testator. Haidl v. Sacher did not, however, resolve all problems in wills construction. As subsequent judicial decisions indicated, the

courts have not always applied Haidl v. Sacher in a consistent fashion. Recent cases have demonstrated that there are many occasions in the course of wills construction where the intention of the testator had been frustrated, and where it is difficult for an ordinary client or his solicitor to predict with confidence the outcome of an application to construe a will.

It is beyond the scope of this thesis to provide an exhaustive review of every Canadian judicial decision where the issue of wills construction and the re-making of a will by a court has arisen. However, in order to support the assertion that this is an ongoing and current dilemma confronting the courts necessitating law reform, this thesis will select eight cases, from Manitoba and other Canadian provinces and territories decided within the past decade, each of which exemplifies a specific problem that the courts have encountered.

I. The Clear and Unambiguous Will

In the 1993 decision of Sparks Estate v. Wenham, the Manitoba Court of Queens Bench was asked to construe a will where the testatrix, by her professionally drawn will, left specific and residuary bequests to an individual who predeceased her, with no gift over to govern the disposition of the bequests in the event of that beneficiary's predecease.[88] The court reviewed the will and found it to be clear and unambiguous. It struck out portions of affidavits filed by certain parties containing extrinsic evidence claiming a interest in the estate, based on their relationship with the deceased. Clearwater, J. stated that "if there is a problem with this will, it is not with the words that are used; rather it is with the words that are not used. No gift over or alternative gift was

provided with respect to any of the bequests, be they specific or residuary".[89] The court held that The Wills Act provided that, as a result of the lapse of the gift, the specific and residuary bequests fell into residue.

The court in Sparks Estate v. Wenham relied upon a fixed rule of construction codified by statute, that in the absence of any contrary intention contained in the will, a testator will be presumed to have intended a lapsed residuary gift to fall into residue. Sparks Estate v. Wenham demonstrates one of the underlying issues within the law of wills construction, namely, whether the construction of a will shall be governed by fixed rules, or whether wills construction should be conducted within the context of a flexible framework based on judicial discretion. If the latter, then rules have to be developed to define the scope of evidence to be admitted in the course of wills construction and in the related standard of proof, so that an ordinary client and his solicitor may predict the outcome of a proceeding. The application of the exclusionary rule of evidence, in conjunction with the operation of the statutory provision related to lapsed gifts, underscored the problem in Sparks Estate v. Wenham: that by following a fixed statutory formula, the intentions of the testator may have been defeated. If the court had possessed the clear jurisdiction to admit the expunged evidence, and weigh it according to appropriate standards, then the court may have been able to balance the evidence filed as against the presumed intention of the testator, as reflected by the provision related to lapsed gifts. This inability to consider extrinsic evidence in the face of conflicting claims, and to weigh the evidence against statutory presumptions and rules, represents one of a

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[88] Sparks Estate v. Wenham (1993), 1 Estates and Trusts Reports (2d) 212 (Manitoba Court of Queen's Bench).
[89] Ibid., 224.

number of gaps in the current legal framework in Manitoba, which make it difficult for ordinary clients and their solicitors to predict with certainty the outcome of a construction application.

II. Surrounding Circumstances

In Bergey v. Cassel, a 1995 decision of the Manitoba Court of Queen's Bench, the applicant applied for an order "rectifying" the will of his uncle to provide for a bequest to Donald Bergey, as a residual beneficiary rather than "Mrs. Donald Bergey".[90] Morse, J. applied the decision in Haidl v. Sacher and stated that in the course of interpreting a will, a court must place itself in the position of the testator at the time the will was made and endeavour to read the content of the will in the context of the circumstances then surrounding the testator. The court concluded that the evidence of surrounding circumstances indicated that the testator intended to name Donald Bergey as a residual beneficiary and that the word "Mrs." was a typographical error.

On the surface Bergey v. Cassel is properly decided in that the court admitted extrinsic evidence in order to arrive at the truth and determine the intentions of the testator. However, it is problematic because apparently either counsel or the learned judge appear to have confused the function of the court at probate with the role of a court of construction. The reasons for the decision begin with the phrase "the applicant has applied for an order 'rectifying' the will...".[91] The court then proceeded to apply the rule in Haidl v. Sacher which applies in construction, not rectification. It is simply not clear from the text of the case whether the court was sitting in probate, at construction or in both contexts. Courts of construction do not rectify wills, but rather construe them as if

[90] Bergey v. Cassel (1995), 8 Estates and Trusts Reports (2d) 161 (Manitoba Court of Queen's Bench).

words have been added or omitted. Morse, J.'s description of the process, however, underscores the problem that, whenever a court construes a will, it is effectively rectifying it by correcting and re-making it. This apparent confusion in Bergey v. Cassel supports the proposition that a clear, consistent and principled set of legal rules is needed in Manitoba, as to when a court may exercise and justify its discretion to re-make a will.

III. The Problem of "The Armchair Rule"

In McDonald v. Brown Estate (1995) the Nova Scotia Supreme Court had to interpret a will that provided the beneficiary with an unconditional, absolute share of the estate, and a codicil that stipulated that the share be held in trust, and vest absolutely only on the occurrence of certain events.[92] The beneficiary argued that the codicil should be interpreted as providing an additional gift to the beneficiary. Stewart, J. found that the intentions of the testator were ambiguous and resolved the dispute by admitting extrinsic evidence and examining the circumstances surrounding the making of the will. The problem in this case is not the result obtained, but rather the way it was arrived at by the court. In addressing the matter of ambiguity, the court stated:

> the ambiguity as to what the testator intended is not clarified by turning to the four corners of the will. The circumstances existing at the time of the making of the will and codicils must, as noted by Thomas G. Feeney, in Canadian Law of Wills...be examined.[93]

The difficulty with this comment is that in the course of citing Professor Feeney's analysis with approval, the court seemed to suggest that the four corners of the will are to

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[91] Ibid., 161.

[92] McDonald v. Brown Estate (1995), 6 Estates and Trusts Reports (2d) 160 (Nova Scotia Queen's Bench). The "arm chair rule" continues to apply in Manitoba, as noted in the recent decision of the Manitoba Court of Appeal in Mulligan Estate v. Minaker, supra.

be examined first, before looking at evidence of surrounding circumstances. This of course is the nineteenth century approach favoured in Higgins v. Dawson, not the modern approach referred to in Haidl v. Sacher. This case once again serves as evidence to support the view that a consistent and uniform approach to wills construction should be adopted in order to enhance certainty and alleviate any confusion which may pervade the wills construction process.

IV. Examining the Entire Will

Re Lenko Estate is a 1997 decision of the Saskatchewan Court of Queen's Bench which again demonstrates the inconsistency in approaches followed by the courts in construing wills and grappling with the issue of extrinsic evidence.[94] There the executor brought an application to interpret certain clauses contained in a will. The son of the testator had predeceased him, leaving no spouse or issue, and the testator's daughter was the only surviving child. Based on the wording of the will, there were three possible interpretations available, namely that the son's share fell into residue, that it went as on an intestacy or that it went to the surviving daughter. Barclay, J. stated:

> the first principle of construction is to give effect to the intention of the testator as expressed in the words of the will. The intention is collected from the whole will and every part of it is determined according to that intention. A will is construed in the same way as any other document; however, if the intention is shown, the mode of expression of that intention and the form and language of the will are unimportant.[95]

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[93] Ibid., McDonald v. Brown Estate, 171.
[94] Re Lenko Estate (1997), 19 Estates and Trusts Reports (2d) 314 (Saskatchewan Court of Queen's Bench).
[95] Ibid., 316.

The approach taken by Barclay, J. is problematic for a number of reasons. First, he ignores the decision in Haidl v. Sacher despite the fact that it is an appellate decision in his own province. Second, the statement of the law is not accurate. While it is true that the intention of the testator is to be determined from the whole will, the modern Canadian approach referred to in Haidl v. Sacher suggests that the will should be read in the context of surrounding circumstances, regardless of whether there is ambiguity on the face of the will or not. There is no indication in Barclay, J.'s judgment as to when extrinsic evidence of surrounding circumstances may be admissible. If in fact the courts are taking the view that the will must be read in the absence of extrinsic evidence, before extrinsic evidence is considered, then this rule of construction should be clarified. In the face of this decision and the earlier pronouncement in Haidl v. Sacher, an ordinary client and his solicitor would simply not be certain whether, in an application to construe the will, evidence of surrounding circumstances may be admissible at the outset, or whether the court must first attempt to glean testamentary intent without the aid of evidence from outside the will's four corners.

V. The Problem of Direct Evidence of Intention

The 1998 decision of the Yukon Territory Supreme Court in Re Bruce Estate illustrates the ongoing controversy related to the admissibility of direct extrinsic evidence of testamentary intent.[96] There a testator directed his executor to liquidate his company and distribute the proceeds to twenty beneficiaries, disposing of the residue to residual legatees. The executor wound up the company and applied to the court for directions as to whether the shareholder's loan was to be distributed to the twenty beneficiaries, or

[96]Re Bruce Estate (1998), 24 Estates and Trusts Reports (2d) 44 (Yukon Territory Supreme Court).

whether it was to fall into residue. The court considered whether direct extrinsic evidence of the solicitor who drew the will, as to the testator's instructions, was admissible in the course of will construction. The court acknowledged that the approach in Haidl v. Sacher was appropriate, but indicated that Haidl v. Sacher dealt only with indirect evidence of surrounding circumstances: to admit direct evidence there must be a latent ambiguity. The court refused to admit direct evidence, and stated:

> I have no doubt that direct evidence as to intention may be helpful in most, if not all, of these types of cases. There may be good reason to allow direct evidence but to do so under any basis other than that currently laid down by law would presumably require legislation to that effect.[97]

The court also stated that there is a "fine line" that separates direct and indirect evidence of testamentary intention, and that the testimony of the testator's accountant heard by the court came close to being direct evidence of intention.[98]

The decision in Re Bruce Estate brings out many of the underlying problems currently surrounding the construction of wills in Canada. The entire will construction process is based upon judicial discretion. Although the rule in Haidl v. Sacher established that a will should be read in the context of surrounding circumstances, that still begs large questions over what mechanism the courts may use to determine what constitutes direct evidence and what constitutes indirect evidence. In Re Bruce Estate, the evidence came close to crossing the "fine line". In reality how the court controlled the admissibility of the evidence in the hearing was entirely through the exercise of discretion which could not be easily circumscribed by statute. The legislature must assume that a court is able to distinguish admissible from inadmissible evidence. The real

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[97] Ibid., 49.
[98] Ibid., 50.

issue to be considered, however, is whether at the close of the twentieth century, the distinction between direct and indirect evidence continues to remain valid. Vertes, J. would have preferred to be able to admit direct evidence of intention, or at the very least not be plagued by a nagging concern that he was inadvertently allowing such evidence to form part of the record. Re Bruce Estate demonstrates that the traditional distinction between direct and indirect evidence may do nothing more than hamstring the court in the course of a hearing, and potentially lead to a defeat of the testator's intention as a result of restrictions imposed on the court in the course of the construction of a will.

VI. The Problem of Judicially Defined Words

The 1990 decision of the Saskatchewan Court of Appeal in Kernahan Estate v. Hanson,[99] and the 1994 decision of the British Columbia Supreme Court in Jackson Estate v. Jackson,[100] illustrate the uncertainty in the law which pervades the wills construction process, where a word contained in a will has been previously judicially defined. In Kernahan Estate v. Hanson, the will of the testatrix provided that the residue of her estate be divided among her "issue" in equal shares per capita.[101] The solicitor who drew the will filed an affidavit providing direct evidence of the testatrix's intent, indicating that she intended her residue to be divided among her surviving children. The Saskatchewan Court of Queen's Bench found that the will was ambiguous, and admitted the evidence of the solicitor for the purposes of demonstrating the testatrix's intention. The material contained in the solicitor's affidavit stated that the residue of the estate was

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[99] Kernahan Estate v. Hanson (1990), 39 Estates and Trusts Reports 243 (Saskatchewan Court of Queen's Bench), reversed (1990) 39 Estates and Trusts Reports 249 (Saskatchewan Court of Appeal).
[100] Jackson Estate v. Jackson (1994), 4 Estates and Trusts Reports (2d) 245 (British Columbia Supreme Court).
[101] Supra, Kernahan Estate v. Hansen, note 99, at 244.

to be divided among the surviving children. The court held that the word "issue" used by the deceased would be read as meaning "children".

The Saskatchewan Court of Appeal reversed the decision. It held that the word "issue" was not ambiguous and that extrinsic evidence was not admissible to interpret it. The court applied the test in Perrin v. Morgan and stated that "the question is not what the testator meant when he made his will, but what the written words he uses mean in the particular case, that is, what are the "expressed intentions" of the testator."[102] Gerwing, J.A. also noted that he did "not in any way disagree"[103] with the principles of law cited in Haidl v. Sacher; but his lordship failed to reconcile Haidl v. Sacher with the outcome in Kernahan Estate. The Court of Appeal concluded that the term "issue" is used routinely in wills to mean descendants of all generations, had a clear meaning and is not ambiguous.

The appellate decision in Kernahan Estate v. Hanson demonstrates that the current rules of construction are problematic, not only because direct evidence is inadmissible unless there is a latent ambiguity; but, it is difficult to predict how a court will exercise its discretion to determine whether a word contained in a will is ambiguous or not. The threshold question is whether the word contained in the will is ambiguous. The approach to resolving this issue has not been defined by the court. In Kernahan Estate v. Hanson the evidence before the court was clear that the testatrix intended to benefit her surviving children, not her issue. The Court of Appeal excluded that evidence however, and elected to resolve the matter on the basis of the meaning of the word "issue" as defined in the

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[102] Ibid., at 251.
[103] Ibid., 251.

case law. This judicial rule was used by the court to overide evidence of testamentary intent, and the testatrix's freedom of testation was defeated.

Four years later in British Columbia the same legal problem resulted in a different judicial outcome. In Jackson Estate v. Jackson, the testator's will provided for the residue of his estate to be held in trust for his issue alive at his death and to his wife in equal shares per capita. The testator died leaving six adult children, five adult grandchildren, ten infant grandchildren and one infant great-grandchild. The court refused to admit direct evidence of intention, as there was no equivocation. The court considered the technical meaning of the word "issue" and stated that "if the provisions of a will are crafted by a solicitor, it may be presumed that technical words are used in their technical sense."[104] The court concluded, however, that because the residue clause did not appear to be drawn with care, the testator's intention in using the word issue should be determined from the language of the will as a whole. The court concluded that looking at the will and residue clause as a whole, the only reasonable conclusion would be that the word "issue" referred to the testator's children, and not to all of his descendants. Based on the conflicting results generated by Kernahan Estate v. Kernahan and Jackson Estate v. Jackson it is not clear at this time how Canadian courts, including Manitoba courts, will construe the word "issue", or how they will determine the meaning of any word which has been judicially defined in the face of extrinsic evidence of intention.

VII. The Court's Professed Unwillingness to Make a New Will

In the 1990 Ontario Supreme Court decision in Stork Estate v. Stork,

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[104] Jackson Estate v. Jackson, supra note 100 at 250.

the testator gave his wife a life interest in the residue of his estate, providing a gift over of the capital in the event of his wife's predecease.[105] The wife survived and subsequently died. The issue arose as to disposition of the capital upon her death. The court held that the words were not ambiguous, but that the testator had simply failed to provide for a disposition of the residue in the event that the wife survived the testator and later died. The court held that the capital would pass as on an intestacy. McKeown, J. stated:

> Further, it is not for the Court to depart from the clear and ordinary meaning from the words contained in the will. The law is well settled that the court may only supply missing words to a will where it is clear that 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 clear what the words are which he has omitted. When the language of the will expresses a definite and unambiguous intention, the evidence of surrounding circumstances is inadmissible for the purposes of varying the intention expressed in the will.[106]

McKeown, J.'s statement of the law is capable of causing more confusion than it will resolve. Although it is a fine distinction, a court of construction does not "supply" missing words in a will, but rather reads the will as if words were added or deleted. Evidence of surrounding circumstances is never admissible for purposes of "varying" the intention expressed in the will, but is admissible for the opposite purpose, namely, giving effect to the testator's intention. The decision in Stork Estate v. Stork serves only to demonstrate the relatively unprincipled and incoherent approach taken by a court to wills construction when it concludes that the meaning of a will is clear on its face.

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[105] Stork Estate v. Stork (1990), 38 Estates and Trusts Reports 290 (Ontario Supreme Court).
[106] Ibid., 294.

D. The Construction of Wills within the Broader Legal Context

The development of judicial dispensation legislation, in conjunction with the admission of extrinsic evidence of surrounding circumstances at the inception of the construction process, signals that courts have become more concerned with giving effect to the subjectively determined intention of the testator than with enforcing strict compliance with the statutory requirements of writing, signature and attestation. The judicial construction of wills differs from the construction of contracts, however, because in wills construction the material witness is deceased and unable to challenge or refute any allegations made by potential claimants. In the law of contract, either one or often both of the parties may be present to assist the court with evidence of what was intended; and the parties may have intended ancillary oral agreements along with the written document to govern their relationship. The alteration of a probated will, through the admissibility of extrinsic direct evidence of testamentary intention in the course of wills construction, results in a probated will being altered by language which has neither been written, signed or attested by the testator and without the presence of the document's maker to confirm or refute what has been alleged. This places the authentication of a will in jeopardy and replaces the original, written, will with one that is based upon evidence that may not be reliable. This is the crux of the problem confronting a court when extrinsic evidence is admitted in the course of construing a will.

E. Alternative Approaches to Reform

I. The English Law Reform Committee, Nineteenth Report

The Nineteenth Report of the English Law Reform Committee on the Interpretation of Wills, 1973 concluded that no change should be made in the law which prevents a court from re-making a will for a testator.[107] The Commission was in favour of liberalizing the law, rather than codifying the nineteenth century case law. Although the Commission recommended that the written will of the testator should be the governing document in ascertaining his testamentary intention, it was, however, in favour of admitting extrinsic evidence in order to establish the meaning a testator attached to specific "words, names or expressions" used in a will, as well as for purposes of resolving any latent ambiguity contained in a will.[108] The majority of the Committee favoured admitting all extrinsic evidence of testamentary intent in order to resolve an ambiguity, except for direct evidence of intention, unless there was equivocation. The minority of the Committee favoured the admissibility of all evidence of testamentary intention, including direct evidence, without condition or qualification.

The approach of the English Law Reform Committee was based on the premise that the written will remained sacrosant; and for this reason, extrinsic direct evidence of testamentary intention should not be admitted except in the case of latent ambiguity. On the surface, by maintaining the importance of the written will, this approach should foster certainty in the law. On a deeper level, however, this approach does not provide a mechanism for enabling a court to determine whether there was a latent or patent ambiguity, and it would be difficult for an ordinary client or his solicitor to predict when

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[107] England, supra note 72, at 23.

direct evidence of testamentary intention would be admissible. This approach suggests that extrinsic evidence would be admissible to construe the meaning of words, names and expressions used by the testator; but the Committee was silent as to the effect such evidence would have upon the multiple rules and presumptions which would otherwise apply in the will construction process. For example, if a will provided a disposition of my "baby" and the testatrix always referred to her Porsche automobile as her "baby", the Committee's rule, that the will speaks from death, might need to interact with a rule permitting the admissibility of extrinsic evidence, respecting the specific meaning accorded by the testatrix to the word "baby". The Committee also did not indicate whether the will was to be read in the absence of extrinsic evidence first, and then construed in the context of surrounding circumstances, or whether surrounding circumstances are admissible at first instance in construing the plain meaning of the words contained in the will. Overall, the Committee left more questions unanswered than answered. Its approach does not adequately address most of the problems reflected in current Canadian jurisprudence as previously explicated in this chapter.

II. Section 21 of the U.K. Administration of Justice Act, 1982

This came into force 1 January 1983 and provides that:

(1) This section applies to a will

(a) in so far as any part of it is meaningless;
(b) in so far as the language used in any part of it is ambiguous on the face of it;
(c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in light of surrounding circumstances.

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[108] Ibid., 23.

(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.[109]

The response of the British Parliament to the problem of extrinsic evidence addresses the problem with a broad sweeping stroke. In essence, if a will is meaningless, patently ambiguous, or ambiguous in light of surrounding circumstances, extrinsic evidence is admissible to aid in its construction. The provision does not distinguish between direct and indirect evidence of testamentary intention, nor does it dictate when either type of evidence would be admissible. The provision demonstrates a strong legislative bias against intestacy, by including references to meaningless provisions, as well as ambiguous provisions. It appears to circumvent the difficulty of requiring a court to distinguish between patent and latent ambiguity. It also does not limit the nature of admissible indirect evidence of intention, and appears to encompass statements and conduct of a testator before, contemporaneous with and subsequent to the execution of a will. Despite the expansive wording of Section 21, it has received conservative treatment in the courts. The provision was considered in the decision in Re Williams, Wiles v. Magden, a 1985 decision of the English Court of Chancery.[110] There the testatrix's home made will listed twenty-five names in three separate groups, but the groups were not associated with gifts to any specified beneficiaries. Subsequent to execution of the will, the testatrix forwarded a letter to her solicitors and requested that they place the groupings in proper order. The issue arose as to whether the letter was admissible in the course of construing the will. Nicholls, J. stated as follows:

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[109] Administration of Justice Act, 1982, Chapter 53, Section 21 (United Kingdom).
[110] Re Williams, Wiles v. Magden, [1985] 1 All England Reports 964 (Chancery Division).

> I have found the letter to be of no assistance, for several reasons....[A]s to possible constructions, it is necessary to keep in mind the purpose of s. 21. Section 21 is concerned with the admission of evidence as an aid to construction. Subsection (2), when read with the material paragraph (para (b)) of sub-s (1), provides that, in so far as the language used in any part of a will is ambiguous on the face of it, extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation. The evidence may assist by showing which of two or more possible meanings a testator was attaching to a particular word or phrase. 'My effects' and 'my money' are obvious examples. That meaning may be one which, without recourse to the extrinsic evidence, would not really have been apparent at all. So long as that meaning is one which the word or phrase is capable of bearing, then the court may conclude that, assisted by the extrinsic evidence, that is its correct construction. But if, however liberal may be the approach of the court, the meaning is one which the word or phrase cannot bear, I do not see how, in carrying out a process of construction (or interpretation, to use the word employed in s. 21), the court can declare the meaning to be the meaning of the word or the phrase. Such a conclusion, varying or contradicting the language used, would amount to rewriting part of the will, and that is a result to be achieved, if at all, under the rectification provisions in s. 20....Again, if extrinsic evidence shows that a testator was unclear, or undecided, on what he meant by the ambiguous word or phrase, I do not see how that can require or enable the court to reject the word or phrase altogether if the court is able to construe the word or phrase without the aid of extrinsic evidence. [111]

This interpretation cut down the reach of the statute. The court limited the scope of will construction by circumscribing the interpretation on the basis of the meaning the word or phrase was capable of bearing . The court limited the extent to which it could impose a liberal construction on the words by looking at the meaning of the surrounding provisions, and then limiting the scope of interpretation available by reference to the context of the provision as a whole.

III. The Approach of the Republic of Ireland (Eire)

Section 90 of its Succession Act (1965) provides that:

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[111] Ibid., 969.

"Extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will."[112]

The Irish provision, like its English counterpart, is broadly worded and does not distinguish between direct and indirect extrinsic evidence of intention. The statute refers to " any contradiction", which is language that is not referred to in the English statute. The intent of the legislation appears to be to resolve both ambiguity contained within the body of a will as well as any inconsistencies contained within a will which are not readily explained. The use of the word "shall" indicates that the legislation is mandatory. This suggests that, rather than repose broad discretion in a court through permissive language, the legislature decided to remove judicial discretion and simply required that the court admit extrinsic evidence of intention in the context of will construction.

Section 90 of this Succession Act was considered in Rowe v. Law by the Irish Supreme Court and upheld on appeal by the Irish High Court.[113] The issue arose in both the Supreme and High Court as to the meaning of the phrase "any balance then remaining" in the testator's will. Kenney, J. concluded that extrinsic evidence was not admissible and stated at first instance:

> I do not think that extrinsic evidence is admissible to show the intention of the testator when the will is clear; this construction is supported, to some extent, by the words "to assist in the construction of, or to explain any contradiction in a will." It is only when the Court requires assistance because the will is ambiguous or because there is some contradiction in that the intention is in doubt. The intention cannot be in doubt if the will itself is unambiguous. The alternative construction of s. 90 that extrinsic evidence is always admissible to show the intention of the testator has the remarkable result that everything that the testator said before and after he made the will would be admissible in

[112] Irish Succession Act, 1965, Section 90.
[113] Rowe v. Law, [1978] Irish Reports 55 (High Court), upheld [1978] Irish Reports 62 (Supreme Court).

> evidence. The result would be that in many cases a construction summons would be a probate suit. Are oral promises given before the will was made by the testator admissible: Are statements made years after the will admissible? I do not think so.[114]

Kenney, J.'s comments highlighted one of the risks confronting legislatures in the law of wills, namely, the potential blurring of the probate and the construction functions. In Manitoba, the Court of Queen's Bench sits as both the court of probate and construction. The scope of the exclusionary rule governing the admissibility of extrinsic evidence is contingent upon which court is considering the testamentary proceeding. Currently, a court of probate will admit all extrinsic evidence of intention in the course of rectifying a will, but a court of construction will admit only indirect evidence of intention, except in the case of equivocation. If oral statements by a testator either before or after the making of the will are admitted into evidence in the course of construing a will, then the court of construction is essentially exercising a probate function. Blurring the functions between probate and construction courts in a jurisdiction has served only to complicate the law and render it more uncertain. It also has diminished the ability of the court to develop a coherent set of principles.

The Supreme Court disallowed the appeal, and in construing the scope of the provision, Henchy, J. stated:

> The plain fact is that the grant of an unlimited and undefined jurisdiction to admit extrinsic evidence to show the testator's intention would be so large in its scope and so untoward in its potential consequences that it would exceed the spirit and purpose of the Act. The necessary delimitation of the jurisdiction to admit such evidence is effected by the second limb of the section: "and to assist in the construction of, or to explain any contradiction in, a will." The conjunctive and

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[114] Ibid., 60.

> cumulative "and" is to be contrasted with the disjunctive and alternative "or". It connotes a duality of purpose as a condition for the admission under the section of extrinsic evidence. The necessary conditions are: to show the intention of the testator and to assist in the construction of, or to explain a contradiction in, the will. If either condition is not satisfied, the section does not allow the evidence to be admitted.[115]

The approach of Henchey, J. set the parameters of the legislation. He contemplated that the admissibility of extrinsic evidence of intention was circumscribed by two constraints: the evidence must show the intention of the testator and show a contradiction in the will. Section 90 was designed to test whether the written will reflected accurately the intentions of a testator. The provision did not purport to admit extrinsic evidence of intention without condition or qualification. Rather, the admissibility of the evidence was constrained by limiting it for the purpose of assisting in the construction of, or explaining a contradiction in, a will. It was not intended to admit extrinsic evidence so that a new will might be substituted for the existing written will. By referring to the existing will, the legislature attempted to remove from the court the power to make a new will for a testator after his death. Although the legislation did attempt to limit the scope of admissible evidence, it did not resolve the problem of predictability or clarity in the legislation, because it is difficult to ascertain the basis upon which a court will find that an item of evidence will relate to intention or contradiction in the body of a will.

IV. The New South Wales Law Reform Commission Report 85

This Report in Australia proposed that:

31 Use of extrinsic evidence to clarify a will:

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[115] Ibid., 72.

(1) In proceedings to construe a will, evidence, including evidence of the testator's intention, is admissible to the extent that the language used in the will renders the will, or any part of the will:

(a) meaningless, or
(b) ambiguous on the face of the will, or
(c) ambiguous in light of the surrounding circumstances.

(2) Evidence of a testator's intention is not admissible to establish any of the circumstances referred to in subsection 1(c).

(3) Nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will.[116]

The New South Wales Law Reform Commission proposal is more limited than the English statutory provision, because it does not permit direct evidence of the testator's intention to be admitted in order to construe a will which is ambiguous in light of surrounding circumstances. This approach reflects a policy of protecting the sanctity of the written will to a greater degree than the English or Irish approaches. The Commission developed this approach in the face of Section 12B of the Australian Capital Territory Wills Act (1968), which permitted the admissibility of extrinsic evidence to the extent that the language of the will rendered the will ambiguous or uncertain either on its face, or in light of its surrounding circumstances.[117] The Australian Capital Territory provision admits evidence of a testator's intention even if there is no evidence available to explain that intention. This would enhance uncertainty in the law of wills, because a will which is uncertain on its face or in the context of surrounding circumstances could be construed in light of evidence which did not provide any further indication as to when a testator made the comments he made, either before or after the will was executed. This would

[116] New South Wales, supra note 80, at 12.
[117] Wills Act, 1968, Australian Capital Territory, Section 12B.

result in a will becoming subject to evidence which the testator himself may not have been aware of during his lifetime.

The New South Wales approach is problematic because it provides no assistance to a court in determining whether a will is meaningless or ambiguous on its face. A court would still be forced to grapple with the threshold question of determining if a will was meaningless or ambiguous, before it could consider the admissibility of extrinsic evidence. This could result in the anomalous situation that a probate court might admit extrinsic evidence in the course of rectifying a will, while a court of construction would be prohibited from receiving evidence of testamentary intention which the probate court obtained. Once again, an ordinary client would have difficulty predicting the outcome of a case, and therefore, the New South Wales Law Reform Commission Report does not provide a satisfactory response.

V. The Law Reform Commission of British Columbia

In its 1982 Report on the Interpretation of Wills, the British Columbia Law Reform Commission recommended that all relevant evidence, including "statements made by the testator or other evidence of his intent" should be admissible in the course of construing a will.[118] The British Columbia approach eliminated the problem of a court having to discern, as a threshold question, whether a provision in a will was meaningless, uncertain or ambiguous, because all extrinsic evidence of testamentary intention would be admissible. The British Columbia approach offers predictability in that the scope of admissible evidence is clear. This approach derogates from the requirement that a will be

in writing, while entrusting the courts "to determine the weight" the extrinsic evidence should be given.[119] The Commission did not offer any draft legislation in its report.

F. Competing Policy Considerations and Recommendations for Reform

The re-making of a will by a court at the stage of will construction is completely contingent on the admissibility of extrinsic evidence. In the absence of extrinsic evidence, it is not possible for a court to read a will as if certain words were added or deleted from it. Before providing a specific proposal for legislative reform, we should consider the problems in construction exemplified in recent Canadian case law and the alternatives from foreign jurisdictions, in the context of the underlying policy considerations.

The concept of a will, which is ancient and medieval in origins, developed in the nineteenth century as the product of extreme formalism. Courts equated the intention of a testator with the specific language contained in a document which he or his solicitor prepared. In the twentieth century, by contrast, courts have looked beyond the specific words embodied within the four corners of the will, to discern the overall testamentary plan. This shift in emphasis from literalism to substance reflects an effort by the courts to fulfill, rather than frustrate, the testator's intentions. This has been particularly pronounced where authentication of the will has not been placed into issue and requirements for execution mandated by statute have been satisfied.

The statutory formalities established by the Statute of Frauds (1677) and refined by the English Wills Act (1837) were designed to prevent mistake and fraud in the

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[118] British Columbia, Attorney General, Report of the Law Reform Commission on the Interpretation of Wills (Vancouver, Queen's Printer for British Columbia, 1982)(John S. Aikins, Chairman), at 25.
[119] Ibid., 25.

making or alteration of a will. Where a will had been executed with regard to the statutory requirements, including writing, signature and attestation, the likelihood of fraud diminished. In order to prevent mistake from vitiating testamentary intent, twentieth century Canadian courts increasingly relaxed the strictly objective approach of nineteenth century English courts in favour of a focus on the substantive scheme contained in the will, rather than exclusively on the words contained in it. Legislation permitting the admissibility of extrinsic evidence would change the concept of a will as an instrument of testamentary disposition. A statutory regime admitting extrinsic evidence recognises that a will, as a written document, merely serves as a symbol of the testator's intention, and that the scheme of testamentary disposition becomes the basis for testamentary freedom.

The issues related to wills construction arise because occasionally solicitors or testators draw a will which contains words which are meaningless, uncertain, or ambiguous. As in the case of rectification, where the problem arose from insertion or deletion of language in a will by mistake, the parties involved in construction problems usually include the testator, spouse, children, collateral relatives, and any beneficiaries who are not a part of the family. If a court reads a will as if words have been added or deleted both the quantum of gifts contained in the will and the identification of beneficiaries designated by will may be directly affected. The construction of a will enables a court to redistribute property from one beneficiary to another, or from those persons who may be entitled to a testator's property on an intestacy, to those who would take under the will. On a superficial level, wills construction concerns reconciling the intentions of a testator with strict statutory requirements of writing, attestation and signature. The underlying issue concerns whether a court will alter a will as a result of

oral statements of, or conduct by, a testator subsequent to the will's execution. A court of construction, like a court of probate in rectification, endeavours to ensure that a will authentically represents the intentions of a testator. Authenticity is ultimately a matter of evidence and proof, not substantive law. Therefore, the mechanism which a court uses to admit and weigh evidence, as opposed to the application of substantive legal rules must form the basis for law reform governing the exercise of a court's discretion in the course of construing a will.

The trend in wills construction cases across Canada demonstrates that the courts are concerned with effecting the true intentions of a testator, but are having difficulty developing a consistent principled approach to the matter. The problem of determining when a will is ambiguous or meaningless, and the distinction between direct and indirect evidence, are not always clear. In order to enable an ordinary client or his solicitor to confidently predict the outcome of a proceeding, the antiquated nineteenth century distinction between direct and indirect evidence should be eliminated, and both direct and indirect evidence of intention should be admissible. However, the requirement of writing also contributes, at least in part, to certainty in the law. In preparing legislative reform, it is necessary to ensure that written wills do not become replaced by oral wills or undermined by alterations based upon oral statements of testators after a will is executed. Therefore, the proposed legislation must not admit direct extrinsic evidence of intention subsequent to the execution of a written will, if it contradicts the express provisions of a

probated will. Accordingly, the proposed legislative reform should be worded as follows:

The Court shall admit both direct and indirect extrinsic evidence in construing, on a balance of probabilities, the meaning of a probated will, provided that any direct evidence of intention subsequent to the execution of a will shall not be permitted to contradict the express provisions contained in a will.

CHAPTER THREE: THE JUDICIAL RECONSTRUCTION OF WILLS UNDER THE DEPENDANTS RELIEF ACT

A. Introduction

When the Manitoba Court of Queen's Bench rectifies a will at probate, or interprets the meaning of a will in construction, the court either deletes words at probate, or reads the will as if words were added or omitted in construction in order to effect the intentions of a testator. The addition of language at probate, and the notional alteration of language in construction, effectively produces a will bearing a different content than the document drafted, signed and attested at the time of execution. Freedom of testation depends upon the protection of testamentary intention and continues to remain a fundamental precept of the Manitoba law of succession; for this reason the Manitoban and other Canadian courts have routinely invoked their discretion to re-make wills, even in the absence of specific enabling legislation conferring expressed jurisdiction to do so.

There are, however, limits to freedom of testation. In inter vivos transactions, the limits upon freedom are provided by a series of statutes, including, for example, The Family Maintenance Act,[120] The Marital Property Act,[121] The Homesteads Act,[122] and on the federal level, the Divorce Act (1985).[123] These statutes all stem from family law and are designed to provide protection for family members in the event of separation or divorce. The Family Maintenance Act and the Divorce Act impose obligations for support of the spouse and children upon the separating parties; The Marital Property Act confers an entitlement to an equalization payment upon separation, divorce or death; The

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[120] The Family Maintenance Act, Revised Statutes of Manitoba 1987, Chapter F20.
[121] The Marital Property Act, Revised Statutes of Manitoba 1987, Chapter M45, sections 25-45.
[122] The Homesteads Act, Statutes of Manitoba 1992, Chapter 46-Cap. H80.
[123] Divorce Act, Revised Statutes of Canada 1985, Chapter 3 (2nd Supplement).

Homesteads Act confers entitlements to a life interest in the homestead upon death. The Dependants Relief Act is designed to continue the obligations parents and spouses have to support their families during their lifetime, after the party responsible for support has died. It confers a discretion upon the Manitoba Court of Queen's Bench to grant an award of reasonable support in favour of members of a defined class of applicants, in the event that an application for support is made by those persons within a prescribed time period after death. If a court is persuaded to exercise that discretion and grant relief, the award of support is payable out of the estate of the deceased, despite expressed provisions which may otherwise be contained in the deceased's will.

The primary jurisdiction contained in The Dependants Relief Act is provided by subsection 2(1):

> If it appears to the court that a dependant is in financial need, the court, on application by or on behalf of the dependant, may order that reasonable provision be made out of the estate of the deceased for the maintenance and support of the dependant.[124]

Section 1 provides a detailed definition of the term "dependant" which specifically identifies and limits the class of beneficiaries who may apply for relief under the Act.[125] The class includes spouses, former spouses, children, grandchildren, parents, grandparents and siblings of the deceased, all of whom must meet specified criteria established by the legislation before they qualify as "dependants" under the Act. As an example, the Act distinguishes between children of the deceased under age eighteen at the time of the deceased's death; a child who, by reason of illness, disability or other cause was unable at the time of the deceased's death to withdraw from the charge of the

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[124] Supra, The Dependants Relief Act, note 2, Section 2(1).
[125] Ibid., Section 1.

deceased or provide himself with the necessaries of life; and a child who was substantially dependant on the deceased at the time of the deceased's death. If an applicant qualifies in one of these ways, then application can be made to the Court of Queen's Bench under subsection 2(1) of the Act, for reasonable provision out of the estate of the deceased for maintenance and support.

The Dependants Relief Act enables a court to re-make a testator's will by changing the substance of the dispositions contained within the will, in order to protect certain statutorily designated members of a deceased's family. This judicial reconstruction of a will's substance is conceptually similar to the re-making of a will by a court at probate or in construction. Before discussing the deficiencies contained within The Dependants Relief Act, it is of assistance to compare the judicial will making function at probate and construction, with the process of judicial will making under The Dependants Relief Act.

Requirements for wills provided by The Wills Act stipulate that wills must be in writing, signed by the testator, and attested by two independent witnesses. Most wills in Manitoba will begin with a revocation clause, revoking earlier wills, followed immediately thereafter with a clause appointing executors and trustees. Certain words contained in wills, such as "residue" or "per stirpes" have specified meanings which have been considered over the years in the jurisprudence. A will is a creature of statute which confers freedom on a testator to choose the individuals he wishes to benefit and the property he wishes to dispose of after death. Although a testator may use language which has not been tried and tested by the courts, in practical terms a testator lacks the freedom to choose the language which may be used to express his meaning within the

will, or the procedure which must be followed by a testator at the time the will is executed. The statutory requirements restrict testamentary freedom by placing limits on the nature and scope of language which may be used in drawing a will and the rituals and ceremonies to be completed when a will is executed. A testator who does not execute a will in accordance with statutory requirements will leave his executor with no recourse but to seek relief at the time of probate under judicial dispensation legislation. Similarly, a testator who uses language which is uncertain, vague or ambiguous, or whose will omits certain language which it should have contained, will subject his executor or prospective beneficiaries to the uncertainties inherent in an application for rectification at probate, or in interpretation by a court of construction.

The core of the statutory requirements is the standardised form of wills. The contents of a will cannot be made uniform, because each will possesses a unique scheme of distribution, dependent upon the property which comprises a testator's estate and the beneficiaries who constitute the objects of his bounty. The statutory requirements circumscribe the formal execution of a will. The powers of rectification and construction, however, are not focused upon the form of wills, but impact directly on the contents of the will itself. If a properly executed will is submitted for probate, and a court is satisfied that the will contains language which has been inserted by mistake, a court which rectifies the will is effectively changing its substance by deleting language which would otherwise comprise its contents. This may include deleting the names of beneficiaries or the description of property inserted in the will in error. Alternatively, if application is made to construe a probated will, and a court of construction is satisfied that the meaning of a word contained in the will is ambiguous, a court which notionally

changes the will by reading it as if words were added or deleted is changing the substance of the language contained within the document. Again, this may result in a court of construction reading the will as if the names of certain beneficiaries were inserted or omitted, or that certain property was included within or excluded from the scope of certain gifts. The scope of a court's jurisdiction to re-make a will in rectification or construction is limited by the scope of admissible evidence of testamentary intention. In rectification at probate, all extrinsic evidence, direct and indirect, is admissible to enable a court to determine testamentary intention; whereas in construction, direct evidence of intention is only admissible in the event of latent ambiguity or equivocation in the document. In both probate and construction, the re-making of a will by the court will result in direct deletion of language at probate, or the notional addition or deletion of language at construction, which can change the substance of a will by altering, after execution, the beneficiaries, gifts, and property contained in the body of the document.

The Dependants Relief Act of Manitoba by contrast, constrains the testamentary freedom which The Wills Act is designed to protect, by enabling a court to order reasonable provision out of a testator's estate to provide maintenance and support for a dependant in financial need. The comparable legislation in some other Canadian provinces has a second purpose, to ensure that a fair share of the estate has been given to various family members. Although the receipt of an order for maintenance and support is not automatic, every testatrix in Manitoba is deemed to know that her will must be prepared in the knowledge that the Court of Queen's Bench may exercise its jurisdiction, conferred by The Dependants Relief Act, to re-make her will after death by awarding maintenance and support to certain designated beneficiaries granted protection by statute.

In contrast to the courts of probate and construction, which endeavour to protect testamentary freedom, a court exercising jurisdiction under The Dependants Relief Act will re-make a will in order to provide financial protection to a testatrix's family, and specifically to those beneficiaries referred to in Section 1 of the Act who have been granted status to make application for relief. The Dependants Relief Act enables a court to redistribute property, from a beneficiary designated by a testatrix's will to an applicant granted relief under the Act. The Act permits a court to remake a testatrix's will by changing the beneficiaries referred to in her will and altering the scheme of distribution which the will otherwise provided after the death of the testatrix. The court reconstructs a testatrix's will by redistributing private property, from a class of beneficiaries whose rights stem from the exercise of testamentary freedom under The Wills Act to another class of beneficiaries whose plight rests upon the exercise of judicial discretion under The Dependants Relief Act.

B. The Dependants Relief Act Within the Broader Context of the Law of Succession

The development of such legislation was shaped, partly by differences in social circumstances existing in late-nineteenth and early-twentieth century England, and in the various jurisdictions including Manitoba which received the English law of property at that time. In The Law of Dependants' Relief in British Columbia, Leopold Amighetti stated:

> Testamentary freedom in England existed at a time when there were some well-defined norms of conduct in relation to the "kindred" of a property owner. These norms included such concepts as the making of a marriage and other settlements which would assure maintenance of those to whom the testator owed a duty. In addition, it existed at a time when most of the wealth was represented by realty which had been passed from family to family through the generations, and testators probably did not

> consider such realty as anything other than family property.
>
> However, the dynamics which sustained the system in England were absent in other parts of the world where the English law of succession was adopted.[126]

The dependants relief legislation reflected a legislative response to a gap in the English common law system which failed to protect the family in jurisdictions outside England, which had received the English common law but not the English social customs and practices. The Act imposed constraints on testamentary freedom through the exercise of judicial discretion. The discretionary nature of the court's jurisdiction, as opposed to a fixed statutory scheme reflected the importance of testamentary freedom in the law of succession and the fact that the legislature strove to develop a system which would preserve testamentary freedom to the greatest extent possible, while at the same time enabling a court to intervene, where necessary to protect a testator's family. The flexible scheme of legislation has hovered over the freedom of testation protected by The Wills Act permitting a testator to disinherit those prospective beneficiaries considered undeserving, while at the same time preventing a testator from leaving his most vulnerable family members in an impoverished state. The flexible nature of the legislative jurisdiction permits a court, on application, to make a thorough investigation of the circumstances of each individual applicant and his family, rather than blindly to apply a fixed, arbitrary statutory formula. The discretionary nature of the court's jurisdiction not only serves to safeguard testamentary freedom to the greatest extent possible, but also reflects that legal certainty is not always equated with rigid application of a legal rule. Rather, it may be more properly defined in terms of a rule of law which

yields predictable results, contingent upon the facts marshalled by the parties to a judicial proceeding.

Manitoba enacted its first dependants relief legislation in 1946.[127] Until 1989, the Manitoba courts interpreted the legislative scheme in Manitoba as conferring jurisdiction to award maintenance and support on the basis of both fair share morality and financial need.[128] In 1989, the Manitoba Legislature significantly amended the legislation by removing fair share morality as one ground upon which a court would exercise its jurisdiction, and codified financial need as the only basis for the exercise of court discretion in an application for support. The elimination of fair share morality as a primary basis for jurisdiction was an appropriate step taken by the Manitoba Legislature when The Testator's Family Maintenance Act was repealed and replaced with The Dependants Relief Act in 1989. The morality of one judge may differ from the moral perspective of another, and it would be difficult for an ordinary client or his solicitor to predict the outcome of a judicial proceeding if the legislative test was founded primarily on moral grounds. However, the abandonment of morality as a primary basis for jurisdiction has effectively precluded the court from granting relief under the Act in two specific, but related kinds of cases. These situations arise where a member of the deceased's family has provided services to a deceased in the expectation of payment, or has assisted the deceased significantly with the acquisition, maintenance or enhancement of his estate.

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[126] Leopold Amighetti, The Law of Dependants Relief in British Columbia (Scarborough, Carswell, 1991), at 5.
[127] The Testators' Family Maintenance Act, Statutes of Manitoba 1946, Chapter 64.
[128] Barr v. Barr, [1972] 2 Western Weekly Reports 346 (Manitoba Court of Appeal).

Athough The Dependants Relief Act traces its origin to the late-nineteenth and early-twentieth century Commonwealth statutes, it constitutes only one of a number of restrictions imposed upon freedom of testation by the English common law since the Norman Conquest. For example, the English law of dower provided that a widow was entitled to a life interest in one third of her husband's land held during the period of marriage; while the law of curtesy provided the widower with a life interest in the wife's lands, provided there were children of the marriage.[129] In order to facilitate economic growth, the common law also developed judicial rules designed to prevent property from being removed from circulation for lengthy periods of time through long term dynastic settlements.[130] In addition, there are other judicial and statutory rules which limit testamentary freedom, such as the taxation of capital gains on death,[131] and the law of capacity in terms of age[132] and mental capacity.[133] Accordingly, the legitimacy of dependants relief legislation as a restriction on freedom of testation through the judicial

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[129] Although Manitoba has never possessed strict dower rights as existed at common law, it did receive the English Dower Act (1833), and the subsequent Dower Act and related successor legislation provided for rights in a surviving spouse similar to dower which restricted testamentary freedom; Chricton v. Zelenitsky, [1946] 2 Western Weekly Reports 209 at 232-233 (Manitoba Court of Appeal). For a detailed study of the history of dower in western Canada, see also Robert E. Hawkins, "Dower Abolition in Western Canada: How Law Reform Failed", (1995) 24 Manitoba Law Journal 635 at 643-648. Currently in Manitoba, section 21 of The Homesteads Act constrains testamentary freedom by providing a surviving legally married spouse with a life interest in the homestead as if it had been willed to her, while sections 25 through 45 of The Marital Property Act provide a surviving legally married spouse with the right to elect for an accounting and equalisation of assets upon the death of the other spouse.

[130] For example, the "old" rule against perpetuities was developed by the courts to prevent property from being devised to a landowner's son, and then to the son's unborn son, and then to the unborn son's son, into perpetuity; Whitby v. Mitchell (1890), 44 Chancery Reports 85 (Court of Appeal). The "modern" rule against perpetuities, by contrast, was developed to prevent property from becoming inalienable for lengthy periods of time through the operation of a series of shifting and springing uses, by limiting the time during which an interest in property must vest; Duke of Norfolk's Case (1681-85), 3 Chancery Cases 1, 22 English Reports 931 (House of Lords); Cadell v. Palmer (1833), 1 Clark & Finnelly 372, 6 English Reports 956 (House of Lords). The rule against perpetuities has been abolished in Manitoba; The Pepetuities and Accumulations Act, Revised Statutes of Manitoba 1987, Chapter P33, Sections 2-3. But see The Trustee Act, Revised Statutes of Manitoba 1987, Chapter T160, Section 59, which reposes jurisdiction in a court to vary or terminate a trust on application.

[131] Income Tax Act, Revised Statutes of Canada 1985, Chapter 1 (5th Supplement), as amended, section 70.

reconstruction of wills, is completely in harmony with the legal context surrounding the law of succession. The remainder of this chapter will examine how the power of the court to re-make wills under The Dependants Relief Act may be improved in light of prevailing Manitoba social values.

C. Problems in the Current Legislative Scheme

There are three problems in the legislative scheme provided by The Dependants Relief Act which necessitate law reform: namely will substitutes, contracting out, and claims based upon services provided to a deceased. The Dependants Relief Act restricts the ability of a testator to dispose freely of property upon death, by enabling a court to make provision for the family out of a testator's estate. The problem, however, is that in Manitoba in 1999, a series of transactions enable a testator to dispose of property after death without the property passing through his estate. These transactions, which operate as will substitutes, may be lawfully utilised to circumvent The Dependants Relief Act and to enable a testator to dispose of part or all of his estate without the necessity of a will, and thereby defeat the purposes of the Act. If a testator places property into joint tenancy, the surviving joint tenant will take the whole of the property by right of survivorship upon the testator's death. If a testator owns a policy of life insurance or a registered retirement savings plan, and designates a beneficiary of the policy or plan as someone other than his estate, then the proceeds of the policy or plan will vest on his death in the designated beneficiary by contract, regardless of the

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[132] Supra, The Wills Act, note 1, Section 8 .
[133] Banks v. Goodfellow (1870), Law Reports 5 Queen's Bench 549 at 563 (House of Lords).

provisions contained in his will.[134] A trust established during a deceased's lifetime with remainder provisions will enable property to be disposed of after death without the necessity of a will. A gift mortis causa or an outright disposition during a deceased's lifetime will also remove property from the reach of the legislation. These transactions all effect a disposition of property which passes entirely outside of a testator's estate. As a result, although the intent of the Act is designed to protect the family, the law of property, in conjunction with the laws of trusts and contract enable a testator to completely avoid The Dependants Relief Act and potentially leave the testator's family with limited recourse for redress.

The Dependants Relief Act provides a form of maintenance and support for a defined class of family members. It reflects a concern by the legislature that testators may not adequately protect their families, and that family members may not be able to adequately fend for themselves. In order to prevent family members from forfeiting residual legislative protections, the courts have attempted to define the scope of a family member's ability to release or waive rights otherwise provided by the Act. Only some Canadian jurisdictions have enacted legislation specifically addressing the problem of contracting out of the Act's safeguards. The issues of release and waiver go to the heart of the limitation placed on testamentary freedom by The Dependants Relief Act. If legislatures or courts permit the release or waiver of rights under the Act, then the constraints on testamentary freedom provided by The Dependants Relief Act will be curtailed by freedom of contract.

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[134] But see The Retirement Plan Beneficiaries Act, Statutes of Manitoba 1992, Chapter 31-Cap. R138, where Section 5 states that if a will specifically or generally identifies a retirement plan and the will is

The disposition of property after death by will substitutes, and the release or waiver of rights under the Act, provide testators with the means for circumventing the protections afforded the family by the Dependants Relief Act. Will substitutes may allow a testator to strip assets out of his estate, thereby transforming an order for maintenance and support into a dry judgment. If a court finds that a release of rights under The Dependants Relief Act bars a claim which might be pursued under the legislation, this will prevent an applicant from recovering an order for necessary or morally fair maintenance and support. The abandonment of morality as a primary basis for jurisdiction under The Dependants Relief Act prevents a court from granting relief under the Act where a member of the deceased's family has provided services to a deceased in the expectation of payment, or has assisted the deceased significantly with the acquisition, maintenance or enhancement of his assets.

The practical consequences of the abandonment of morality are that testators may be motivated to induce family members to provide them with unremunerated services during the testator's lifetime, and the family member may only have recourse to actions against his estate for quantum meruit or constructive trust based on unjust enrichment. The complete abolition of morality as a relevant consideration in applications for relief has created a gap within the legislative scheme which has left certain claimants potentially vulnerable, without the protection which The Testators Family Maintenance Act had previously afforded to them.

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executed subsequent to the designation of the retirement plan instrument, then proceeds of the retirement

Although it is difficult to state with certainty how frequently these problems of will substitutes, contracting out and residual moral claims arise, collectively they limit the ability of a court to re-make a testator's will in order to protect the family. Will substitutes reduce the quantum of assets which comprise an estate; releases and waivers eliminate an estate's obligations; while the elimination of morality as a primary basis of jurisdiction restricts the scope of relief otherwise available under the legislation. The remainder of this chapter will examine how approaches taken by legislatures and courts in jurisdictions outside of Manitoba have attempted to address these concerns, and will then offer proposals for legislative reform.

I. The Scope of Assets Attached by the Act

Section 2(1) of The Dependants Relief Act provides that the court may order that reasonable provision be made out of the "estate" of the deceased, but the Act does not provide a definition of the term "estate". This is problematic, because a properly constructed estate plan may lawfully enable a testator to dispose of his assets after death without leaving any estate, and effectively avoid The Dependants Relief Act. Consider the case of a testator who prepares his will, providing a gift of the residue of his estate to his wife, but if she predeceases to his children in equal shares per stirpes. After making the will, the testator may designate his mistress as beneficiary of his life insurance policies and registered retirement savings plans. He may rent, not own his marital home, but own some undeveloped property in the country with his brother in joint tenancy. He may also set up an trust which will take effect during his lifetime, with remainder provisions in favour of his favourite charity. This estate plan may in fact leave little or no

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plan will be disposed of by will and pass through the testator's estate.

property in the testator's "estate", although he has arranged for significant dispositions of property after death through various will substitutes. When the testator dies, the proceeds of the life insurance[135] and registered retirement savings plans[136] will, by contract, vest in the designated beneficiaries. The jointly held property in the country will vest in the testator's surviving brother, by right of survivorship. The remainder provisions of the lifetime trust will "click in" when the testator dies, assuming the testator's death was the condition stipulated by the trust to trigger the operation of those provisions. At the end of the day, the testator may have effectively structured his affairs so as to ensure that he leaves no estate of any real value. Based on the current wording of The Dependants Relief Act, the claim of any applicant granted standing under the Act would be in vain, because there would be no property available to satisfy an order for reasonable provision for maintenance or support.

i) Section 72 of the Ontario Succession Law Reform Act

In order to prevent the avoidance of The Dependants Relief Act in this manner, several jurisdictions have enacted legislation which effectively closes the gap contained in the current Manitoba legislation. Section 72 of the Ontario Succession Law Reform Act provides a very comprehensive response to this problem. It provides:

72 (1) Subject to section 71, for the purpose of this Part, the capital value of the following transactions effected by a deceased before his death, whether benefitting his dependant or any other person, shall be included as testamentary dispositions as of the date of death of the deceased and shall be deemed to be part of his net estate for purposes of ascertaining the value of his estate, and being available to be charged for payment by an order under clause 63(2)(f),

[135] King v. King (1990), 68 Manitoba Reports (2d) 253 (Manitoba Court of Queen's Bench).
[136] Daniel v. Daniel (1986), 41 Manitoba Reports (2d) 66 (Manitoba Court of Queen's Bench).

(a) gifts mortis causa;

(b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any chartered bank, savings office, credit union or trust company, and remaining on deposit at the date of the death of the deceased;

(c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivor or survivors of those persons with any chartered bank, savings office, credit union or trust company, and remaining on deposit at the date of the death of the deceased;

(d) any disposition of property made by a deceased whereby property is held at the date of his death by the deceased and another as joint tenants;

(e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof, but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of death of the deceased;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him; and

(g) any amount payable under a designation of beneficiary under Part III.

(2) The capital value of the transactions referred to in clauses 1(b), (c) and (d) shall be deemed to be included in the net estate of the deceased to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held as joint tenants was furnished by the deceased.

(3) Dependants claiming under this Part shall have the burden of establishing that the funds or property, or any portion thereof, belonged to the deceased.

(4) Where the other party to a transaction described in clause (1)(c) or (d) is a dependant, he shall have the burden of establishing the amount of his contribution, if any.

(5) This section does not prohibit any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been personally served on the corporation or person a certified copy of a suspensory order made under section 59 enjoining such payment or transfer.

(6) Personal service upon the corporation or person holding any such fund or property of a certified copy of a suspensory order shall be a defence to any action or proceeding brought against the corporation or person with respect to the fund or property during the period the order is in force.

(7) This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights.[137]

This legislation overcomes the limitations which might otherwise confront a court in making an order, where the bulk of the assets of the deceased pass outside of the probate process and do not form part of the deceased's estate. The provision includes, as testamentary dispositions on the date of death, certain transactions undertaken by the deceased during his lifetime and through a deeming provision includes the value of assets referred to in those transactions in the deceased's estate and makes those assets available for the support of a dependant. This provision will prevent a deceased from conducting his affairs during his lifetime either by inadvertence or design so as to defeat the maintenance claim of a dependant who is granted an entitlement to apply for support under the Act. Section 63(2)(f) of the Succession Law Reform Act enables a court to trace funds captured by the provision to transferees who may have received the property from the deceased, by securing payment under an order by a charge on property or

[137] Succession Law Reform Act, Revised Statutes of Ontario 1990, Chapter S26, Section 72. The category of dependants, which is defined in Section 57 of the Act, is quite broad and includes the spouse of the deceased, a parent of the deceased, a child of the deceased, or a brother of the deceased, to whom the deceased was providing support or was under a legal obligation to provide support immediately before his death. Therefore, although the scope of Section 72 is quite wide ranging, the category of dependants is not so restrictive as to limit its application. The provisions contained in section 72 apply in the event of dispositions after death. The Act also provides, however, that dispositions made by a deceased in good faith and for value during his lifetime are not liable to the provisions of an order made under the Act unless the value of the property in the opinion of the court exceeds the consideration received for the disposition. Similar provisions are contained in the Prince Edward Island, North West Territories, Newfoundland, Nova Scotia, Yukon, Saskatchewan, Alberta and New Brunswick Acts. Although the Manitoba Act does not contain similar provisions, a similar result has been obtained at common law, in the absence of legislation in Zajic v. Chomiak Estate (1990), 63 Manitoba Reports (2d) 178 (Manitoba Court of Queen's Bench).

otherwise.[138] This ensures that the intention of the legislature is not defeated by steps taken by the deceased before the provisions of the Act may be invoked.

ii) Section 20 of the Prince Edward Island Dependants of a Deceased Person Relief Act

One of the deficiencies contained in the Ontario legislation is that it does not adequately trace an absolute disposition made by a deceased prior to his death. The Prince Edward Island Dependants of a Deceased Person Relief Act attempts to fill this gap. Section 20(1) of the Dependants of a Deceased Person Relief Act provides:

> Where, upon an application for an order under section 2, it appears to the court that
> (a) the deceased has within one year prior to his death made an unreasonably large disposition of real or personal property (i) as an immediate gift while the donor and donee are alive, whether by transfer, delivery, declaration or revocable or irrevocable trust or otherwise, or (ii) the value of which at the date of the disposition exceeded the consideration received by the deceased therefor; and
> (b) there are insufficient assets in the estate of the deceased to provide adequate maintenance and support for the dependants or any of them,
> the court may, subject to subsection (2), order that any person who benefitted or who will benefit by the disposition pay to the executor, administrator or trustee of the estate of the deceased or to the dependants or any of them, as the court may direct, such amount as the court deems adequate for the proper maintenance and support of the dependants or any of them.[139]

iii) Section 21 of the Northwest Territories Dependants Relief Act

Section 21 of the Northwest Territories Dependants Relief Act extends the concept of recovery from a transferee further, by allowing an applicant to trace a transaction which occurred three years prior to the death of the deceased. Section 21 provides:

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[138] Ibid., Section 63(2)(f).
[139] Dependants of a Deceased Person Relief Act, Revised Statutes of Prince Edward Island 1988, Chapter D-7, Section 20(1).

Where
(a) the estate of a deceased is insufficient to provide appropriate maintenance to the dependants of the deceased, and
(b) the deceased within three years before the date of his or her death, made a transfer of property that in the opinion of the Supreme Court was unreasonably large,
if the Supreme Court considers it just in the circumstances, the Supreme Court may, on the application of the dependants or any of them, order the transferee to contribute to the maintenance of the dependant or dependants of the deceased.[140]

iv) The North Dakota Approach

Generally American testamentary law would be inapplicable but North Dakota's deserves consideration. North Dakota, like Ontario, is a jurisdiction which abuts Manitoba. Like Manitoba, North Dakota consists of a relatively large geographical area with a comparatively small population base. The economic base of both jurisdictions is significantly reliant upon agriculture. In light of these similarities, there is merit in considering how North Dakota has approached the problem of attaching non-probate assets, in the context of proceedings which seek to provide adequate support for a surviving spouse after death.

Chapter 30.1-05 of the Uniform Probate Code, adopted by the State of North Dakota, contains provisions which refer to the "elective share of surviving spouse".[141] This legislation is conceptually more similar to the accounting and division of assets provided by Sections 28-45 of Manitoba's Marital Property Act than it is to Manitoba's Dependants Relief Act, in that it provides for a right of election in a surviving spouse to seek a "forced share" of the estate based upon a fixed statutory formula, as opposed to the exercise of judicial discretion. Unlike The Dependants Relief Act, the legislation focuses on the surviving spouse only, not the children. It is possible, however, to refer to

[140] Dependants Relief Act, Revised Statutes of the North West Territories 1988, Chapter D-4, Section 21.

the North Dakota legislation and to conduct a meaningful comparative analysis because the concept of the "augmented estate" set out in its legislation is similar, in broad terms, to the concept of the "net estate" referred to in section 72 of the Ontario Succession Law Reform Act, and this concept "net estate" provides a useful framework for legislative reform in Manitoba.

The provisions of the Uniform Probate Code are designed to prevent a deceased person from disinheriting his surviving spouse and leaving her destitute, by imposing the concept of a forced share interest, and preventing a testator from disposing of his estate property in such a way as to defeat the forced share provisions contained in the Uniform Probate Code.

Chapter 30.1-05-01 of the Uniform Probate Code provides that if a surviving spouse of a decedent dies domiciled in North Dakota, she may take an elective share of one half of the "augmented estate". The concept of the augmented estate is set out in Chapter 30.1-05-02 of the Uniform Probate Code. Calculation of the augmented estate is lengthy and complex, but essentially requires the addition of two groups of property.[142] These include dispositions of property made by a deceased during his marriage, which provide him with continued control over the property up until his death, and property which the surviving spouse acquired before or after marriage which may be traced to the deceased as well as property which the surviving spouse herself may have purported to dispose of during her lifetime.

The augmented estate provisions are similar to provisions contained in The Marital Property Act of Manitoba designed to capture transactions which have taken

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[141] Uniform Probate Code, 1993, North Dakota, Chapter 30.1-05.

place within a specified period of time prior to the death of the testator and to add those items back into the calculation of the accounting and division of assets under The Marital Property Act. This Act provides that on the death of a spouse, a surviving spouse may make application for an accounting and equalization of assets[143] within six months of the grant of letters probate or letters of administration.[144] The surviving spouse may elect to take either under the will of the deceased or under the provisions of the Marital Property Act,[145] and these rights are in addition to the life interest a surviving spouse has in the homestead under The Homesteads Act.[146]

The concept of the augmented estate contained in the North Dakota legislation is valuable in that it attempts to attach certain interests which are not otherwise attached by Section 72 of the Ontario Succession Law Reform Act. Specifically, Chapter 30.1-05-02, paragraph 2(b)(1) of the Uniform Probate Code includes the following property:

> Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment created by the decedent during the marriage, the amount included is the value of the property subject to the power, to the extent that the property passed at the decedent's death, by exercise, release, lapse in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.[147]

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[142] Ibid., Chapter 30.1-05-02.

[143] The Marital Property Act provides a complex definition of the term "assets", encompassing most ordinary household assets used by a family for such things as shelter, recreation, transportation or education, and the value of an asset dissipated by a deceased spouse, an excessive gift, or transfer for inadequate consideration made by a deceased spouse before death. The definition of "assets" also includes gifts mortis causa, property with a right of survivorship held by a deceased spouse with a person other than a surviving spouse, various retirement savings plans, the cash surrender value of life insurance, and the proceeds of life insurance not payable to the estate; The Marital Property Act, supra, note 3, Sections 1, 6, 29, 35, 43, 44.

[144] Ibid., Section 29.

[145] Ibid., Section 43.

[146] Ibid., Section 44.

[147] Supra, Uniform Probate Code, note 141, Chapter 30.1-05-02, Paragraph 2(b)(1).

In addition, Chapter 30.1-05-02, paragraph 2(c)(3) provides a much more expansive definition of insurance than that contained in the Ontario Succession Law Reform Act. The language of the Uniform Probate Code provides:

> "Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if, and to the extent that the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds; the amount included is the value of the proceeds, to the extent that they were payable at the decedent's death."[148]

The problem related to will substitutes arises when a testator may attempt to denude his estate of assets in order to prevent certain family members who have been conferred standing under the Act from disturbing the provisions of his estate plan by applying under the Act for relief. The parties affected by this issue consist of not only those family members granted standing under the Act by their status, but also other beneficiaries whose entitlement by the testator's will may be disturbed if an order is made under the Act attaching to property disposed of by will substitutes. In order to draft legislation which will prevent will substitutes from defeating the purpose of The Dependants Relief Act, any legislative amendment will have to contain three components. First, the legislation will have to provide that certain assets or dispositions are to be included in the estate of the deceased for the purposes of the Act. Second, the list of assets and dispositions comprising will substitutes will have to be sufficiently expansive to encompass those forms of disposition which are currently utilised within contemporary Manitoba. Third, the legislation will have to contain provisions which will enable a court to trace assets in the event that a testator has completed transactions during his lifetime within a prescribed period of time prior to his death. The language contained in Section

72 of the Ontario Succession Law Reform Act combined with the language contained in the Prince Edward Island legislation provides a useful framework for legislative reform. The list of assets and dispositions contained in it should be supplemented by clauses similar to clauses related to insurance and powers of appointment contained in the North Dakota legislation. In order to ensure that the Act has teeth, and is able to recover property which has been transferred by the testator during his lifetime to third parties, the language contained in Section 21 of the North West Territories Dependants Relief Act should also be enacted in order to permit a tracing of property. The North West Territories' legislation is superior to the Prince Edward Island legislative enactment, in that the former purports to catch dispositions made within the three years preceding the testator's death, while the latter only catches transactions completed within one year of the testator's death. Legislation which prevents avoidance of The Dependants Relief Act through the use of will substitutes will enable the Act to protect vulnerable family members of the deceased from dispositions by will substitutes after death and from transactions made during the lifetime of the deceased which had the effect of structuring a deceased's affairs so as to defeat a dependant's claim.[149]

The proposed legislation should provide:

1. In this Act, 'estate' includes:

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[148] Ibid., Chapter 30.1-05-02, Paragraph 2(c)(3).

[149] Although the Quebec Civil Code provides for a legislative scheme based upon forced share, as opposed to judicial discretion, Article 689 of the Quebec Civil Code also provides for a concept of tracing, in that it provides that "where the assets of the succession are insufficient to make full payment of the contributions due to the spouse or to a descedant, as a result of liberalities made by acts inter vivos during the three years preceding the death or taking effect at the death, the court may order the liberalities reduced. Liberalities to which the spouse or descendant consented may not be reduced, however, and those he has received shall be debited from his claim"; Article 689 Civil Code of Quebec.

a) any donatio mortis causa;
b) any disposition of money or other property made by a deceased whereby property is held at the date of his death by the deceased and another as joint tenants;
c) any disposition of property made by the deceased by way of revocable trust, exercise of power of appointment, or designation of beneficiary by contract for the benefit of any person other than the deceased's estate within three years of the date of the date of the deceased's death;
d) any amount payable under a policy of life or accidental death insurance owned by the deceased.

2. A person may pay or transfer any property included in a deceased's estate to a person other than a dependant unless the person has been personally served with a true copy of an order made under this Act suspending such payment or transfer.

3. Where in an application by a dependant for reasonable provision out of the deceased's estate the court finds that there is insufficient property within the estate of the deceased to satisfy an order for the maintenance and support of a dependant and within three years of the deceased's death the deceased made an unusually large disposition of property from his estate which in the opinion of the Court was unreasonably large, the Court may order the transferee to contribute to the maintenance and support of the dependant.

Section Three should be kept separate from Section One because Section One refers to dispositions of property which only take effect after the death of the deceased, while Section Three refers to dispositions of property during the deceased's lifetime. By expanding the definition of the term "estate", this proposed legislation enables the Act to extend its reach beyond merely those assets referred to in an application for probate, by permitting a court to order reasonable provision out of the estate of the deceased for maintenance and support of the dependant, as well as to trace assets transferred out of an estate through unusually large transactions within three years of a deceased's death.

II. The Failure of the Act to Protect those Family Members Who Possess Legitimate Claims Based on Moral Entitlement

Claims based on moral entitlement are problematic, in that it is difficult for an ordinary client or his solicitor to predict with any degree of accuracy the moral predisposition of a particular court. There are, however, two kinds of claims founded on moral grounds which may be codified by principled and coherent legislation. These include claims for unpaid services, and claims by a dependant who has provided assistance to a testator in acquiring, maintaining or increasing the assets which comprises their estate.

Claims for unpaid services have historically been difficult for the courts in both domestic and succession laws. These claims often arise where an older family member, such as a parent or an uncle, promises a younger family member, such as an adult child or niece, that if they take care of them in their advancing years and help them manage their household, they will provide for them in their will. The initial motivation for the relationship between the family members is usually love and affection. The difficulty, however, is that, although love and affection constitute the foundation of the relationship, the ongoing provision of services is often based on the expectation of the younger family member that the deceased will fairly compensate them after death.

The problem of unpaid services may be analysed from the perspective of the law of unjust enrichment. If a niece provides housekeeping services to her elderly aunt, and the niece communicates to her aunt that she expects to be paid for those services, it is only just that the aunt compensate the niece for the services provided on the basis of quantum meruit, or be prepared to lose the service. It would be unjust for the aunt not to

compensate the niece, because the niece, has to her detriment provided value to the aunt. The aunt has been enriched and, in the absence of an agreement for compensation, there is no "juristic reason" for the enrichment.[150] The detriment suffered by the niece, and the corresponding enrichment experienced by the aunt, means that the court must take steps to rectify the problem and award compensation to the niece, because the niece has a "legitimate expectation" of payment.[151] The aunt has not been placed in a difficult position by this result, for she would have the opportunity to decline to accept the services during her lifetime, if she does not wish to be liable for compensation after her death.[152] The aunt could therefore plan for the liabilities to be faced by her estate after death and there would be no uncertainty in her estate plan as a result.

The provision of services will usually attract a claim for monetary compensation based upon quantum meruit, as opposed to a claim for constructive trust. In the case of an elderly person, by the time they are recipient of the services offered, they will have usually acquired their home and basic household assets; and it will be difficult to argue that the person who has provided the services has assisted the elderly person in acquiring the assets.[153] A constructive trust is, at the end of the day, a proprietary remedy; and "the notion that one can dispense with a link between the services rendered and the property which is claimed to be subject to the trust is inconsistent with the proprietary nature of the notion of constructive trust."[154]

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[150] Peter v. Beblow, [1993] 1 Supreme Court Reports 980 at 990 (Supreme Court of Canada). However, if the aunt refused the services, and the niece still provided the services, there may be no unjust enrichment.
[151] Ibid., 990.
[152] Avi Gesser, "Disrespecting Your Elders or Getting What is Rightfully Yours? Unjust Enrichment in Estate Litigation" (1997) Estate Trusts and Pensions Journal 37 at 42.
[153] Ibid., 54.
[154] Supra, Peter v. Beblow, note 150, at 996.

There have been two recent decisions of the Manitoba Court of Appeal addressing claims of this nature.[155] These decisions reflect the transplantation of concepts of unjust enrichment to the law of wills and estates. It would not be appropriate to expand The Dependants Relief Act to encompass every claim of this nature. If the services are provided by a stranger, then the common law of unjust enrichment should be permitted to continue to develop. If, however, the services are provided by the class of dependants who have been granted standing to apply for relief under The Dependants Relief Act, then the Act should be amended to permit them to advance a claim for compensation for unremunerated services. Although at first glance this may result in the development of two different lines of judicial authority, namely case law under this Act and precedents at common law, it is necessary to maintain a distinction between claims against an estate by dependants, as defined under the Act, and claims of creditors at common law. An order under The Dependants Relief Act may provide for security for payment of an order under the Act and provide for priority over the claims of creditors at common law.[156] It would be inappropriate to extend the definition of "dependant" to include all claimants for compensation for services provided, because this would extend the concept of a dependant beyond the family, and the focus of The Dependants Relief Act is upon family provision.

Ontario, Newfoundland and Nova Scotia have each enacted specific legislation in order to address, at least in part, this deficiency in the law.

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[155] Somers Estate v. Maxwell (1995), 107 Manitoba Reports (2d) 221 (Manitoba Court of Appeal); Single v. Macharski Estate (1995), 107 Manitoba Reports (2d) 291 (Manitoba Court of Appeal).

[156] Supra, The Dependants Relief Act, note 2, s. 16(2).

i) Section 5(1)(g) of the Newfoundland Family Relief Act

This provides:

(1) Upon the hearing of an application made by or on behalf of a dependant under subsection 3(1), the judge shall inquire into and consider all matters that should be fairly taken into account in deciding upon the application, including...
(g) services rendered by the dependant to the deceased.[157]

ii) Section 5(1)(g) of the Nova Scotia Testators' Family Maintenance Act

The Nova Scotia law provides:

(1) Upon the hearing of an application made by or on behalf of a dependant under subsection (1) of Section 3, the judge shall inquire into and consider all matters that should be fairly taken into account in deciding upon the application including, without limiting the generality of the foregoing...(h) any services rendered by the dependant to the testator.[158]

iii) Section 62(1)(r)(vi) of the Ontario Succession Law Reform Act

Here the Ontario Act provides:

In determining the amount and duration, if any, of support, the court shall consider all the circumstances of the application, including...(r) if the dependant is a spouse,...
(vi) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse had devoted the time spent in performing that service in remunerative employment and had contributed the earnings to the family's support.[159]

iv) The New Zealand Law Reform Commission Report

This Commission has advocated that New Zealand's dependants relief legislation be amended so that a claim may be advanced by a family member, either on the basis of an express breach of a promise to pay or where services have been provided, on the

[157] Family Relief Act, Revised Statutes of Newfoundland 1990, Chapter F-3, Section 5(1)(g).
[158] Testators Family Maintenance Act, Revised Statutes of Nova Scotia 1989, Chapter 465, Section 5(1)(g).
[159] Supra, Ontario, note 137, Section 62(1)(r)(iv).

ground that it would be unjust to allow the estate to keep the benefits provided to the testator, when the testator well knew there was an expectation of payment.[160]

The problem these legislative enactments are designed to address arises where a family member of a deceased performs services for the deceased in the expectation of payment. The parties involved are not limited to only those dependants granted standing under the Act, for any award made under the Act may potentially effect a redistribution of property, from non-family beneficiaries to those beneficiaries who have standing to make an application for relief as a result of their status. The Dependants Relief Act should be amended to provide that, in addition to ordering reasonable maintenance and support out of an estate, a court should be empowered to order payment of reasonable compensation out of the estate of the deceased. The specific language of the reform should be as follows:

> Where a dependant has provided services to a testator at the request and for the benefit of a testator, and the court is satisfied that the testator knew that the dependant expected to receive reasonable remuneration for his services, the court may order the payment of reasonable remuneration to the dependant out of the estate in order to compensate the dependant for the services provided to the deceased.

III. Failure of The Act to Provide Compensation for Contribution to a Deceased's Estate

Closely related to claims for unremunerated services is the problem which arises

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[160] New Zealand, Preliminary Report of The Law Commission, Testamentary Claims (Wellington, New Zealand Law Commission, 1996).

when a family member assists the deceased in building up her estate. These cases may arise in a variety of contexts, but they commonly occur where a child helps a parent build up a farm operation or business, or a spouse assists another spouse with the accumulation of assets during cohabitation. When the Testators Family Maintenance Act was repealed in 1989 and The Dependants Relief Act passed, the Manitoba legislature abandoned morality as one of the primary bases for the exercise of jurisdiction. Unlike morality, financial need is a much more objectively determined concept and it is easier to circumscribe the exercise of judicial discretion based on financial need than on morality.

A family member who may not necessarily be a dependant as defined in the Act may provide considerable assistance to a deceased in acquiring and building up her estate. The family member may have provided the deceased with necessary funding to operate a business, or simply provided services on an ongoing basis over time. The business or assets acquired may stem from the joint efforts of both the deceased and the family member. On the other hand, a deceased may have several children and some may have contributed nothing to the deceased's estate, while others contributed significant amounts of money and time. For example, in Re Walker's Will, the testator's adult son worked hard on the testator's farm in order to enable the farm to become a success.[161] The court found that the deceased had formed an inappropriate feeling of disdain towards his son, and awarded him relief under the former Testator's Family Maintenance Act. Similarly, in Re Steinberg, the court found that the applicant for relief had assisted the testator in building up his business and amassing his estate, and thus varied provisions of the will by an additional lump sum payment, in addition to that sum already provided to him by the

[161] Re Walker's Will (1963), 43 Western Weekly Reports 321 (Manitoba Court of Queen's Bench).

testator's will.[162] The court granted this relief to the adult son on the basis of the moral entitlement of the child, despite the fact that there had been fisticuffs between the adult child and the testator at one point in their relationship. In Barr v. Barr, the Manitoba Court of Appeal again confronted a claim by one of the testator's children who had worked on the farm since leaving school, improving the farm and investing some of his own money in it.[163] The estate was valued at $21,422, the farm was worth $20,000.00, and the testator divided the residue of his estate among his four children. The court awarded the applicant $6,000.00, and divided the net residue equally among the other children.

The Dependants Relief Act contains a gap in that it currently makes no provision for family members who are not financially dependant on the deceased at the time of his death, but who contributed significantly to the acquisition or maintenance of his estate. It also does not distinguish between the relative contributions made by various family members to the acquisition of a deceased's property. Two jurisdictions in Canada have enacted specific provisions within their dependants relief legislation which enable a court to grant relief for claims where a dependant has assisted a testator in acquiring, building up, or maintaining their estate.

i) Section 62(1)(i) of the Ontario Succession Law Reform Act

This provides that:

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[162] Re Steinberg (1969), 3 Dominion Law Reports 565 (Manitoba Court of Queen's Bench).
[163] Supra, Barr v. Barr, note 128.

> In determining the amount and duration, if any, of support, the court shall consider all the circumstances of the application, including, (i) the contributions made by the dependant to the acquisition, maintenance and improvement of the deceased's property or business;.[164]

ii) Section 5(1)(g) of the Newfoundland Family Relief Act

The Newfoundland Family Relief Act provides that:

> Upon the hearing of an application made by or on behalf of a dependant under subsection (1) of Section 3, the judge shall inquire into and consider all matters that should be fairly taken into account in deciding upon the application, including (h) a sum of money or property provided by the dependant for the deceased for the purpose of providing a home or assisting in a business....[165]

In order to address the current deficiency in the Act, the proposal for reform should stipulate that the basis of the claim is the contribution, or relative contribution, by the claimant to the deceased's in the course of the deceased's amassing his estate assets. The reform should take into account any substantial gifts provided by a deceased to a dependant during a deceased's lifetime, to avoid a dependant's reaping a double benefit under the legislation. This is consistent with section 8(1)(j) of Manitoba's Dependants Relief Act which enables a court to consider "any provision which the deceased while living made for the dependant and any other dependants", and is harmonious with the rules related to portions contained in the law of wills[166] and provisions of the Intestate Succession Act, related to advancements made during the lifetime of the deceased.[167] In the law of wills, if a parent gives property to a child by his will, and makes a substantially similar gift to the child during the parent's lifetime, the gift in the will is reduced by the

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[164] Supra, Ontario, note 137, Section 62(1)(i).
[165] Supra, Newfoundland, note 157, Section 5(1)(g).
[166] Hauck v. Schmaltz, [1935] Supreme Court Reports 478 (Supreme Court of Canada); Tucket-Lawry v. Lamoureaux (1902), 1 Ontario Law Reports 364 (Ontario High Court), affirmed 3 Ontario Law Reports 577 (Ontario Court of Appeal).
[167] Intestate Succession Act, Statutes of Manitoba 1989-90, Chapter 185, Section 8(5).

amount of the lifetime advancement, provided the court is satisfied that the parent intended that the child should not receive both the gift during the parent's lifetime and the gift made by will after the parent's death. This result arises because there is an equitable presumption against double portions. Similarly, section 8(5) of the Manitoba Intestate Succession Act provides that property given by an intestate to a prospective successor during his lifetime shall be treated as an advancement, provided the advancement has been declared by the intestate, or acknowledged by the recipient in writing. Failing this, the onus of proving that an advancement was made is on the person asserting the advancement. In this regard, the proposed reform should provide as follows:

> Where a court is satisfied that an applicant for relief has provided significant assistance to a testator in acquiring or maintaining property which constitutes part of the testator's estate at the date of his death, the court may, on application, grant the applicant reasonable compensation out of the estate for the assistance provided by the applicant to the deceased.
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> In this section, the word "assistance" includes financial assistance, services rendered, and any other form of assistance which in any way caused, contributed or facilitated the acquisition or maintenance of the property which constituted part of the testator's estate on his death.
>
> In the course of assessing the compensation under this section the court may consider any compensation made by the deceased to the applicant during the lifetime of the deceased in order to compensate the applicant for services provided to the deceased.

In a similar manner to the proposal respecting unremunerated services, the problem which generates the need for this legislation arises where a family member provided assistance to a deceased without compensation. The class of applicants entitled to apply for relief would be limited to those persons defined as dependants under the legislation; but again the parties affected would include both family members protected by the legislation, and any other beneficiary whose interest under the deceased's estate

would be disturbed if an order under the legislation is granted. The enactment of this provision would foster certainty in the law, because it would force every testator in Manitoba to consider seriously his obligations to family members who assisted him with the acquisition or maintenance or growth of his estate property.

IV. The Problem of Contracting Out of the Act

(i) Underlying Policy Considerations

The current policy objective of The Dependants Relief Act of Manitoba is to prevent testators from disinheriting their families and causing them to become impoverished. If a testator confers no benefit on his family by his will, his family may be required to look to the community for assistance and support. The law strives to prevent testators from transforming family members into public charges, by redistributing the private property of a testator among family members who are able to demonstrate financial need. An issue which arises is whether a potential dependant under the Act should be permitted to contract out of the protections afforded to them by the Act. Alternatively, should the law void such contracts on the basis of public policy, in order to protect a potential applicant for relief from their own folly or spite?

The germ of the problem frequently arises in the course of domestic litigation.[168] A husband and wife may separate and negotiate a separation agreement. It may provide, among other things for the exchange of mutual releases. The releases may include one for all claims each spouse might have against the estate of the other, including any claims under the The Dependants Relief Act. In Manitoba, as in all other Canadian jurisdictions

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[168] See, for example, Peters v. Gibbins, [1979] 3 All Canada Weekly Summary 686 (Ontario Supreme Court); Re Marquis Estate (1980), 30 New Brunswick Reports (2d) 93 (New Brunswick Court of Queen's

except Ontario, although a separation agreement is one factor a court may consider in an application for reasonable provision, a release of claims under The Dependants Relief Act will not automatically bar an application for relief.

In order to evaluate the approach taken by the courts to contracting out under The Dependants Relief Act, consider the treatment accorded releases between spouses in domestic proceedings. In 1987, the Supreme Court of Canada handed down three decisions under the former Divorce Act, a trilogy which considered whether parties to a separation agreement, who have received the benefit of independent legal advice, should be held to the terms of their agreement and prohibited from claiming for spousal support in the face of an absolute release.[169]

Three principles with relevance to the law of succession emerged from the trilogy. First, a separation agreement does not completely oust the jurisdiction of a court at the time the divorce is granted.[170] Second, although the court retains a residual discretion to rewrite a separation agreement in relation to spousal maintenance, considerable weight should be accorded to separation agreements by the courts in the interest of fostering closure and self-responsibility between the parties.[171] A court will consider whether the agreement was free and voluntary, the parties had independent legal advice and whether the agreement was grossly unfair. Third, although a party to a separation agreement may ultimately become a public charge, that fact alone is not sufficient to cause a court to vary

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Bench); McMaken v. McMaken (1984), 18 Estates and Trusts Reports 60 (Ontario Supreme Court); Mealey v. Broadbent (1984), 17 Estates and Trusts Reports 160 (Ontario Supreme Court).

[169] Pelech v. Pelech, [1987] 1 Supreme Court Reports 801 (Supreme Court of Canada); Richardson v. Richardson, [1987] 1 Supreme Court Reports 857 (Supreme Court of Canada); Caron v. Caron, [1987] 1 Supreme Court Reports 892 (Supreme Court of Canada). These three decisions were decided pursuant to the Divorce Act, Revised Statutes of Canada 1970, Chapter D-8.

[170] Supra, note 169, Pelech v. Pelech, at 827.

[171] Ibid., 850, 852-853.

a separation agreement.[172] The court has an obligation to protect the public purse; and although this policy consideration supports judicial intervention in the course of the variation of separation agreements, it is not determinative of the issue.

In Wagner v. Wagner Estate, Lysyk, J. had the opportunity to review the principles of law stemming from that trilogy of cases in the course of considering an application by a widow under the British Columbia Wills Variation Act. There the husband and wife entered into a separation agreement in 1982 which provided that the wife was to be paid $280,000.00, and the parties were to release each other of all claims. The husband died in 1986 and left his whole estate to his son. In 1987, the husband's estate was worth $400,000.00, while the wife was nearly destitute, having lost substantial sums of money on the Vancouver Stock Exchange. The widow alleged financial need and the matter came before Lysyk, J. who applied the trilogy and stated:

> There is, I think, merit in the defence submission to the effect that the philosophy and analysis of the Supreme Court of Canada in the trilogy relating to the effect of separation agreements are pertinent as a guide to the exercise of judicial discretion under section 2(1) of the Wills Variation Act. Agreements freely negotiated and with the advice of independent counsel should, as a general rule, be respected. The parties to such an agreement ought to be able to rely with some confidence upon its terms in ordering their affairs. The notorious uncertainty surrounding application of the Wills Variation Act tends to spawn protracted litigation. When spouses, through the lawyers, have been at pains to reach a permanent settlement, it would seem appropriate for a court, as well as the parties, to respect their agreement in the absence of compelling reasons to the contrary.[173]

The court found no such compelling reasons and dismissed the application. Although Lysyk J.'s approach is attractive because it fosters certainty in the law, the British Columbia Court of Appeal reversed his decision and made an order in favour of

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[172] Ibid., 852.

the spouse. The Court of Appeal limited the reach of the trilogy to "certain kinds of applications under the Divorce Act".[174] The Court of Appeal stated:

> Thus, it seems to me this case must be decided on the basis that, while the separation agreement is an important factor in the history of the parties, and that it governed their relationship during their married lifetime, it does not follow that the testator, for the purposes of the Wills Variation Act, can be said to have discharged the moral duty which the Act imposes upon him to make proper provision in his will for his needy wife.[175]

The Supreme Court of Canada refused to grant leave to appeal the Court of Appeal's decision.

The decision in Wagner v. Wagner Estate makes clear that certainty in the law requires that separation agreements be upheld, but also that protection of the family mandates that the court re-open an agreement if, at the date of the testator's death, circumstances have changed and the former spouse is in financial need. In Wagner v.

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[173] Wagner v. Wagner Estate (1990), 39 Estates and Trusts Reports 5 at 18 (British Columbia Supreme Court), reversed (1991), 62 British Columbia Law Reports (2d) 1 (Court of Appeal); leave to appeal to the Supreme Court of Canada refused (1992), 66 British Columbia Law Reports (2d) xxx.

[174] Ibid., note 158, (1991) 62 British Columbia Law Reports (2d) 1 at 10 (British Columbia Court of Appeal). The reach of the trilogy of cases has also been limited in family law by the specific legislative provisions contained in both the Divorce Act, Revised Statutes of Canada 1985, Chapter 3 (2nd Supplement), and The Family Maintenance Act, Revised Statutes of Manitoba 1987, Chapter F20. Section 15 of the Divorce Act, 1985 provides that in making an order for maintenance, the court shall take into consideration "the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including...(c) any order, agreement or arrangement relating to support of the spouse or child". Section 9(2) of the Manitoba Family Maintenance Act provides that a release of spousal support will be upheld unless the spouse required to make support is in default, the support is inadequate given the circumstances of both spouses at the time of the agreement, or the releasor or recipient of support is a public charge or a person in need of public assistance. In addition, in L.G. v. G.B. (1995), 127 Dominion Law Reports (4th) 385 (Supreme Court of Canada), L'Heureux-Dube, J., in delivering the the minority decision stated at page 403: "...while it is true that the parties should be encouraged to reach an agreement on the economic consequences resulting from their divorce rather than going to the courts, such agreements are only one factor, 'albeit an important one', which must be considered in the exercise of a judge's discretionary power..." to vary spousal support under section 17 of the Divorce Act, 1985. In addition, Sopinka, J., in delivering the majority decision stated at page 408 that "...I fully agree that this court, in an appropriate case, will have to review the application of the trilogy."

[175] Wagner v. Wagner Estate (1991), 62 British Columbia Law Reports (2d) 1 at 10-11 (British Columbia Court of Appeal).

Wagner Estate there had been a time lag of approximately seven years from the date of the separation agreement until trial, and the wife had lost considerable money on the stock market. For this reason, the court went behind the terms of the release and restructured the maintenance agreement negotiated by the parties after the husband died.

This decision of the British Columbia Court of Appeal provides that a separation agreement is a significant factor which the court may consider in an application for relief; but it is not determinative of the issue and will not bar an application for relief. Wagner v. Wagner Estate concerned the British Columbia Wills Variation Act, under which judicial discretion is exercised on the grounds of morality as well as financial need. However, the principle of law, that a separation agreement is a signficant but not determinative factor in an application for dependants relief, transcends those jurisdictions where relief is based on both morality and financial need. It also applies in Manitoba where the only basis for the exercise of a court's jurisdiction is financial need. Because the Supreme Court of Canada refused to grant leave to appeal, the decision of the British Columbia Court of Appeal in Wagner v. Wagner Estate represents the last word, at least for the moment on the law related to releases of claims under dependants relief legislation.

Accordingly in Manitoba, if a husband and wife enter into a separation agreement providing for an exchange of mutual releases for valuable consideration with independent legal advice, the release, while a significant factor, will not be determinative of the outcome of an application for relief under The Dependants Relief Act. The release constitutes evidence of what the parties intended but it does not bar a further application for relief. However, if the release has been granted for valuable consideration in the

course of a settlement, with each party receiving the benefit of independent legal advice, unless there has been a material change in circumstances from the date of the release until trial, a court will likely not disturb the settlement which has been reached. The policy rationale underlying this principle is provided in Boulanger v. Singh, a 1984 decision of the British Columbia Court of Appeal.[176] There the husband and wife entered into a separation agreement whereby they each purported to release the other from claims under the dependants relief legislation. The court quoted from Lord Merrivale in Matthews v. Matthews, [1932] P. 103 (D.C.), and held that the separation agreement had "evidential value, but not value by way of estoppel."[177] In the course of the reasons for decision, Macdonald, J.A. described the policy issues underlying contracting out and stated:

> Thus, an agreement between the parties may be perfectly suitable at the time it is made, and it may be treated as binding upon the parties during the lifetime of the testator. But, having regard to the scope and policy of the statute and the public interest, the moral duty of the testator may have to be reviewed in a wider context, and in light of the circumstances existing at the date of death of the testator. This does not mean to say that a solemn and well-considered agreement between the parties is to be disregarded. To the contrary, a fair agreement ought to be given considerable weight.[178]

The court found that the plaintiff had an ongoing financial need, and awarded her the sum of $50,000.00 from the estate.

Similarly, in Menrad v. Blowers approximately ten years before Wagner v. Wagner Estate was decided Morse, J. stated:

> So far as the claim of Mrs. Blowers is concerned, I see no reason why

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[176] Boulanger v. Singh (1984), 18 Estates and Trusts Reports 1 (British Columbia Court of Appeal). The decision in Boulanger v. Singh was applied by the British Columbia Court of Appeal in Wagner v. Wagner Estate, Supra.
[177] Ibid., 7.
[178] Ibid., 8.

> I should interfere with the bargain which the parties agreed to at the time the property settlement was concluded and the decree obtained. Clearly, Mrs. Blowers was prepared to accept what she agreed to in full settlement of her claims against her husband and, in exchange for what he agreed to pay, Mr. Blowers received a divorce. If death had not intervened, he would not have been able to obtain a decree absolute, and Mrs. Blowers would have had no further claims against him except to the extent that a court might have been persuaded to vary the maintenance provisions of the decree nisi, something which seems to me highly unlikely.[179]

(ii) Various Legislative Responses to Contracting Out of the Act

The legislatures of several provinces have attempted to address the issue of contracting out. In Nova Scotia, Prince Edward Island and The Yukon, a waiver or release of rights under family provision legislation will be of no force or effect. In Ontario, a release or waiver will not bar an order for relief, unless the dependant was neither someone to whom the deceased was providing support or someone to whom the deceased was under a legal obligation to provide support immediately before his death.

(a) Sections 57 and 63(4) of the Ontario Succession Law Reform Act

There are two relevant provisions contained within the Ontario legislation including Sections 57 and 63(4) of the Succession Law Reform Act. Section 57 provides:

> "In this part, "dependant" means
> (a) the spouse of the deceased,
> (b) a parent of the deceased,
> (c) a child of the deceased, or
> (d) a brother of the deceased,
> to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death.

Section 63(4) of the Ontario Succession Law Reform Act provides that:

> "An order under this section may be made despite any agreement or waiver

[179] Menrad v. Blowers (1982), 137 Dominion Law Reports (3d) 309 (Manitoba Court of Queen's Bench).

to the contrary."[180]

The Ontario legislation is unique because its definition of "dependant" to a certain extent, contradicts the language in Section 63(4) of the Ontario Act.

(b) Section 16 of the Prince Edward Island Dependants of a Deceased Person Relief Act

This provides:

> An agreement by or on behalf of a dependant that this Act does not apply or that any benefit or remedy provided by this Act is not to be available is invalid.[181]

(c) Section 16(2) of the Nova Scotia Testator's Family Maintenance Act

> If a dependant has entered into any agreement with a testator in his lifetime the consideration for which is a promise by the dependant not to apply under this Act for relief from the provisions of the testator's will, such promise is not binding upon the dependant under this Act.[182]

(d) Section 17 of the Yukon Dependants Relief Act

Similarly:

> Any agreement by or on behalf of a dependant that this Act does not apply or that any benefit or remedy provided by this Act is not to be available is invalid.[183]

(iii) Proposals For Reform

The issue that contracting out of the legislation raises is that various family members who have been granted standing to apply for relief under the legislation by virtue of their status, may release or waive their statutory rights, either by consent or as a result of the undue influence of the testator. The contracting out provisions have a profound impact upon the concept of proprietary rights. The Dependants Relief Act

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[180] Supra, Ontario, note 137, Section 63(4).
[181] Supra, Prince Edward Island, note 139, Section 16.
[182] Supra, Nova Scotia, note 158, Section 16(2).

renders the proprietary rights of a beneficiary under a will contingent upon the exercise of judicial discretion. The Dependants Relief Act does not create an explicit proprietary entitlement, such as under the Intestate Succession Act or The Homesteads Act, under which a contracting out would be appropriately enforceable, but, rather, gives the court a discretion, the exercise of which should not be able to be defeated. If the Act permits the release or waiver or its protections, then freedom of contract may limit the scope of judicial discretion provided by statute. The prohibition of the right to release or waive rights by contract strikes a balance between the limitations placed on testamentary freedom by The Dependants Relief Act and the protection of the interests of beneficiaries provided by The Wills Act.

In assessing whether to allow contracting out of the legislation, the social reality reflected in the case law indicates that, in the course of completing a separation agreement, there is a propensity for separating spouses to provide each other with releases of all claims that each may have against the other. These releases usually extend to claims under The Dependants Relief Act. The decisions of the courts related to releases and dependants relief legislation have consistently stated that releases, while of significant evidential value, will not operate as a bar to an application for relief. The challenge confronting the legislature and the courts, however, is to balance the needs of an ordinary client for finality in legal proceedings, as against protecting vulnerable family members from pressures which may arise in the course of concluding separation agreements. Uncertainty in the law and disrespect for the legal process may result if contracts freely entered into, with independent legal advice, are not enforced by the

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[183] Dependants Relief Act, Revised Statutes of the Yukon Territory 1986, Chapter 44, Section 17.

courts. However, the long term consequences flowing from such releases necessitate judicial regulation of the release and waiver process.

Therefore, the legislature should pass an enactment providing that, in order for a release or waiver to be valid, it must be made subject to court approval.[184] In light of the vulnerability of parties in agreements between family members, courts should also have the power to vary agreements when circumstances materially change from the date of the release to the date of the testator's death. This will necessitate assessing the circumstances at the time the agreement was entered into, comparing the changes which have transpired over time, and determining whether, in light of the changes in circumstances, the agreement remains fair and just. If a court approves a release at the time a contract is entered into, an applicant for relief under the Act will have an additional hurdle to overcome if he ever attempts to obtain relief under the legislation again. Specifically, if a court approves a release or waiver of rights under the Act at the time the contract is entered into, an applicant who seeks relief under the Act when the testator subsequently dies will have to demonstrate both financial need under subsection 2(1) of the Act, as well as demonstrate that a material change in circumstances from the date of the release was approved to the date of a testator's death. It is conceded that the creation of this additional hurdle may not preclude subsequent applications under the Act, and courts may supersede prior judicial approval upon proof of changed circumstances.[185]

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[184] Supra, New Zealand, note 160, at 99.

[185] In Re Edwards Estate (1961-62) 36 Western Weekly Reports 605 (Alberta Supreme Court, Appellate Division), Smith, C.J.A. stated at page 609 that judicial approval of a separation agreement providing for a

This proposal for reform may, however, make the application process more difficult for the dependant, and thereby provide greater protection to testators who secured releases in exchange for valuable consideration.

Accordingly, in order to clarify the law in relation to this matter, Manitoba should enact the following legislative provision:

> The Court may approve or enforce the release or waiver of a dependant's rights under this Act provided the court is satisfied that the releasor has freely and voluntarily signed the release or waiver after first obtaining the benefit of independent legal advice and receiving valuable consideration in exchange for the release or waiver granted, and that the taking of the release or waiver by the releasee is not grossly unfair, either at the time of the grant of the release or waiver or at the time of the releasee's death.

V. The Problem of Judicial Will-Making Revisited

The common thread flowing through the rectification of wills, wills construction and application for relief under the dependants relief legislation is the judicial reconstruction of wills. The underlying policy consideration concerns the extent to which freedom of testamentary disposition should be constrained by judicial discretion, and whether the fetters imposed upon judicial discretion are sufficient to safeguard the family and protect testamentary autonomy. In wills rectification and construction proceedings, as well as in applications for relief under dependants relief legislation, the courts often premise their decisions on the basis that a court does not have authority to make a new will for a testator.

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release of rights under dependants relief legislation was, however, of "no legal consequence whatever and added no legal effect to the separation agreement it did not have before approved" by the court at first instance.

A recent example of this judicial attitude is reflected in the decision of the Supreme Court of Canada in Tataryn v. Tataryn, where McLachlin, J., in considering an application under the British Columbia Wills Variation Act, stated:

> The other interest protected by the Act is testamentary autonomy. The Act did not remove the right of a legal owner of property to dispose of it upon death. Rather, it limited that right. The absolute testamentary autonomy of the 19th century was required to yield to the interests of spouses and children to the extent that this was necessary to provide the latter with what was "adequate, just and equitable in the circumstances". And if that testamentary autonomy must yield to what is "adequate, just and equitable", then the ultimate question is, what is "adequate, just and equitable" in the circumstances judged by contemporary standards. Once that is established, it cannot be cut down on the ground that the testator did not want to provide what is adequate, just and equitable....
>
> I add this. In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligation as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only insofar as the statute requires.[186]

By couching her language in terms of testamentary autonomy, McLachlin, J. underscored the historical reluctance of the English and Canadian common law courts to disturb the scheme of distribution provided by a testator's will. The reality, however, is that courts do re-make wills every time they rectify or construe a will, or grant relief under dependants relief legislation. This was emphasised by Egbert, J. in Re Willan:

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[186] Tataryn v. Tataryn, [1994] 2 Supreme Court Reports 807 (Supreme Court of Canada), at 815, 823. See also Cameron Harvey, The Law of Dependants' Relief in Canada (Scarborough: Carswell, 1999), pp. 166-169, where Professor Harvey, in discussing testamentary autonomy, cites these excerpts from Tataryn v.

> ...the statement that 'the Act is not a statute to empower the court to make a new will for the testator'... amounts not only to a closing of the court's eyes to the realities of the situation, but also to the enunciation of a principle which is palpably untrue. The Act does confer power on a court to make a new will for the testator and every time a court grants an application under the Act it does in fact make a new will for a testator....It seems to me futile to deny that the Act does confer upon the court the very power which it, in fact, actually confers.... The Act, being in derogation of a centuries-old right of free testamentary disposition, should be construed strictly, and that, despite the wide discretionary powers conferred on the court, those powers should be exercised only to the limited extent necessary to achieve the main purposes of the Act....[187]

In wills rectification and construction proceedings, the law is designed to effect the intentions of a testator, while in family provision proceedings, the law is intended to provide reasonable support for family members granted status to make application for relief, provided the estate has the means to pay support. In order to assist ordinary clients, legislative reform should endeavour to clarify the law and provide a coherent set of legal principles which will enable clients to predict the outcome of proceedings. Apart from legislative reform, however, it is also necessary for the courts to abandon the fiction that they do not re-make a will for a testator and explicitly acknowledge that they do so each time they entertain an application for rectification, construction, or family provision. The courts should recognise that these proceedings result in a new will being made for a testator and strive to develop a consistent approach which allows ordinary clients to predict how testamentary autonomy will be balanced against judicial discretion in the context of rectification, construction and dependants relief proceedings.

Tataryn, as well as the excerpt from Re Willan Estate, [1951] 4 Western Weekly Reports (New Series) 114 at 126 (Alberta Supreme Court), which is cited below.

[187] Re Willan Estate, [1951] 4 Western Weekly Reports (New Series) 114 at 126 (Alberta Supreme Court).

CONCLUSION

A. Importance of Law Reforms in the Context of Solicitors' Negligence

The law related to solicitors' negligence for failure to draw a will properly and to ensure its due execution in compliance with statutory requirements is evolving. Although nineteenth century courts limited solicitors' liability on the basis of privity of contract,[188] in the twentieth century the principles of tort liability enunciated in McAlister (Donoghue) v. Stevenson[189] and later in Hedley Byrne & Co. v. Heller & Partners Ltd.[190] have been recently applied in circumstances where solicitors have made mistakes in the course of preparing or attending upon the execution of wills. As an example, in the 1978 British Columbia decision of Whittingham v. Crease & Co., a lawyer who attended upon his client for the execution of a will was found liable in negligence on the basis of the rule in Hedley Byrne & Co., because he erroneously allowed the wife of a beneficiary designated in the will to attest the signature of the testator at the time of execution.[191] This mistake by the solicitor was in direct contravention of the statutory requirement that neither a beneficiary nor the spouse of a beneficiary could validly witness a will. The gift in favour of the beneficiary was declared void, and the court found the solicitor liable for the loss sustained by the disappointed beneficiary. Similarly, in Ross v. Caunters, a decision of the English Court of Chancery, a solicitor forwarded a draft will to his client with a letter of instructions detailing the manner in which the will had to be executed.[192] The solicitor neglected to indicate in the letter that neither a beneficiary nor a spouse of a

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[188] Stan J. Sokol, Mistakes in Wills in Canada (Carswell: Scarborough, Ontario, 1995), at 31.
[189] Donoghue (McAlister) v. Stevenson, [1932] All England Reports 1 (House of Lords).
[190] Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1963] 2 All England Reports 575 (House of Lords).
[191] Whittingham v. Crease & Co., [1978] 5 Western Weekly Reports 45 (British Columbia Supreme Court).

beneficiary should witness the will. The spouse of the beneficiary witnessed the will, and the gift was declared void. Megarry, V-C. held that a solicitor could be found liable to both the testator and the beneficiaries of the testator who may be harmed by the negligence of the solicitor, on the basis of the rule in McAlister (Donoghue) v. Stevenson. The court found the solicitor liable for the beneficiary's economic loss because it was reasonably foreseeable and within the direct contemplation of the solicitor that the beneficiary would likely suffer prejudice if the solicitor discharged his duties in a negligent manner.

Both Whittingham v. Crease & Co. and Ross v. Caunters concerned solicitors' negligence in the context of wills execution. In 1997, the Saskatchewan Court of Queen's Bench extended the principles applied in those two cases to a case where the solicitors were negligent in the course of taking instructions and preparing a will. In Earl v. Wilhelm, the testator was initially represented by a member of the defendant law firm who had incorporated his farming business for tax purposes.[193] That member of the defendant firm was then appointed to the Bench, and a second member of the law firm assumed conduct of the testator's affairs and prepared his will. The will provided for specific gifts of farm land. The testator transferred his farm land to his corporation and the gifts failed. As a result, the land fell into residue and was disposed of according to the residuary clauses contained in his will. The beneficiaries who were designated to receive the land by will commenced legal action against the lawyer who had become a judge,

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[192] Ross v. Caunters, [1979] 3 All England Reports 580 (Chancery Division).
[193] Earl v. Wilhelm (1997), 160 Saskatchewan Law Reports 4 (Saskatchewan Court of Queen's Bench), further reasons 164 Saskatchewan Law Reports 4 (Saskatchewan Court of Queen's Bench), further reasons 166 Saskatchewan Law Reports 148 (Saskatchewan Court of Queen's Bench).

because he had incorporated the farming operation, against the lawyer who drew the will, for failing to verify ownership of the lands, and against the law firm.

The court held that the defendants were seventy-five per cent negligent and that the testator was twenty-five per cent contributorily negligent for the instructions he gave to his solicitor. Zarzeczny, J. applied the English decision in White v. Jones, where Lord Brown-Wilkinson stated:

> The solicitor who accepts instructions to draw a will knows that the future economic welfare of the intended beneficiary is dependant upon his careful execution of the task. It is true that the intended beneficiary (being ignorant of the instructions) may not rely on the particular solicitor's actions. But, as I have sought to demonstrate, in the case of a duty of care flowing from a fiduciary relationship liability is not dependant upon actual reliance by the plaintiff on the dependant's actions but on the fact that, as the fiduciary is well aware, the plaintiff's economic well-being is dependant upon the proper discharge of his duty. Second, the solicitor by accepting the instructions has entered upon, and therefore assumed responsibility for, the task of procuring the execution of a skillfully drawn will knowing that the beneficiary is wholly dependant upon his carefully carrying out his function. That assumption of responsibility for the task is a feature of both of the two categories of a special relationship so far identified in the authorities....[194]

Zarzeczny, J. added:

> To suggest that it is a sufficient discharge of a solicitor's duty to a testator in circumstances such as these to simply inquire of him what he wishes and then to record and thereafter prepare the will without anything further is to relegate a solicitor and his obligations to that of a parts counterman or order taker. The public is entitled to expect more from the legal profession.[195]

It is beyond the scope of this thesis to provide a detailed study of the law of solicitors' negligence. In order to evaluate the efficacy of judicial will-making, and

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[194] White v. Jones, [1995] 1 All England Reports 691 at 717-718 (House of Lords).
[195] Earl v. Wilhelm (1997) 160 Saskatchewan Law Reports 4 at 20 (Saskatchewan Court of Queen's Bench).

assess whether the law should be strengthened through legislative reform, it is necessary to consider whether the law will produce a more just result by permitting a potential beneficiary under a will, or an applicant under The Dependants Relief Act, to seek relief from the courts in the context of will rectification or construction; or alternatively, to seek family provision, as opposed to an action that might otherwise lie against a solicitor for negligence or a claim by a disinherited beneficiary for social assistance.

The issues may be illustrated by a concrete example. A testatrix who is the sole income provider for her household meets her solicitor to prepare her will. In the course of providing the solicitor with instructions, the testatrix informs the solicitor that she is married with two adult children who are both on their own and doing well. She further indicates to the solicitor that her marriage is shaky and, in her recent cohabitation agreement her husband waived his claim to a marital property accounting. She wishes to leave her husband nothing by her will. Concerning the children, she wishes to divide the residue of her estate into two equal shares, to provide each child with a life interest in the residue, with remainder to their children in equal shares per stirpes. Any residue remaining should devolve upon her issue in equal shares, per stirpes.

The solicitor should advise the testatrix that, under The Dependants Relief Act, her husband will likely be in a position to apply for reasonable provision out of the estate for maintenance and support. In order to lawfully circumvent the ability of the court to re-make her will and disturb its dispositive scheme, she may wish to consider disposing of her estate through the use of various will substitutes. These might include, for example, setting up a trust during her lifetime with remainder provisions in favour of the children, single premium payment life insurance designating the children as beneficiaries,

a transfer of all property into joint tenancy with either or both of the children, or outright absolute gifts which she could make during her lifetime.

In the face of this advice, the client may say to her solicitor: "those are all good ideas and I want to think about them for a few days. In the meantime, just prepare a 'simple will' for me to sign, so I have something in place to tide me over while I consider my options further." The solicitor then prepares a will while the client waits at the office, but by inadvertence provides for an absolute gift in favour of the children, with a gift over to the grandchildren , as opposed to a life interest to her children with remainder to the grandchildren, as instructed. The solicitor may also forget to include a residuary clause in the will. The will, only three pages in length, is then read by the testatrix who, not being legally trained, does not notice the errors. The will may be duly executed and placed in safekeeping. When the testatrix dies a year later, one of her children will have already predeceased her without leaving issue, and the testatrix will not have returned to her solicitor's office since she initially attended upon him to have the will drawn. At that point, the remaining child, the testatrix's husband and the executor will each find their way into their own respective solicitor's office. The lawyer who drew the will would notify the Law Society professional liability insurer of potential claims which may be brought against him for negligently preparing the will.

The solicitors for the executor, surviving spouse, and children each have divergent interests. The executor will likely instruct his solicitor to take all appropriate steps to protect the testatrix's intentions. This will likely necessitate asking the court to re-make the will, by either rectifying the will at probate or allowing it to be admitted to probate and asking the court to read it at construction as if certain words were added and deleted.

Based on the law of Manitoba at present, the court at probate does not have the power to rectify a will by adding words. Therefore, rectification can not assist the parties in this case. The best to be hoped for by the executor would be to persuade the court to read the will in light of the surrounding circumstances and available indirect evidence of intention, inviting the court to read the will as if the gifts actually intended by the testatrix were contained within the will's four corners.

The husband, left nothing by the will, will likely instruct his solicitor to make application for reasonable provision out of the estate for his maintenance and support. His solicitor will have to ask the court to re-make the will by exercising its discretion under The Dependants Relief Act, to order the payment of support out of the estate. Alternatively, his lawyer will seek to oppose the re-making of the will at probate or construction because, in light of the predecease of one child without issue and in the absence of a residuary bequest in the will, the property earmarked for the predeceased child will go as on an intestacy. In Manitoba, because the parties were married and cohabiting on the date of death and all children of the parties were children of the marriage, the widower would take the gift as on an intestacy.[196]

The child who survived the executor would likely instruct his solicitor to oppose the re-making of the will by the court. He will wish to retain the absolute gift of his share of the residue provided by the will. He will also instruct his solicitor to oppose the re-making of the will under The Dependants Relief Act, because any award in favour of the widower under that Act would likely be paid out of the residue of the estate and would directly affect his residual share. Alternatively, he may seek to have the court re-make

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[196] Intestate Succession Act, Statutes of Manitoba 1989-90, Chapter 43-Cap. 185, Section 2(2).

the will himself, in order to have the court either directly or notionally insert the residue clause omitted by the solicitor's inadvertence.

Finally, the solicitor who drew the will would advise all parties that he is in a conflict of interest, and that they must each seek independent legal advice. With the consent of the Law Society, he would likely turn his file over to his professional liability insurer, who would appoint counsel on his behalf to assist him in the inevitable proceedings to follow.

As an alternative to proceedings to re-make the will, the parties could choose to invoke other remedies. The children of the surviving child could sue the solicitor who drew the will for negligence, on the basis that they should have received the balance of the capital remaining after the termination of their mother's life interest, as opposed to a gift of capital which would be paid only in the event of her predecease. The surviving child could sue the solicitor who drew the will for failure to include a clause providing for a bequest of the residue in favour of the two children. He could also sue the solicitor who drew the will for failure to follow up with the testatrix to determine if she wished to dispose of any of her property using will substitutes, when he well knew that the "simple will" was put in place only to "tide her over". In the absence of an action for reasonable support, the husband would have no basis for an action against the solicitor who drew the will, and may have no alternative but to seek support from the community through social assistance.

In Mistakes in Wills in Canada, Stan J. Sokol identified a number of underlying problems related to the viability of tort actions against solicitors, in connection with

determining the measure of recoverable damages.[197] Sokol indicated that even if professional negligence could be proved, a series of factors may reduce the scope of recoverable damages so as to render a lawsuit impractical.

In the course of a negligence action, a court must consider where the loss has fallen. In the above example, the integrity of the estate itself has not been violated, and the estate has not suffered any loss. The only issue to be determined is how the assets of the estate will be distributed. A claim by the surviving child against the solicitor who drew the will, for failure to complete proposed transactions during the deceased's lifetime, is speculative at best. The testatrix indicated that, for the immediate future, she just wanted a "simple will". It may not have been easy for the solicitor to persuade the testatrix to re-attend at his office to complete those transactions. Even if the testatrix did re-attend, she may not have signed all of the documents prepared for her by the solicitor. She may have required changes to the documents, or simply wished to take further time to consider her position. She could also have re-done her will, upon further reflection. These factors are only subject to conjecture and cannot be ascertained with certainty.

A second problem confronting the surviving child and grandchildren is to determine the value of the estate for the purposes of the damage assessment. If the estate had a specified value on the date the solicitor originally received instructions, then that value could be used as a basis for calculating the foreseeable loss. On the other hand, if as a result of the passage of time the value of the estate diminished, the actual loss suffered by the beneficiaries would be reduced. In Earl v. Wilhelm, the court "favoured an award of damages equal to the value of the bequest lost at the time of the death with

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[197] Sokol, supra, note 188, at pp. 50-51.

appropriate adjustments (whether by way of interest or valuation to the date of judgment)".[198] If the value of the estate at the date of death is the basis for the damage assessment, the court must then determine what impact, if any, The Dependants Relief Act application will have on the ultimate residual value of the estate in determining quantum. If the application is successful, then the residue of the estate will be reduced. If The Dependants Relief Act application is heard before the hearing of the rectification or construction proceedings, there may be separate findings of fact. It may be necessary to arrange to have all matters heard at the same time. This may cause additional delays and costs. It will be difficult for a court to consider an award of damages until the net value of the estate is ascertained. On the other hand, if the surviving child or grandchildren are only partially successful, and the residue clause is not inserted by the court in the will, either at probate or notionally in construction, then the husband will take on the partial intestacy. This result may further impact on the damages assessment and may also affect the outcome of the The Dependants Relief Act application.

This example does not provide any indication as to whether the testatrix was advised of the error contained in the will. If she was aware of it, but took no steps to correct it, the court may be hard pressed to hold the solicitor liable for negligence in the course of drawing the will. Moreover, as Sokol suggests, the courts must consider the problem of the solicitor who receives his client's instructions, warns his client of potential dangers and, in the face of that advice, is instructed by his client to proceed. If the solicitor in this example had caught the errors related to the life interest and remainder interest, notified his client, and his client responded by saying "don't worry, my children

[198] Supra, Earl v. Wilhelm, note 193, at 20.

know what I mean and they will work it out when I'm gone", the court may have a difficult time determining the scope of duty, if any, to attach to a solicitor in those circumstances.

In addition to the issues raised by Sokol, Professors Langbein and Waggoner have highlighted several additional concerns which further reduce the usefulness of tort litigation as a suitable remedy in place of the judicial reconstruction of wills.[199] In the above example, it was assumed that the solicitor who drew the will carried sufficient professional liability insurance to satisfy any judgment a plaintiff might recover. If the estate is large, and the loss suffered by a beneficiary exceeds the solicitor's coverage, then an action in negligence will not provide a remedy to a disappointed beneficiary in any event. A will speaks from death, and the error may be discovered many years after the will is prepared. The lawyer who drew the will may himself be deceased or retired by the time the will is read, and carry no professional liability insurance. Once again, the beneficiary may well have a meritorious claim, but any judgment granted by the court may hold with little or no scope for recovery.

In the above scenario, the facts involved a professionally drawn will. A tort action would be particularly ineffectual in the event of a home drawn will. If a testatrix drafts a will on her own, in the absence of jurisdiction in a court to re-make the will, a beneficiary who was left out may be left with no more than common law actions for unjust enrichment, quantum meruit, or similar proceedings if the foundation to support those proceedings exists.

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[199] Supra, J.Langebein and L. Waggoner, note 68 at 588-590.

Tort actions are expensive, drawn out and unpredictable. If a solicitor is represented by a professional liability insurer, all appropriate defences may be raised, thereby lengthening the proceedings and adding costs to the plaintiff. As time progresses and costs accrue, the value of the beneficiary's claim may diminish, due to the expense, delay and uncertainty associated with the action. Tort actions are simply not as useful for redressing wrongs in the context of wills and estates as are proceedings to judicially reconstruct wills, provided the legislature has conferred on the courts discretion which provides a rational, logical and predictable set of rules. In practical terms, such legislation may serve to shield the legal profession from claims for professional negligence. The Court of Queen's Bench Rules may be amended, however, to provide that in the event of an application for rectification, construction or family provision, the court has a discretion to award costs against a solicitor who drew the will, if the court is satisfied that the judicial reconstruction of the will was necessitated by the negligence of the solicitor.

B. Judicial Reconstruction of Wills within the Broader Legal Context

The impact of the judicial reconstruction of wills upon the concept of proprietary rights has profound implications for the rule of law and the administration of justice. In the illustration provided in this chapter, the testatrix intended to provide a life interest to her children, with remainder to their children in equal shares per stirpes. Instead, the will provided for an absolute gift to the children, with a gift to the grandchildren, in the event of the children's predecease. As a result of an error caused by the solicitor in the course of drafting the will, the grandchildren of the testatrix suffered a loss of the gift of capital which had been intended for them.

The rule of law provides that an individual is ordinarily subject to a civil sanction or criminal penalty when he has transgressed a rule contained either within the private or public law system.[200] The rule of law applies in Manitoba and is "a fundamental postulate of our constitutional structure".[201] The rule of law may not always apply in the Manitoba law of succession, however, for in the scenario referred to, the grandchildren have been deprived of their proprietary entitlement under the testatrix's will, through no fault of their own, but, as a result of a blunder by the solicitor. The integrity of the rule of law therefore mandates that a mechanism be in place within the legal system to permit the innocent grandchildren to apply to court for appropriate relief. In light of the deficiencies inherent in reliance upon tort actions, it is necessary to ensure that there is a legislative scheme which provides a principled, coherent and predictable method for innocent parties to seek judicial relief, so that the rule of law is protected. The grandchildren will likely have both a moral and legal claim. Without a useful remedy, the rule of law, the scope of private proprietary rights and testamentary freedom may all be placed in jeopardy.

Closely related to the issues concerning the rule of law are problems of unjust enrichment. In the above example, the testatrix's surviving child received a benefit solely as a result of the solicitor's error, and the benefit was to the detriment of the testatrix's grandchildren. Theoretically, the surviving child should be required to hold the gift of capital in remainder in trust for his children, in accordance with the testatrix's

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[200] W.Barton Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror" (1952) 65 Harvard Law Review 721 at 734.

[201] Roncarelli v. Duplessis, [1959] Supreme Court Reports 121 at 142 (Supreme Court of Canada).

intentions.[202] In practical terms, however, an action for unjust enrichment against the surviving child would be fraught with the same pragmatic constraints inherent in action for solicitor's negligence, namely cost, delay, and uncertainty in outcome. Therefore, in order to prevent the beneficiary who received the windfall from becoming unjustly enriched to the detriment of the beneficiary whose interest was defeated, a court should intervene to reconstruct a will to effect testamentary intention or provide for the family. Although historically the requirements of The Wills Act have impeded the judicial reconstruction of wills, the concerns over authenticity in rectification and construction may be addressed by admitting extrinsic evidence of testamentary intention, maintaining the civil standard of proof on a balance of probabilities, while according the evidence appropriate weight. In addition, by closing the gaps in The Dependants Relief Act, the court will be able to prevent an avoidance of the Act and ensure that all beneficiaries entitled to its protection are able to pursue the remedies intended by the legislation.

Both the rule of law and the principle of unjust enrichment have an impact on perceptions within the community of the fairness inherent in the legal system. If a beneficiary loses an entitlement under a will, and the rule of law is violated in a harsh and capricious manner, or if a beneficiary receives a windfall at the expense of an innocent party with no apparent justification, the administration of justice will inevitably be brought into disrepute. Alternatively, if a testatrix cuts out a spouse or child from her estate, and the dependant becomes a public charge reliant upon the community for support, it is difficult to formulate a cogent argument to support the disinheritance of the dependant. This is particularly so in the face of legislative enactments governing the

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[202]Supra, J.Langbein and L. Waggoner, note 68.

law of domestic relations, which mandate the support of the family by the primary income earner, as opposed to shifting those responsibilities onto the greater community. The integrity of the administration of justice necessitates that jurisdiction be located within a court to enable it to re-make wills in a manner which will maintain community respect for the legal process.

C. Judicial Will-Making as An Instrument of Social Policy

The contemporary law of wills and family provision in Manitoba reflects a tension between two fundamental macro-political issues: the liberty of individual control and the authority of the intervening state. Individual liberty is manifested through the principle of testamentary freedom. The Wills Act provides requirements which necessitate a uniform and efficient mechanism for the transfer of property from a testator to a beneficiary after death. While these requirements facilitate the exercise of testamentary freedom, The Dependants Relief Act constrains testamentary volition, by making reasonable provision out of the testator's estate to protect a defined class of family members who have been granted the right to make application for relief based upon their status. Within the context of the interaction of individual liberty and state authority the courts grapple on a micro-level with: the social struggles between donors and donees, the generational and inter-familial struggles between various classes of donees, and among those who would take on an intestacy. On a micro-level, the ordinary client and his solicitor require a legal system which consists of legal principles that are predictable.

The proposals for reform offered by this thesis will not resolve every problem inherent in the rectification or construction of wills, or in applications for family

provision. They will not prevent wills from being drafted which contain language that is completely meaningless or uncertain, even if direct evidence of intention is admissible. They will not enable ordinary clients and their solicitors to predict precisely how courts will exercise discretion in individual cases. They will also not prevent a testator who is determined to leave no property in his estate from disposing of assets by various legal devices during his lifetime. These problems are beyond the scope of any law reform proposals, because there are limits to what legislative or judicial reform can realistically accomplish. The proposals for law reform offered by this thesis should, however, eliminate much of the uncertainty which presently pervades the law of wills rectification and construction, and close the gaps in the law related to family provision. These changes should enable the law more appropriately to reflect current social values, and thereby prepare the Manitoba law of succession for the twenty-first century.

PRIMARY SOURCES CITED

1. STATUTES

A. MANITOBA

An Act Respecting the Court of Queen's Bench in Manitoba, 1874, 38 Vict. c.12, s.1.

Dower Act, R.S.M. 1988, c. D100.

Intestate Succession Act, 1989, C.C.S.M. c. 185.

Law Society Act, R.S.M. 1987, c. L100.

Manitoba Evidence Act, R.S.M. 1987, E150.

The Dependants Relief Act, S.M. 1989-90, c. 42-Cap.D37.

The Family Maintenace Act, R.S.M. 1987, c. F20.

The Homesteads Act, S.M. 1992, c. 46-Cap. H80.

The Marital Property Act, R.S.M. 1987.

The Perpetuities and Accumulations Act, R.S.M. 1987, c. P-33.

The Retirement Plan Beneficiaries Act, S.M. 1992, c. 31-Cap. R138.

The Testator's Family Maintenance Act, S.M. 1946, c. 64.

The Wills Act, R.S.M. 1988, c. W150.

Trustee Act, R.S.M. 1987, c. T160.

B. OTHER PROVINCES

Dependants of a Deceased Person Relief Act, R.S.P.E.I. 1988, Cap. D-7.

Dependants Relief Act, R.S.N.W.T. 1988, c. D-4.

Dependants Relief Act, R.S.Y.T. 1986, c. 44.

Family Relief Act, R.S.N. 1990, c. F-3.

Succession Law Reform Act, 1990, R.S.O., c. S26.

Testators Family Maintenance Act, R.S.N.S. 1989, c. 465.

C. CANADA

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) as amended.

The Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

D. OTHER

An Act for the Amendment of Law with Respect to Wills,1837, 1 Vict. c. 26, 4 Chitty, Collection of All the Statutes (928).

An Act Relating to Wills, 1871, 34 Vict. c. 4.

Administration of Justice Act, 1982, c. 53 (U.K.).

Irish Succession Act, 1965.

Civil Code of Quebec.

Statute of Frauds, 1677 , 29 Car. 2, c.3 (U.K.), 5 Statutes of the Realm (839).

Statute of Military Tenures, 1660, 12 Car. II, c. 24 (U.K.), 5 Statutes of the Realm (259).

Statute of Uses, 1535, 27 Hen. VIII, c. 10 (U.K.), 3 Statutes of the Realm (539).

Statute of Wills, 1540, 32 Hen. VIII, c. 1 (U.K.), 3 Statutes of the Realm (744).

Tenures Abolition Act, 1660, 12 Car. 2, c. 24 (U.K.), 5 Statutes of the Realm (259).

Uniform Probate Code, 1993, North Dakota.

Wills Act, 1968, Australian Capital Territory.

2. CASE LAW

A. MANITOBA

Barr v. Barr, [1972] 2 W.W.R. 346 (Man. C.A.).

Bergey v. Cassel (1995), 8 E.T.R. (2d) 161 (Man. Q.B.).

Chrichton v. Zelenitsky, [1946] 2 W.W.R. 209 (Man. C.A.).

Daniel v. Daniel (1986), 41 Man. R. (2d) 66 (Man. Q.B.).

George v. Daily (1997), 115 M.R. (2d) 172 (Man. C.A.).

In Re Thorleifson Estate (1954), 13 W.W.R. (N.S.) 515 (Man. Surr. Ct.).

King v. King (1990), 68 Man. R. (2d) 253 (Man. Q.B.).

Menrad v. Blowers (1982), 137 D.L.R. (3d) 309 (Man. Q.B.).

Montreal Trust Company of Canada v. Andrejewski Estate (1994), 98 M.R. (2d) 218 (Man. Q.B.).

Mulligan Estate v. Minaker (1995), 102 Man. R. (2d) 283 (Man. C.A.).

Re Briggs Estate (1985), 37 Man. R. (2d) 172 (Man. Q.B.).

Re Chersak Estate (1995), 95 Man. R. 228 (Man. Q.B.).

Re Langseth Estate (1990), 68 Man. R. (2d) 289 (Man. C.A.).

Re Myers Estate (1993), 87 Man. R. (2d) 200 (Man. Q.B.).

Re Perdue, [1943] 1 D.L.R. 46 (Man. K.B.).

Re Phillip, [1979] 3 W.W.R. 555 (Man. C. A.).

Re Pouliott; National Trust Company v. Sutton, [1984] 5 W.W.R. 765 (Man. Q.B.).

Re Shorrock Estate (1996), 109 Man. R. (2d) 104 (Man. Q.B.).

Re Steinberg (1969), 3 D.L.R. 565 (Man. Q.B.).

Re Walker's Will (1963), 43 W.W.R. 321 (Man. Q.B.).

Single v. Macharski Estate (1995), 107 Man. R. (2d) 291 (Man. C.A.).

Somers Estate v. Maxwell (1995), 107 Man. R. (2d) 221 (Man. C.A.).

Sparks Estate v. Wenham (1993), 1 E.T.R. (2d) 212 (Man. Q.B.).

Zajic v. Chomiak Estate (1990), 63 Man. R. (2d) 178 (Man. Q.B.).

B. OTHER PROVINCES

Alexander Estate v. Adams (1998), 20 E.T.R. (2d) 294 (B.C.S.C.).

Boulanger v. Singh (1984), 18 E.T.R. 1 (B.C.C.A.).

Earl v. Willhelm (1997), 160 Sask. L.R. 148 (Sask. Q.B.), further reasons 164 Sask. L.R. 4, further reasons 166 Sask. L.R. 148 (Sask. Q.B.).

Haidl v. Sacher (1979), 7 E.T.R. 1 (Sask. C.A.).

Jackson Estate v. Jackson (1994), 4 E.T.R. (2d) 244 (B.C.S.C.).

McDonald v. Brown Estate (1995), 6 E.T.R. (2d) 161 (N.S.S.C.).

McMaken v. McMaken (1984), 18 E.T.R. 60 (Ont. S.C.).

Mealey v. Broadbent (1984), 17 E.T.R. 160 (Ont. S.C.).

Owen v. Owen (1996), 14 E.T.R. (2d) 108 (B.C.S.C.).

Peden v. Abraham, [1912] 3 W.W.R. 265 (B.C.S.C.).

Peter Pan Drive-In Ltd. v. Flambro Realty Ltd. (1978), 93 D.L.R. (3d) 221 (Ont. H.C.J.), affirmed 106 D.L.R. (3d) 576 (C.A.), leave to appeal refused [1980] 1 S.C.R. xi (S.C.C.).

Peters v. Gibbins, [1979] 3 A.C.W.S. 686 (Ont. Surr. Ct.).

Re Brander, [1952] 6 W.W.R. (N.S.) 702 (B.C.S.C.).

Re Brown, [1954] O.W.N. 301 (Ont. Surr. Ct.).

Re Bruce Estate (1998), 24 E.T.R. (2d) 44 (Y.T.S.C.).

Re Lenko Estate (1997), 19 E.T.R. (2d) 314 (Sask. Q.B.).

Re Marquis Estate (1980), 30 N.B.R. (2d) 93 (N.B.Q.B.).

Re Rapp Estate (1991), 42 E.T.R. 222 (B.C.S.C.).

Re Solicitor, Ex Parte Fitzpatrick, [1924]1 D.L.R. 981 (Ont. S.C., App. Div.).

Re Wozeichowitz, [1931] W.W.R. 265 (B.C.S.C.).

Stork Estate v. Stork (1990), 38 E.T.R. 290 (Ont. S.C.).

Tucket-Lawry v. Lamoureaux (1902), 1 O.L.R. 364 (H.C.), affirmed 3 O.L.R. 577 (C.A.).

Wagg v. Bradley (1996), 11 E.T.R. (2d) 313 (B.C.S.C.).

Wagner v. Wagner Estate (1990), 39 E.T.R. 5 (B.C.S.C.), reversed (1991), 62 B.C.L.R. (2d) 1 (C.A.), leave to appeal to the Supreme Court of Canada refused (1992), 66 B.C.L.R. (2d) xxx.

Whittingham v. Crease & Company, [1978] 5 W.W.R. 45 (B.C.S.C.).

C. CANADA

Caron v. Caron, [1987] 1 S.C.R. 857 (S.C.C.).

Hart v. Boutilier (1916), 56 D.L.R. 620 (S.C.C.).

Hauck v. Schmaltz, [1935] S.C.R. 478 (S.C.C.).

L.G. v. G.B. (1995), 127 D.L.R. (4^{th}) 385 (S.C.C.).

Kernahan Estate v. Hanson (1990), 39 E.T.R. 243 (Sask. Q.B.), reversed (1990), 39 E.T.R. 249 (Sask. C.A.).

Marks v. Marks (1908), 40 S.C.R. 210 (S.C.C.).

Pelech v. Pelech, [1987] 1 S.C.R. 801 (S.C.C.).

Richardson v. Richardson, [1987] 1 S.C.R. 857 (S.C.C.).

Roncarelli v. Duplessis, [1959] S.C.R. 121 (S.C.C.).

Tataryn v. Tataryn, [1994] 2 S.C.R. 807 (S.C.C.).

D. OTHER

Banks v. Goodfellow (1870), L.R. 5 Q.B. 549 (H.L.).

Cadell v. Palmer (1833), 1 Cl. & F. 372, 6 E.R. 956 (H.L.).

Duke of Norfolk's Case (1681-85), 3 Ch. Cas. 1, 22 E.R. 931 (H.L.).

Guardhouse v. Blackburn (1866), L.R. 1 P. & D. 109 (Prob. Div.).

Hedley Byrne & Co.Ltd. v. Heller & Partners Ltd., [1963] 2 All E.R. 575 (H.L.).

Higgins v. Dawson [1902] A.C. 1 (H.L.).

McAlister (Donoghue) v. Stevenson, [1932] All E.R. 1 (H.L.).

Re Beadle, [1974] 1 All E.R. 493 (Ch. D.).

Re Bean, [1947] 2 All E.R. 348 (P. D.).

Re Morris, [1970] 1 All E.R. 1057 (Ch. D.).

Re Reynette-James, [1976] 1 W.L.R. 161 (Ch. D.).

Rhodes v. Rhodes (1882), 7 A. C. 192 (P.C.).

Re Segelman, [1995] 3 All E.R. 676 (Ch. D.).

Re Williams, Wiles v. Magden, [1985] 1 All E.R. 964 (Ch. D.).

Ross v. Caunters, [1979] 3 All E.R. 580 (Ch. D.).

Rowe v. Law, [1978] I.R. 55 (H.C.), upheld [1978] I.R. 62 (S.C.).

Smith v. Smith (1886), L.R. 1 P. & D. 143 (Prob. Div.)

Whitby v. Mitchell (1890), 44 Ch. D. 85 (C.A.).

White v. Jones, [1995] 1 All E.R. 691 (H.L.).

Wordingham v. Royal Exchange Trust Co. Ltd., [1972] 3 All E.R. 204 (Ch. D.).

3. GOVERNMENT DOCUMENTS

A. MANITOBA

Manitoba, Report of the Law Reform Commission on "The Wills Act" and the Doctrine of Substantial Compliance (Winnipeg: Queen's Printer Office, 1980)(Chairman: Clifford H. C. Edwards).

B. OTHER PROVINCES

British Columbia, Ministry of Attorney General, Report of the Law Reform Commission on the Interpretation of Wills (Vancouver: Queen's Printer of British Columbia, 1982)(Chairman: The Honourable Mr. Justice John S. Aikins).

C. OTHER

England, Report of the English Law Reform Committee on Interpretation of Wills (London: Her Majesty's Stationary Office, 1973)(Chairman: The Right Honourable Lord Pearson, C.B.E.).

New South Wales, Report on the Uniform Succession Laws, The Law of Wills (Sydney: New South Wales Law Reform Commission, 1998)(The Honourable Mr. Justice David Hodgson, Commissioner in Charge).

New Zealand, Law Commission Preliminary Report 24, Succession Law, Testamentary Claims (Wellington: New Zealand Law Commission, 1996).

SECONDARY BIBLIOGRAPHY

Amighetti, Leopold, The Law of Dependants' Relief in British Columbia (Scarborough: Carswell, 1991).

Brown, D.H., "Historical Perspectives on the Statute of Uses", (1979) 9 Manitoba Law Journal 409.

Burn, E.H., Cheshire's Modern Law of Real Property, 12th ed. (London: Butterworths, 1976).

Fridman, G.H.L., The Law of Contract, 3rd ed. (Scarborough: Carswell, 1994).

Gesser, Avi, "Disrespecting Your Elders or Getting What is Rightfully Yours? Unjust Enrichment in Estate Litigation" (1997) Estates, Trusts and Pensions Journal 37.

Harvey, Cameron, The Law of Dependants' Relief in Canada (Scarborough: Carswell, 1999).

Hawkins, Robert E., "Dower Abolition in Western Canada: How Law Reform Failed", (1995) 24 Manitoba Law Journal 635.

Jenks, Edward, A Short History on English Law, Second Edition (London: Methuen & Co. Ltd., 1920).

Langbein, J. H. and Waggoner, L., "Reformation of Wills on the Ground of Mistake: Changing Direction in American Law", (1982) 130 University of Pennsylvania Law Review 521.

Langbein, John H., "Substantial Compliance with the Wills Act", (1975) 88 Harvard Law Review 489.

Leach, W. Barton, "Perpetuities in Perspective: Ending the Rule's Reign of Terror", (1952) 65 Harvard Law Review 721.

Mortimer, Clifford, and Coates, Hamish H.H., The Law and Practice of the Probate Division of the High Court of Justice, 2nd ed. (London: Sweet & Maxwell, Ltd., Stevens & Sons, Ltd., 1927).

Oosterhoff, Albert H., Oosterhoff on Wills and Succession, Text, Commentary and Cases, 4th ed. (Scarborough: Carswell, 1995).

Reppy, Alison and Tomkins, Leslie J., Historical and Statutory Background of the Law of Wills (Chicago: Callaghan and Company, 1928).

Sheehan, Michael M., The Will in Medieval England (Toronto: Pontifical Institute of Medieval Studies, 1963).

Sokol, Stan J., Mistakes in Wills in Canada (Scarborough: Carswell, 1995).

Waddams, S.M., The Law of Contracts, 4th ed. (Toronto: Canada Law Book Inc., 1999).

PRIMARY SOURCES CONSIDERED BUT NOT CITED

1. STATUTES

A. MANITOBA

Insurance Act, R.S.M. 1987, c. 140.

The Power of Attorney Act, S.M. 1996, c. 62 - Cap. P97.

B. OTHER

An Act to Amend the Law Relating to Probate and Letters of Administration in England, 1857, 20 & 21 Vict. 77, 4 Chitty, Collection of All the Statutes (592).

2. CASE LAW

A. MANITOBA

Brown v. The National Victoria and Grey Trust Company, (12 November 1985), Suit Number 341/85 (Man. C.A.).

In Re Elizabeth Maybee Estate (1947), 54 M.R. 453 (Man. Surr. Ct.).

Knox United Church v. Royal Trust Corporation of Canada (1996), 110 Man. R. (2d) 81 (Man. C.A.).

Manitoba Development Corporation v. Columbia Forest Products Ltd., [1974] 2 W.W.R. 237 (Man. C.A.).

May v. May (1994), 96 Man. R. (2d) 268 (Man. Q.B.).

McDermot v. Owens Estate (1981), 25 Man. R. (2d) 24 (Man. Cty. Ct.).

Re Blackmore Estate, [1948] 1 W.W.R. 1001 (Man. Q.B.).

Re Bolton Estate (1961), 35 W.W.R. 621 (Man. C.A.).

Re Charlesworth Estate (1996), 108 Man. R. 228 (Man. Q.B.).

Re Tachibana (1968), 66 D.L.R. 567 (Man. C.A.).

Re Teichman Estate (1996), 110 Man. R. (2d) 114 (Man. C.A.).

Steffenson, Robertson, Decorby and Williams v. Decorby Estate and Decorby (1981), 13 Man. R. (2d) 428 (Man. C.A.).

B. OTHER PROVINCES

Canada Permanent Trust Co. v. Stewart (1965), 52 D.L.R. (2d) 520 (B.C.S.C.).

In Re Garton Estate, [1924] 1 W.W.R. 1023 (Sask. Surr. Ct.).

In Re Catherine Walsh (1893), 7 Nfld. L.R. 738 (Nfld. S.C.).

In Re Ford Estate, [1954] 13 W.W.R. (N.S.) 604 (Alta. S.C.).

In Re Rigden Estate, [1941] 1 W.W.R. 566 (Sask. Surr. Ct.).

Re Brush, [1942] O.R. 647 (Ont. S.C.).

Re Bunn Estate, [1996] 4 W.W.R. 240 (Sask. C.A.).

Re Dyer (1984), 18 E.T.R. 44 (Ont. Surr. Ct.).

Re Laver Estate, [1957] 21 W.W.R. 209 (Sask. Q.B.).

Re McVay Estate, [1955] 16 W.W.R. 200 (Alta. S.C.).

Sisson v. Park Street Baptist Church (1998), 24 E.T.R. (2d) 18 (Ont. H.C.J.).

Sunrise Gospel Hour v. Halpenny (Austin Estate), [1967] 59 W.W.R. 321 (Alta. S.C., App. Div.).

C. CANADA

Hawrish v. Bank of Montreal, [1969] S.C.R. 515 (S.C.C.).

Re Martin; McGregor v. Ryan, [1965] S.C.R. 757 (S.C.C.).

In Re Brown Estate, [1934] S.C.R. 324 reversed on other grounds (sub. nom. Brown v. Moody, [1936] 3 W.W.R. 59 (P.C.).

D. OTHER

Belyng v. Anon (1312), Y.B. 5, Edw. II, Selden Society, Vol. 31, p. 176 (K.B.).

Boyce v. Cook (1880), 14 Ch. D. 53 (Ch. D.).

Hamilton v. Ritchie, [1894] A.C. 310 (H.L.).

Miller v. Travers (1832), 8 Bing. 244, 1 L.J. Ch. 157, 131 E.R. 395 (Ch. D.).

Pells v. Brown (1620), 1 Cro. Jac. 590, 79 E.R. 395 (Ch. D.).

Re Helliwell, Pickles v. Helliwell, [1916] 2 Ch. 580 (Ch. D.).

Re Lord Dacre of the South (dec'd) (1535), Y.B. 27 Hy. VIII, Selden Society Vol. 93, pp. 228 (Exch. Chamber).

Saunders v. Vautier (1841), 4 Beav. 115, 49 E.R. 282 (M.R.).

Taltarum's Case (1472), Y.B. 12 Edw. IV 19 (K.B.).

Thelluson v. Woodford (1798), 4 Ves. Jun. 227; (1805), 11 Ves. Jun. 112; 31 E.R. 117, 32 E.R. 1030 (H.L.).

3. GOVERNMENT DOCUMENTS

A. MANITOBA

Manitoba, Report of the Law Reform Commission on an Examination of the Dower Act (Winnipeg: Queen's Printer Office, 1984)(Clifford H.C. Edwards, Q.C., Chairman).

Manitoba, Report of the Law Reform Commission on the Rule Against Perpetuities (Winnipeg: Queen's Printer Office, 1982)(Clifford H.C. Edwards, Q.C., Chairman).

Manitoba, Report of the Law Reform Commission on the Rule in Saunders v. Vautier (Winnipeg: Queen's Printer Office, 1975)(Francis C. Muldoon, Chairman).

Manitoba, Report of the Law Reform Commission on Sections 33 and 34 of "The Wills Act" (Winnipeg: Queen's Printer Office, 1986)(Clifford H. C. Edwards, Q.C., Chairman).

Manitoba, Report of the Law Reform Commission on the Testator's Family Maintenance Act (Winnipeg: Queen's Printer Office, 1985) (Clifford H. C. Edwards, Chairman).

B. OTHER PROVINCES

British Columbia, Ministry of Attorney General, Report of the Law Reform Commission on the Making and Revocation of Wills (Vancouver: Queen's Printer for British Columbia, 1981)(John S. Aikins, Chairman).

British Columbia, Ministry of Attorney General, Working Paper of the Law Reform Commission of British Columbia on Testamentary Intent and Unexpected Circumstances (Vancouver: Queen's Printer for British Columbia, 1987)(Arthur L. Close, Chairman).

C. OTHER

New South Wales, Issues Paper of the Law Reform Commission, vols. 10, 11 (Sydney: Law Reform Commission, 1996).

Queensland, Working Paper of the Law Reform Commission, vols. 46, 47 (Brisbane: Queensland Law Reform Commission, 1996).

Scotland, Report of the Law Commission on Succession (Edinburgh: Her Majesty's Stationary Office, 1990).

Western Australia, Discussion Paper of the Law Reform Commission on the Effect of Marriage or Divorce on Wills (Perth: The Law Reform Commission of Western Australia, 1990)(Ms. M.E. Rayner, Chairperson).

Western Australia, Report of the Law Reform Commission on the Effect of Marriage or Divorce on Wills (Perth: The Law Reform Commission of Western Australia, 1991) (Associate Professor M.D. Pendleton, Chairman).

SECONDARY BIBLIOGRAPHY CONSIDERED BUT NOT CITED

Austin, J., The Province of Jurisprudence Determined, in M.D.A. Freeman, ed., Lloyds Introduction to Jurisprudence, 6th ed. (London: Sweet & Maxwell Ltd., 1994).

Baker, J. L., "Use upon a Use in Equity", (1977) 93 Law Quarterly Review 33.

Bale, Gordon, "Limitation on Testamentary Disposition in Canada", (1964) 3 Canadian Bar Review 369.

Barnhart, Robert K., The Barnhart Dictionary of Etymology (Bronxville, New York: The H.W. Wilson Company, 1988).

Barton, J.L., "Medieval Use", (1965) 81 Law Quarterly Review 562.

Barton, J.L., "Rise of the Fee Simple", (1976) 92 Law Quarterly Review 108.

Bentham, J., An Introduction to the Principles of Morals and Legislation, in M.D.A. Freeman, ed., Lloyds Introduction to Jurisprudence, 6th ed. (London: Sweet & Maxwell Ltd., 1994).

Brierley, John E.C. and Macdonald, Roderick A. Quebec Civil Law (Toronto: Emond Montgomery Publications Limited, 1993).

Cahn, Edmond N., "Restraints on Disinheritance", (1936) 85 University of Pennsylvania Law Review 139.

Conway, Geoffrey B. and Smith, John G., Studies of the Royal Commission on Taxation Number 19B: The Law Concerning Capital Gains (Ottawa: Queen's Printer and Controller of the Stationary, 1967).

Cretney, Stephen, and Dworkin, Gerald., Theobald on Wills, 13th ed. (London: Stevens & Sons, 1971).

Cullity, Maurice, and Brown, Catherine., Taxation and Estate Planning, 3rd ed. (Scarborough: Thomson Canada Limited, 1992).

Digby, Sir Kenneth E., An Introduction to the History of the Law of Real Property (London: McMillan & Co., 1875).

Durham, Allison, "The Method, Process and Frequency of Wealth Transmission on Death", (1963) 30 University of Chicago Law Review 241.

Farrer, Frederick Edward., "Tenant by Curtesy of England", (1927) CLXLX The Law Quarterly Review 87.

Feeney, Thomas G., The Canadian Law of Wills, Volume One, Probate, Second Edition, (Toronto: Butterworths, 1982).

Feeney, Thomas, G. The Canadian Law of Wills, Volume Two, Construction, Second Edition, (Toronto: Butterworths, 1982).

Freeman, M.D.A., Lloyd's Introduction to Jurisprudence, 6th ed. (London: Sweet & Maxwell Limited, 1994).

Friedman, Lawrence M., "The Law of the Living, the Law of the Dead: Property, Succession and Society", (1961) Wisconsin Law Review 340.

Fuller, Lon L., "Consideration and Form", (1941) Columbia Law Review 759.

Glenn, J.M., "Perpetuities to Purefoy", (1984) 62 Canadian Bar Review 618.

Goodman, Wolfe D., Q.C., "Death Taxes in Canada, in the Past and in the Possible Future", (1995) 43 Canadian Tax Journal 1360.

Green, Milton D., "Proof of Mental Incompetency and the Unexpressed Major Premise", (1944) Yale Law Journal 271.

Gulliver, Ashbel G. and Tilson, Catherine, "Classification of Gratuitous Transfers", (1941) 51 Yale Law Journal 1.

Hart, H.L.A., "Positivism and the Separation of Law and Morals", (1958) 71 Harvard Law Review 593.

Harvey, Cameron, "Checklist for Dependant's Relief Proceedings (Manitoba)" (1983) 6 Estates and Trusts Quarterly 254.

Harvey, Cameron, Materials on Wills and Estates. (Winnipeg:Faculty of Law, University of Manitoba, 1999).

Harvey, Cameron, "The Continuing Relevance of Testator's Family Maintenance Act Cases", (1997-98) 25 Manitoba Law Journal 467.

Haskins, George L., "The Development of Common Law Dower", (1948) 62 Harvard Law Review 42.

Holdsworth, Sir William., A History of English Law, Volume IV (London: Methuen & Co. Ltd.; Sweet & Maxwell Ltd., 1966).

Holmes, O.W., "The Path of Law", (1897) 8 Harvard Law Review 457.

Ives, E.W., "The Genesis of the Statute of Uses", (1967) 82 English Historical Review 673.

Kahn-Freund, O., "On Uses and Misuses of Comparative Law", (1974) 37 Modern Law Review 1.

Keeton, George W. and Grower, L.C.B., "Freedom of Testation in English Law", (1934-35) 20 Iowa Law Review 326.

Kornhauser, Marjorie A., "The Rhetoric of the Anti-Progressive Income Tax Movement: A Typically Male Reaction", (1987) 86 Michigan Law Review 465.

Laube, Herbert D., "The Right of a Testator to Pauperize His Helpless Dependants" (1928) 13 Cornell Law Quarterly 559.

Laufer, Joseph, "Flexible Restraints on Testamentary Freedom – A Report on Decedent's Family Maintenance Legislation (1955) 69 Harvard Law Review 277.

MacIvor, Brian, "Case Comment: Re Kernahan. Admission of Extrinsic Evidence in Aid of the Interpretation of Wills", (1990) 39 Estates and Trusts Reports 253.

McKinnon, Harold R., "Natural Law and Positive Law", (1948) 23 Notre Dame Lawyer 125.

Maloney, Maureen A, "Distributive Justice: That is the Wealth Tax Issue", (1988) 20 Ottawa Law Review 601.

Maloney, Maureen A., "Capital Gains Taxation: Marching (Oh So Slowly) into the Future, (1988) 17 Manitoba Law Journal 299.

McClean, A. J., "The Rule Against Perpetuities, Saunders v. Vautier and Legal Future Interests Abolished", (1983) 13 Manitoba Law Journal 245.

McMurray, Orrin K., "Liberty of Testation and Some Modern Limitations Thereon", (1919) 14 Illinois Law Review 536.

Mellows, Anthony B., The Law of Succession, 4th ed. (London: Butterworths, 1983).

Morris, J.H.C. and Leach, W. Barton., The Rule Against Perpetuities, 2nd ed. (London: Stevens & Sons Limited, 1962).

Mossman, M. J., "Toward 'New Property and New Scholarship'" in Mary Jane Mossman and William F. Flanagan (eds.), Property Law: Cases and Commentary (Toronto: Emond Montgomery Publications Limited, 1998).

Mossman, M.J. and Flanagan, William F., Property Law: Cases and Commentary (Toronto: Emond Montgomery Publications Limited, 1998).

Nelson, Charles I. And Starck, Jeanne M., "Formalities and Formalism: A Critical Look at the Execution of Wills", (1979) 6 Pepperdine Law Review 331.

Nusbaum, Arthur, "Liberty of Testation", (1937) 23 American Bar Association 183.

Onions, C.T., The Oxford Dictionary of English Etymology (Oxford: The Clarendon Press, 1996).

Oosterhoff, Albert H., "Succession Law in the Antipodes: Proposals for Reform in New Zealand", (1997) Estates and Trusts Journal 230.

Parry, Sir David Hughes, The Law of Succession (London: Sweet & Maxwell Limited, 1972).

Pound, R., "What do we ask of Legal History", (1962) 11 American University Law Review 117.

Reid, J. "Touch of History - the Historical Method of the Common Law Judge", (1962) 8 American Journal of Legal History 157.

Simpson, A.W.B., An Introduction to the History of The Land Law (London: Oxford University of Press, 1961).

Simpson, A.W.B., "Entails and Perpetuities", in A.W.B. Simpson, ed. Legal Theory and Legal History (London and Ronceverte: The Hambledon Press, 1987).

Spinoza, C.D., "The Legal Reasoning Behind the Common Collusive Recovery. Taltarum's Case (1472)", (1992) 36 American Journal of Legal History 70.

The Law Society of Manitoba, Thirty Second Bar Admission Course 1998-1999 Family Law (Winnipeg, The Law Society of Manitoba, 1998).

The Law Society of Manitoba, Thirty Second Bar Admission Course 1998-1999 Wills & Estates (Winnipeg, The Law Society of Manitoba, 1998).

Thorne, S.E., "English Feudalism and Estates in Land", (1959) Cambridge Law Journal 193.

Watkin, T.G., "Feudal Theory, Social Needs and the Rise of the Heritable Fee", (1979) 10 Cambrian Law Review 39.

Wedgwood, C.V., The Sense of the Past (New York: Collier Books, 1960).

Windeyer, V., "History in Law and Law in History", (1973), 11 Alberta Law Review 123.

Youdan, T.G., "Case Comment: Re Rapp Estate", (1992) 42 Estates and Trusts Reports 229.