Wills and Succession, 1991–1995

CAMERON HARVEY, Q.C.*

DURING THIS PERIOD twenty noteworthy cases were decided. I will start with *Langseth Estate* v. *Gardiner*.[1] The case had to do with, *inter alia*, an alteration by interlineation of a will, initialled by the testator but not by any witnesses, and thus not in compliance with s. 19(2) of *The Wills Act*. In validating the alteration, pursuant to s. 23 of *The Wills Act*,[2] the Court of Appeal clarified the nature of the dispensation power for which s. 23 provides and commented upon the standard of proof involved in a s. 23 application. On the nature of the dispensation power, the Court was split. The majority held that s. 23 provides for what I call a minimal compliance dispensation power. Justice Philp wrote:

> ... in applying s. 23 ... the Court must be satisfied that there has been some compliance, some attempt to comply with the formal requirements.[3]

The late Justice O'Sullivan in dissent was of the opinion that, with the aid of s. 23, "it is now no longer necessary to have any formalities in a will other than writing ... I do not agree that in applying s. 23 ... the Court must be satisfied that there has been some compliance or some attempt to comply with the formal

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1 (1990) 68 Man. R. (2d) 289 (C.A.)

2 R.S.M. 1987, c.W150. Section 23 reads as follows:

> [w]here, upon application, if the court is satisfied that a document or any writing on a document embodies
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> (a) the testamentary intentions of a deceased; or
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> (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;
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> the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed in this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

3 *Ibid.* at 299, para. 48.

requirements."[4] In other words, it was Justice O'Sullivan's view that s. 23 provides the courts with a general dispensation power.

In 1989 Saskatchewan enacted legislation identical to s. 23 and in 1992 the Saskatchewan Court of Appeal preferred Justice O'Sullivan's dissenting interpretation.[5] Also in 1992 the Manitoba Law Reform Commission recommended to the government of Manitoba a change in the wording of s. 23 to bring the section more clearly in line with Justice O'Sullivan's interpretation.[6] The government accepted the recommendation and enacted *The Wills Amendment Act*,[7] which changes the section heading of s. 23 to "Dispensation Power," deletes the words "was not executed in compliance with all the formal requirements," and substitutes the words "was not executed in compliance with any or all of the formal requirements." Clearly, this amendment supercedes Justice Philp's minimal compliance construction of s. 23. Justice De Graves of the Manitoba Court of Queen's Bench thought so in *George* v. *Daily*.[8] The case had to do with a letter of instructions for the revision of a will, written on behalf of the testator, which the testator subsequently orally confirmed with his lawyer. Before the lawyer implemented the instructions the testator died. In admitting the letter to probate Justice De Graves wrote:

> By the amendment of s. 23 ... previous Manitoba jurisprudence in *Langseth Estate* v. *Gardiner* ... can no longer be considered binding ... . The critical assessment must now be directed to a determination of whether the document contains a clearly expressed testamentary intention in writing, not whether there has been "substantial compliance" with the formalities of *The Wills Act* ... .[9]

Given his reference to *Langseth Estate*, surely Justice De Graves must have meant "minimal compliance," not "substantial compliance."

There is no indication in s. 23 of the standard of proof for a s. 23 application; the section merely requires the court to be "satisfied." The comparable legislation of South Australia requires the court to be "satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will." Justice Philp writing in *Langseth Estate* on this point for all three judges who comprised the panel of the Court said:

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4 *Ibid.* at 291, para. 6.

5 *Re Bunn*, [1992] 4 W.W.R. 240 (Sask. C.A.).

6 *Informal Report #22B*, 14 December 1992, to be found in the 22nd Annual Report, at 37.

7 S.M. 1995, c. 12.

8 (1996), Winnipeg PR 95-01-38672 (Man. Q.B.).

9 *Ibid.* at para. 12.

... adopting the general rule of evidence that the standard of proof should vary with the nature of the issue and its gravity, I am persuaded that nothing in the circumstances of this case requires a higher standard of proof than proof on the balance of probabilities to establish testamentary intent.[10]

There were two other reported decisions during the period under review involving old s. 23. In *Re Myers*[11] the court validated a holograph document made like the will in *Re Tachibana.*[12] The document began "Harold Myers' Will"; it was not signed by Mr. Myers at its end. *Re Tachibana* continues to be the authority validating such wills made prior to 1983 when the words "at its end" were added to s.6, the holograph will section. In *Montreal Trust Co. of Canada* v. *Andrezejewski Estate*,[13] the Court refused probate through s. 23 to a piece of paper upon which the Court was satisfied that the testator had handwritten a disposition of his estate by fifths, but which was not dated, upon which the testator's name did not appear, and which the testator had not signed; the piece of paper was paperclipped to a blank printed will form and both were found in a booklet about wills and estates. The Court was not satisfied that the paper embodied "the testamentary intentions of the deceased" and noted that "there was no compliance whatsoever with the requirements of the *Act*."

Two unreported decisions concerning old s. 23 have also come to my attention. In *Steuart* v. *King*[14] after his divorce the testator handwrote under the identification clause of his formal will "changes made in this document January 30, 1990 with the intent of excluding [his wife] ... from my will and including [X] ... in her place" and signed his name underneath. Thereafter whenever the name of his wife appeared in his will he stroked it out and added X's name, but without initialling or having witnessed these interlineations. The court validated the changes pursuant to s. 23. In *Re Chersak Estate*[15] the testator dictated his will to a friend, who used a will form to implement the instructions. On another occasion the testator identified the document as his will to two other friends and had them sign the document as witnesses. However, the testator never signed the will. With reference to all of the reported Manitoba cases on s. 23,[16] and particularly *Langseth Estate*, and giving a

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[10] *Supra* note 1 at 296, para. 37.

[11] (1993) 87 Man. R. (2d) 200 (Q.B.).

[12] (1968) 63 W.W.R. 99 (Man. C.A.).

[13] (1994) 98 Man. R. (2d) 218 (Q.B.).

[14] (10 November 1994), Winnipeg PR 93-01-731873 (Man. Q.B.)

[15] (1995) 99 Man. R. (2d) 169 (Q.B.).

[16] There had been three other reported decisions involving s. 23, including *Re Lanpseth*; see an annotation to *Re Langseth* (1991), 39 E.T.R. 218.

strict construction to s. 4(c) of *The Wills Act* concerning witnessing, the court concluded that there had not "been any compliance whatsoever with the requirements of the *Act*" and that the "applicants have failed to establish on the balance of probabilities the testamentary intention of the deceased." I find the court's conclusion regarding testamentary intention surprising. Pursuant to the amended s. 23 such a document should be admitted to probate.

In 1986 in *Stechishin* v. *Palmer*[17] the Manitoba Court of Queen's Bench construed s. 25 of *The Wills Act*[18] in a way different from all preceding decisions in other jurisdictions. *Stechishin* was followed by *Re Cera*,[19] and by the trial judge in *Re Sparks Estate*.[20] These decisions construed s. 25 to apply to not only lapsed specific bequests and devises, but also to lapsed residuary gifts to have a lapsed residuary gift go to the surviving beneficiary(ies). On a further appeal in *Re Sparkes Estate*,[21] the Court of Appeal, in holding that s. 25 does not apply to residual gifts, brought Manitoba law back into the mainstream. Twenty-four days before the Court of Appeal decision, the Manitoba Law Reform Commission recommended to the Minister of Justice that s. 25 be renumbered s. 25(1) and that a s. 25(2) be enacted to read that "subsection (1) does not apply to a residuary devise or bequest that fails or becomes void."[22] So far, the government has not acted on this recommendation.

An aspect of *Knysh* v. *Knysh Estate*[23] was that the testator and his wife made mutual wills and subsequently the testator made a new will, of which his wife became aware only on his death. About this situation the judge said simply:

> ... according to the authorities, [the mutual wills] are binding on both of them and if one dies before a different will is made, then the survivor is bound by the terms of the mutual wills. However, if an alteration in the agreement has taken place by the testator who dies first having executed a second will and having thereby revoked the first will, then the survivor who has notice of the alteration on the death of the other testator cannot claim to have the later will of the deceased set aside and is not entitled to

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17 (1986) 41 Man. R. (2d) 62 (Q.B.).

18 Section 25 reads as follows: "Except when a contrary intention appears by the will, real or personal property or an interest therein that is comprised, or intended to be comprised, in a device or bequest that fails or becomes void by reason of the death of the devisee or donee in the lifetime of the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, is included in the residuary devise or bequest, if any, contained in the will."

19 (1986) 46 Man. R. (2d) 117 (Q.B.); for a critical annotation, seé C. Harvey (1986) 25 E.T.R. 68.

20 (1993) 91 Man. R. (2d) 52 (Q.B.).

21 (1994) 95 Man. R. (2d) 181 (C.A.).

22 Report #24B, 16 May 1994.

23 (1994) 94 Man. R. (2d) 266 (Q.B.).

any relief against the later will, either by way of declaration of trust or otherwise. (See *Stone* v. *Hoskins*, The Law Times Vol.XCIII-441 (P.,D. & A. Div.)).[24]

I disagree. Assuming that there was an agreement not to revoke the mutual wills, either express or implied, a factual matter with which perhaps the judge should have dealt more specifically, *Stone* v. *Hawkins* is an authority only for its result that in the circumstance of the breaching party dying first the remedy of constructive trust is not available to the surviving honouring party. The court was not asked to, and thus did not award damages in the alternative; however, damages for breach of the agreement should always be a potential remedy.[25]

In *Doucette* v. *Fedoruk*,[26] the testator made the following bequests: (*i*) legacies to the four children of his deceased brother Russell; (*ii*) a legacy to a granddaughter of his deceased brother Charles; (*iii*) legacies to his three sisters, one of whom, Mary, predeceased him; and (*iv*) the residue to two of his brothers, with a proviso that if either or both predeceased him then to their children. The surviving children of Mary claimed her legacy pursuant to s. 25.2, which reads as follows:

> Except where 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
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> (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 his death; and
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> (b) leaves issue any of whom is living at the time of the death or the testator;
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> ...
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> 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 he had died intestate without leaving a spouse and without debts immediately after the death of the testator.

The trial judge inferred a "contrary intention" from particularly the residuary gift, but also the legacies to the children of Russell and the granddaughter of Charles. The Manitoba Court of Appeal reversed the trial judge and held that pursuant to s. 25.2 the children of Mary were entitled to her legacy. Concerning

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[24] *Ibid.* at 273.

[25] See, for instance, H.G. Hanbury, *Modern Equity*, 14th ed. (London: Sweet & Maxwell, 1993) at 312, and C.V. Margrave-Jones, ed., *Mellows: The Law of Succession*, 5th ed. (London: Butterworths, 1993) at 31. Incidentally, Margrave-Jones writes: "The problem of calculating damages may be so difficult and the likely amount ... so small, as to make the threat of an action for breach of contract no serious deterrent." This may be true when notice of the (intended) breach comes during the joint lives of the parties; but, it should be no problem when notice of the breach comes with the death of the breaching party.

[26] (1992) 83 Man. R. (2d) 179 (C.A.).

a contrary intention, with reference to many English and Canadian cases, Justice Philp concluded for the Court

... that in order to exclude the operation of s. 25.2 there must be words or language in the will which, in all of the circumstances, indicate a clear and positive intention to do so. A contrary intention will not be found by "picking out little circumstances." There must be more than mere inference or conjecture; there must be circumstances which "carry conviction to the mind of the court" that the testator intended a result inconsistent with the statutory intention.[27]

Re Abrahamson Estate[28] was an unremarkable case concerning testamentary mental capacity, except for one comment made by the judge. The lawyer who drew the will in question knew that his client "was suffering from a mental disorder which periodically affected her cognitive ability."[29] For this reason he "was cautious about accepting instructions"[30] and he had an associate with him when he reviewed the will prior to its execution. The noteworthy paragraph of the reasons for judgment is:

[29] Mr. ... was criticized for not inquiring of any of the hospital staff of Miss Abrahamson's mental condition or if she was on any medication. While I think it would have been better if he had attempted to obtain a medical opinion as to Miss Abrahamson's testamentary capacity, there was, in my view, no legal obligation on him to do so when, in obtaining instructions from and reviewing the contents of the will with Miss Abrahamson, he had no concern about her capacity to make a will.

Re Mathis Estate[31] is another case involving essentially testamentary mental capacity in connection with a testator who on her death bed had her lawyer make a new will for her. The one noteworthy aspect of the case is Chief Justice Monnin's comment about taking instructions. Although the total value of the deceased's stocks, bonds, and bank account was $190,000.00, she told her lawyer amounts which totalled $117,000.00. Chief Justice Monnin, in approving the lawyer's taking of instructions, said:

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27 *Ibid.* at para. 23. Curiously, Justice Philp did not refer to *Re Gillis* (1988), 55 Man. R. (2d) 39 (C.A.), a case decided along the same line as *Doucette*, in which he dissented. Also, I wonder whether *Re Inkster* (1979), 6 E.T.R. 94 (Man. Q.B.), a case concerning the same wording, "except when a contrary intention appears by the will ... ," at the beginning of s. 25, could now be decided as it was.

28 (1994) 96 Man. R. (2d) 150 (Q.B.).

29 *Ibid.* at para. 27.

30 *Ibid.* at para. 28.

31 (1989) 62 Man. R. 50 (C.A.).

[34] A solicitor who drafts a will is not required to find out to the penny what a prospective testatrix owns. He must know the nature of the assets but need not know the exact total. To properly draft a will a solicitor should know the nature of the assets, namely, whether they are real estate, bank accounts, stocks, bonds or various other types of investments. In this case [the lawyer] ... obtained sufficient information to properly draw the will.

Another instructive case concerning the preparation of a will is *Re Konarski*.[32] It involved the will of a testator whose mental capacity was suspect, whose first language was Ukrainian, and who was brought to the lawyer by the intended sole beneficiary. The lawyer properly interviewed the testator privately, requiring the sole beneficiary, over the protestations of the testator, to remain in the waiting room. Apparently, the lawyer, who is fluent in Ukrainian, conducted a fairly extensive interview, and involved a partner, who also speaks Ukrainian, in the review of the will prior to its execution. Justice Darichuk was critical of the lawyer's taking of instructions in two respects. He thought "his inquiries [could have] been more specific and comprehensive."[33] More significant was the lawyer's failure to make any notes. Justice Darichuk wrote:

[27] Irrespective of the simplicity of the instructions he received from the testator, given the importance of the role of a solicitor in the preparation of a testamentary document, it would have been preferable had notes of the interview been prepared and preserved.

There is a part of Justice Darichuk's reasons, dealing with the doctrine of suspicion, which must be read with care. He quoted from *Re Carvell*[34] in which it is said that the doctrine raises the standard of proof. He did not refer to *Re Hall Estate*[35] in which his colleague Justice Hanssen stated, correctly in my view, that the standard continues to be the ordinary civil standard of proof, on the balance of probabilities.

The doctrine of suspicion has long been a misunderstood and controversial doctrine, as to what it applies to and what is the operative standard of proof when it applies.[36] Rather surprisingly, given the preponderance of public law cases in the appeals it chooses to entertain, the Supreme Court of Canada recently handed

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32 (1988) 57 Man. R. 287 (Q.B.).

33 *Ibid.* at para. 28.

34 (1977) 21 N.B.R. (2d) 642 (Co. Ct.).

35 (1986) 46 Man. R. (2d) 232 (Q.B.).

36 For instance, in *Re Clark Estate* (1991), 74 Man. R. (2d) 116 at para. 34, counsel for the plaintiff incorrectly submitted that evidence of undue influence invokes the doctrine of suspicion.

down a decision concerning the doctrine of suspicion in *Vout* v. *Hay*.[37] First, the Court dealt with the standard of proof. Justice Sopinka for the Court wrote:

> [24] ... in accordance with the general rule applicable in civil cases, it has now been established that the civil standard of proof on a balance of probabilities applies. The evidence must, however, be scrutinized in accordance with the gravity of the suspicion. As stated by Ritchie J. in *Re Martin: MacGregor* v. *Ryan*, [1965] S.C.R. at p.766:
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> > The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case.

This statement is practically identical to what Justice Philp wrote in *Re Langseth* respecting s. 23. It confirms the civil standard of proof, with the virtually it-goes-without-saying common sense rider that what it takes to satisfy the standard of proof will vary from case to case.

Second, as to what the doctrine applies and encompasses, Justice Sopinka, referring to the seminal decision of *Barry* v. *Butlin*,[38] wrote that:

> [25] With respect to the second problem, although *Barry* v. *Butlin* and numerous other cases dealt with circumstances in which the procurer of the will obtained a benefit, it has been determined that the dictum in *Barry* v. *Butlin* extends to any 'well-grounded suspicion' ... . The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud ... .
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> [26] Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval. The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will. Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.
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> [27] Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard. There is nothing mysterious about the role of suspicious circumstances in this respect. The presumption simply casts an evidentiary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.
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> [28] It might have been simpler to apply the same principles to the issue of fraud and undue influence so as to cast the legal burden onto the propounder in the presence of suspicious circumstances as to that issue ... . Indeed the reference in *Barry* v. *Butlin* to the will of a 'free and capable' testator would have supported that view. Nevertheless, the principle has become firmly entrenched that fraud and undue influence are to be treated as an affirmative defence to be raised by those attacking the will.

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[37] (22 June 1995), (S.C.C.) [unreported].

[38] (1938) 12 E.R. 1089.

They, therefore, bear the legal burden of proof. No doubt this reflects the policy in favour of honouring the wishes of the testator where it is established that the formalities have been complied with, and knowledge and approval as well as testamentary capacity have been established. To disallow probate by reason of circumstances merely raising a suspicion of fraud or undue influence would tend to defeat the wishes of the testator in many cases where in fact no fraud or undue influence existed, but the propounder simply failed to discharge the legal burden. Accordingly, it has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption of which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the will...

I have only this to add to Justice Sopinka's statement. I think that it is preferable to consider that the doctrine of suspicion applies to four of the five requirements for a valid will or codicil, namely testamentary intention, testamentary capacity, knowledge and approval (not including fraud and undue influence), and due execution; the doctrine has no application to due form because either its existence or the lack thereof will be indisputable. He might have added that the doctrine of suspicion was an unnecessary creation, which does not exist in connection with other civil issues, and perhaps have decreed its demise. After all, it only states an obvious dynamic regarding the burden of proof, and caution to judges.

There were three construction cases reported in the period under review. *Jobin* v. *Jobin Estate*[39] is simply an application of the common law principle that when a testamentary gift is made to a person not by name, but rather by describing a relationship to the testator, or to some other person, or by describing an office, or an employment situation, the will speaks from the time of execution by, not the death of, the testator. Justice Clearwater correctly held that s. 22(2) of *The Wills Act* does not apply.

The testator in *Canada Trust Co.* v. *Public Trustee (Man.)*[40] made a bequest in his will to the National Cancer Research Foundation, an entity which does not exist. The bequest was claimed by the Canadian Cancer Society and the Cancer Research Society. The trial judge treated the problem as one of misdescription of a beneficiary by the testator, which he resolved by resorting to extrinsic evidence. The Court of Appeal disagreed with the trial judge's characterization of the problem. The Court of Appeal applied the *cy-pres* doctrine to come to the same result.[41]

Another case in which the admissibility of extrinsic evidence was considered was *Re Tucker Estate*.[42] Ultimately, although disagreeing to some extent with the trial judge on the admissibility of some of the evidence, the Court of Appeal based

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[39] (1992) 82 Man. R. (2d) 168 (Q.B.).

[40] (1993) 90 Man. R. (2d) 22 (Q.B.).

[41] (1994) 95 Man. R. (2d) 6 (C.A.).

[42] (1993) 92 Man. R. (2d) 20 (C.A.).

its reversal of the trial judge's construction of the testamentary gift in question on the law pertaining to an attempt to make an absolute gift and at the same time to restrict alienation on the part of the beneficiary. Justice Kroft in an *obiter dicta* also commented upon the law relating to insane delusion. He referred to the leading case, *Banks* v. *Goodfellow*,[43] and its incorporation into Canadian common law by *Skinner* v. *Farquharson*[44] and *Ouderkirk* v. *Ouderkirk*.[45] He described as the "classic expression" of the rule this statement from the *Banks* reasons of Chief Justice Cockburn:

> ... the existence of a delusion, compatible with the retention of the general power and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it.[46]

I think that an important part of the *ratio* of the case is to be found in the following statement from the fourth last paragraph of Chief Justice Cockburn's reasons:

> Neither of these delusions ... *had or could have had* any influence upon [the testator] ... in disposing of his property [emphasis added].

If I am correct, Canadian common law, as evidenced by *Skinner* v. *Farquharson* and *Ouderkirk* v. *Ouderkirk* and other cases including *Re Cadman Estate*[47] is more stringent as regards insane delusions. An insane delusion is invalidating by *Banks* v. *Goodfellow* if it had or could have had an effect on the will the testator made. By the aforementioned Canadian cases, an insane delusion is invalidating only if it can be proved that it had, not could have had, an effect. In other words, the evidentiary burden of proof is heavier on the person contesting validity.

Kologinski v. *Kologinski Estate*[48] decided that an investment certificate designation of beneficiary form did not come within *The Retirement Plan Beneficiaries Act* and thus required execution in accordance with *The Wills Act* to be effective. In *Waugh Estate* v. *Waugh*,[49] Justice Wright made a similar obiter speculation about beneficiary designations in non-insurance R.S.P.s which have not been converted

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43 (1870) 5 L.R. 549 (Q.B.).

44 (1902) 32 S.C.R. 58.

45 [1936] S.C.R. 619.

46 *Supra* note 43 at 571.

47 (1984) 28 Man. R. (2d) 130 (Q.B.) at para. 14.

48 (1988) 54 Man. R. (2d) 120 (Q.B.).

49 (1990) 63 Man. R. (2d) 155 (Q.B.).

into an annuity. In *Pozniak Estate* v. *Pozniak*[50] the Court of Appeal disagreed with Justice Wright. The recently re-enacted *Retirement Plan Beneficiaries Act*[51] covers non-insurance R.S.P.s whether or not they have been converted into an annuity; however, it appears that the extended definition of "plan" in the re-enacted *Act* that does not include an investment certificate.

A second issue in both *Waugh Estate* and *Pozniak Estate* was whether the proceeds of a non-insurance R.S.P. containing a valid beneficiary designation are payable directly to the designated beneficiary or to the designated beneficiary through the deceased's estate. If the latter, the proceeds would be subject to abatement in connection with payment of the deceased's debts and claims pursuant to *The Marital Property* and *Dependents Relief Acts*. In *Waugh Estate* Justice Wright held that such R.S.P. proceeds are an asset of the deceased's estate, noting that there was no exclusionary provision in *The Retirement Plan Beneficiaries Act* comparable to s. 173(1) of *The Insurance Act*, which reads as follows:[52]

> Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.

In so holding Justice Wright expressly disagreed with *Daniel* v. *Daniel*.[53] In *King* v. *King*,[54] Justice Kennedy, without referring to either *Daniel* or *Waugh Estate* decided that R.S.P. proceeds are not an asset of a deceased pensioner's estate. The Court of Appeal in *Pozniak Estate* agreed with *Waugh Estate*. In so doing the Court considered s. 173(1) of *The Insurance Act* and said: "No such provision is found in the *R.P.B. Act*."[55] Presumably, in making that statement the Court considered s.11 of the original *Retirement Plan Beneficiaries Act*,[56] which was the governing law for the case:

> [a]fter the death of a participant who has made a designation that is in effect at the time of his death, the person designated may enforce payment of the benefit payable to him under the plan, but the person

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50 (1993) 88 Man. R. (2d) 36 (C.A.).

51 S.M. 1992, c.31. Note also R.E. Scane, Non-Insurance Beneficiary Designations" (1993) 72 Can. Bar Rev. 178.

52 R.S.M. 1987, c. 140.

53 (1986) 41 Man. R. (2d) 66 (Q.B.).

54 (1990) 68 Man. R. (2d) 253 (Q.B.).

55 *Supra* note 50 at para. 29.

56 R.S.M. 1987, c. R 138.

against whom the payment is sought to be enforced may set up any defence that he could have set up against the participant or his personal representative.

The Court held therefore that such pension proceeds "will form part of the gross value of the estate ... to be treated by the executor as a specific bequest in the distribution of the estate."[57]

In the re-enactment of *The Retirement Plan Beneficiaries Act*,[58] another of the changes made to the *Act* was with respect to former s. 11, which in the re-enacted *Act* is s. 14:

A person to whom a benefit is payable under a plan pursuant to a designation may enforce payment of the benefit against the administrator of the plan, but the administrator may set up any defence against the person that it could have set up against the participant who made the designation.

S. 15 was also added:

Payment by the administrator of a plan of the benefits under the plan in accordance with a designation is, in the absence of actual notice of a subsequent designation or a subsequent revocation of the designation, a full discharge to the administrator of its obligations under the designation.

In *Copet* v. *Clark*[59] Justice Mykle distinguished *Pozniak Estate* on the basis of ss. 14 and 15 of the re-enacted *Act*. He said:

The legislative scheme now permits a designated beneficiary to enforce payment directly to that beneficiary, upon which payment the administrator of othe plan is discharged of its obligations. It is clear that the intent of the present legislation is that such funds do not form part of the deceased's estate. (See also *Baltzan Estate* v. *Royal Bank* [1990] 3 W.W.R. 374 (Sask. Curr. Ct.)).

Justice Mykle's reference to the *Baltzan* case is a bit puzzling; perhaps it was for the court's statement at 382 that legislation which is "remedial in nature ... must be construed liberally to ensure the implementation of the legislature's intention." Justice Mykle may be correct that ss. 14 and 15 supercede *Pozniak Estate*, but s. 14 is not as clear and certain as s. 173(1) of *The Insurance Act*.

Finally of note from this spate of cases, in *Waugh Estate* Justice Wright held that for the purpose of abatement when the residuary and general bequest assets were not sufficient to cover the deceased's debts, specific bequests and specific devises abate "on an equal basis pro rata." In some places the law is that personalty is consumed to satisfy debts before resort is made to realty. Justice Wright's decision

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[57] *Supra* note 50 at paras. 30 and 31.

[58] *Supra* note 51.

[59] (27 February 1995) Brandon Centre 95.02.27OCI (Q.B.).

accords with what probably s.17.3(4) and (5) of *The Law of Property Act* provide, although the last clause of s.17.3(5) may raise some doubt.

The Supreme Court of Canada handed down a decision in *Tatryn* v. *Tatryn Estate*[60] which is noteworthy in two respects. First, it is even more surprising that the Court entertained this appeal than its hearing the appeal in *Vout* v. *Hay*, supra, because *Tatryn Estate* has to do with dependants' relief legislation, which varies significantly from province to province. Second, the Court's decision speaks specifically to *The Variation of Wills Act* of British Columbia, confirming the duty of spouses and parents to take care of the financial need of their spouse and children and the moral obligation of spouses and parents to make some provision for their spouse and children regardless of financial need. Probably, the decision will be applied by the courts of some other provinces. However, it has absolutely no application to *The Dependents Relief Act* of Manitoba. It would have confirmed the Manitoba courts' interpretation of the former *Testators Family Maintenance Act* of Manitoba. The current *Dependents Relief Act*, different from *The Wills Variation Act* of British Columbia and the former *Testator Family Maintenance Act* of Manitoba, is so worded that it clearly restricts the Act's application to financial need.

Finally, *Re Bolton's Estate*[61] is of note for the Court of Appeal's comprehensive review of the legal principles and cases respecting costs in estate litigation.[62]

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[60] [1994] 2 S.C.R. 807.

[61] (1992) 76 Man. R. (2d) 241 (C.A.).

[62] Note also *Re Clark Estate* (1991), 77 Man. R. (2d) 250 (Q.B.) and *Fedon Estate* v. *Fedon* (1992), 78 Man. R. (2d) 103 (C.A.) which involved applications of well established principles.