Wills and succession, 1988

*Cameron Harvey**

Quatre arrêts ont été brièvement passées en revue: Re Hall Estate, Kologinski *c.* Kologinski, Re Gee's Estate, et Re Gillis Estate.

Four cases are briefly reviewed: Re Hall Estate, Kologinski *v.* Kologinski, Re Gee's Estate, and Re Gillis Estate.

THERE WERE FOUR CASES DURING 1988 that are more or less worthy of note. I have commented elsewhere[1] on one of the cases, *Re Hall Estate*.[2] Suffice it to repeat here the most significant aspect of the case. Involved in the case was an issue of knowledge and approval. The trial judge, Hanssen J., specifically considered the appropriate standard of proof under the doctrine of suspicion. Should it be the ordinary civil standard of proof, as some cases have held, or should it be a more stringent standard approaching the criminal standard of proof, as other cases have held? Hanssen J. chose to apply the ordinary civil standard of proof, and, on this point, he was not reversed by the Court of Appeal.

The point that caught my eye in *Kologinski* v. *Kologinski Estate*[3] was the potential application of s. 23 of the *Wills Act*.[4] Michael Kologinski purchased a guaranteed investment certificate from Investors Syndicate Limited. In connection with the purchase, Mr Kologinski completed and signed a Designation of Beneficiary form, indicating his nephew as the death beneficiary of the certificate. When he signed the form, Mr Kologinski did not do so in compliance with s. 4 of the *Wills Act*. In these circumstances, effect could be given to the form only pursuant to s. 23 of the *Wills Act* or pursuant to the *Retirement Plan Beneficiaries Act*.[5] By s. 23, the court can ignore imperfect execution of testamentary documents. The *Retirement Plan Beneficiaries Act* excuses certain testamentary documents from execution in accordance with the *Wills Act*. Re-

* Professor, Faculty of Law in the University of Manitoba.

1 (1988) 30 Est. & Tr. Q 23.

2 (1986), [1987] 44 Man. R. (2d) 232 (Q.B.), rev'd (1988) 52 Man. R. (2d) 1 (C.A.).

3 (1988), [1989] 54 Man. R. (2d) 120 (Q.B.).

4 *Wills Act*, R.S.M. 1988, c. W150, s.34 [hereinafter referred to as *Wills Act*].

5 *Retirement Plan Beneficiaries Act*, R.S.M. 1987, c. R138, [hereinafter referred to as *Retirement Plan Beneficiaries Act*].

garding s. 23, as Jewers J. put it: "Unfortunately, while it might have been saved by s. 23,... that particular section was not in force at the relevant time."[6] The learned judge held against the *Retirement Plan Beneficiaries Act* governing the validity of the form, because it clearly did not come within the *Act*'s definition of a "plan." As well, he summarily rejected a constructive trust argument.

The third case of note is *Re Gee's Estate*.[7] In his will, Mr Gee gave a life interest in the residue of his estate to his widow and directed his trustees as follows:

> 4H. Upon the death of... my... wife to divide the residue of my estate... into as many equal shares as there shall be children of mine then alive, and... if any child... shall then be dead but shall have left issue ... then alive, such deceased child... shall be considered alive for the purpose of this division.

When he made the will in 1968, Mr Gee had a married son, who had a nine-month-old daughter named Tamara. In 1970, his son and daughter-in-law divorced. His former daughter-in-law remarried; she and her new husband jointly adopted Tamara in 1973. Two years later, Mr Gee died, a few months after making a codicil by which he confirmed his will. The executors of Mr Gee's estate asked the court whether Tamara was "issue" within the meaning of clause 4H.

I should have thought that, notwithstanding the adoption of Tamara, this was a matter simply of determining the meaning that the testator intended to be given to the word "issue" in clause 4H, but this was not the way in which Scollin J. dealt with the question. Having apparently determined the "obvious intent" of Mr Gee, Scollin J. considered the meaning and application of s. 61 of the *Child and Family Services Act*.[8] That section deals with the effect of an adoption on legal relationships. He decided that the situation did not come within the wording of s. 61. I think that s. 61 was irrelevant. It would have been relevant if Mr Gee died intestate and been predeceased by his son.

The final case was *Re Gillis Estate*.[9] By her will, Ingun Gillis provided that the residue of her estate was to be divided equally between her brother Thor and her sister Regina. Substitutional gifts were also provided in the event that she was predeceased by Thor or Regina. In the case of Thor's share of the residue, $500 was to be paid to his widow,

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6 *Supra*, note 3 at 123.

7 *Re Gee's Estate* (1988), 52 Man. R. (2d) 157 (Q.B.).

8 *Child and Family Services Act*, S.M. 1985-86, c. 8.

9 (1987), [1988] 50 Man. R. (2d) 235 (Q.B.), aff'd (1988), [1989] 55 Man. R. (2d) 39 (C.A.).

and the balance to thirteen named persons. In the case of Regina's share of the residue, the will provided:

> In the event my sister, Regina Gillis, should also have predeceased me, I DIRECT my Executors... to pay *Regina Gillis's share of the residue* to her husband, Haldor Gillis. In the event that Haldor Gillis should also have predeceased me... I direct my Executors to pay [her] share to... [the same thirteen persons named in connection with Thor's share of the residue]."[10]

The substitutional gift to Haldor Gillis was altered by a series of dash marks typewritten through the underlined words, and above those words were interlineated the typewritten words and numbers, "ONE THOUSAND ($1,000.00)."[11] Ingun Gillis was predeceased by her brother Thor and her sister Regina. There was no problem with Thor's share of the residue. With respect to Regina's share of the residue, the alteration of the will raised two issues. The first issue was whether the alteration was valid, because no signatures related to it. Although the testatrix's solicitor and his secretary testified that it was contrary to their practice to have a will executed containing such an interlineation, the trial judge and the Court of Appeal were of the view that the alteration was valid. They were persuaded by expert testimony on typewriting "that the interlineation had been made by the same typewriter which had been used to type the will, and that the alignment of the alteration on the page was such that it must have been done at the same time as the will was initially typed."[12] That decision raised a second issue. Who was entitled to succeed to the balance of Regina's share of the residue? There were three possibilities: first, Regina's husband and son pursuant to s. 34 of the *Wills Act*[13] in conjunction with s. 14 of the *Devolution of*

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10 *Ibid.* [emphasis added].

11 *Ibid.*

12 *Ibid.* at 41.

13 Section 34:

> 34. Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator, either before or after the testator makes the will, and that person
> (a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in real or personal property not determinable at or before the death of the child or other issue or the brother or sister, as the case may be; and
> (b) leaves issue any of whom is living at the time of the death of the testator;
> the devise or bequest does not lapse, but takes effect as if it had been made directly to the persons among whom, and in the shares in which, the estate of that person would have been divisible if that person had died intestate and without debts immediately after the death of the testator.

Estates Act[14] secondly, Ingun's nephews and nieces pursuant to s. 8(3) of the *Devolution of Estates Act*; and, thirdly, the thirteen persons named in the will as potential substitutional beneficiaries of Regina.

Huband and Hall JJ.A. agreed with the trial judge that Regina's husband and son were entitled to the balance of Regina's share of the residue pursuant to s. 34 of the *Wills Act*. Their dissenting colleague, Philp J.A., was of the opinion, in terms of the opening words of s. 34, that by the interlineated gift of $1,000 to Regina's husband "a contrary intention appears by the will",[15] a conclusion that he reached through his construction of the opening words of s. 34 and from the fact of the substitutional gift provided from out of Thor's share of the residue through the interlineation that created Regina's interest. Philp J.A. was persuaded that, by the interlineation, Ingun Gillis intended the thirteen named persons to receive the balance of Regina's share of the residue. Nonetheless, he was of the opinion that effect could not be given to the testatrix's intention, because, by the clear words of the will, the thirteen named persons only became entitled to the balance of Regina's share of the residue "in the event of that Haldor Gillis should also have predeceased me or should have survived me but died within thirty days following my death." Therefore, in his opinion, the heirs of Ingun Gillis were entitled to the balance of Regina's share of the residue.

Perhaps by the law of mistake, the words, "in the event that Haldor Gillis should also have predeceased me or should have survived me but died within thirty days following my death," could have been ignored to give effect to the intention of the testatrix as Philp J.A. perceived it. When someone drafts a will or makes changes to a will for a testatrix, inadvertent wording errors can be deleted or ignored by the court on the basis that the testatrix is not deemed to know and approve of such wording.[16] According to the findings of the courts in this case, the interlineation was made by Ingun Gillis' solicitor. Surely it is not reaching too far to conclude that, in making the interlineation, the solicitor inadvertently failed to delete the words in question; that is, in making the alteration and interlineation in the way that it was made, the solicitor inadvertently worded the will in error. For this reasoning, the thirteen named persons would have been entitled to the balance of Regina's share of the residue.

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14 *Devolution of Estates Act*, R.S.M. 1987, c. D70, s. 14 [hereinafter referred to as *Devolution of Estates Act*].

15 *Supra*, note 9.

16 *Re Morris* [1971] P. 62.