The Judicial Reconstruction Of Wills in Manitoba

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I. INTRODUCTION

SHOULD ANYTHING HAPPEN, IN LAW AND IN FACT, when a probated will does not conform to established statutory and common law requirements? The testator is dead, the form of the will is valid: so why not let his or her choices for winners and losers rule?

The law of succession in Manitoba strives to protect the intentions of a testatrix and make reasonable provision for her family. Testamentary autonomy in Manitoba is not absolute, because a court may remake a testatrix's will in order to effect her intentions or prevent her family members from becoming reliant upon the community for support.[1] Although remaking a testatrix's will may be

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1 The scope of testamentary freedom has been extensively canvassed in the secondary literature in both textbooks and journal articles. See, for example, G. Bale, "Limitations on Testamentary Disposition in Canada" (1964) 3 Can. Bar Rev. 369; E.N. Cahn, "Restraints on Disinheritance" (1936) 85 U. Pa. L. Rev. 139; A.Durham, "The Method, Process and Frequency of Wealth Transmission on Death" (1963) 30 U. Chi. L. Rev. 241; L.M. Friedman, "The Law of the Living, the Law of the Dead: Property, Succession and Society" (1961) Wis. L. Rev. 340; G. W. Keeton & L.C.B. Grower, "Freedom of Testation in English Law" (1934–35) 20 Iowa L. Rev. 326; H. D. Laube, "The Right of a Testator to Pauperize His Helpless Dependants" (1928) Cornell L.Q. 559; J. Laufer, "Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation" (1955) 69 Harv. L. Rev. 277; O. K. McMurray, "Liberty of Testation and Some Modern Limitations Thereon" (1919) 14 Ills. L. Rev. 536; A. Nusbaum, "Liberty of Testation" (1937) 23 Am. Bar Assoc. 183.

socially desirable, it may also impact upon individual freedom, social relations, and proprietary rights.[2]

The remaking of a will by a court limits an individual's freedom to choose how her property will be used and enjoyed after death.[3] It may also change relations between spouses, grandparents, parents, children, siblings, donees, and donors. Remaking a will may redistribute property from one beneficiary under a will to another, from a beneficiary under a will to one who may take under intestacy, or from a beneficiary under a will to a beneficiary whose entitlement depends upon status.[4]

A court may remake a testator's will in Manitoba in three ways. These include rectification of a will at probate, construing a probated will as if words have been added or deleted, or by ordering reasonable provision out of a testator's estate under dependant's relief legislation. The problem, however, is that the case law surrounding rectification and construction has been inconsistent and incoherent; and there are gaps in *The Dependant's Relief Act* which may defeat the purposes of the legislation.[5]

This article will study the judicial reconstruction of wills in Manitoba in the context of wills rectification, construction, and family provision. The discussion will offer recommendations for law reform in order to render the law of rectification and construction more certain and predictable,[6] and eliminate deficiencies in the law related to family provision.

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2 A court may also limit freedom of testation for other reasons of public policy. In *Gould Estate* v. *Stoddart Publishing Co.*, [1997] 30 O.R. (3d) 520 (Ont. G.D.), aff'd. on other grounds, (1998) 39 O.R. (3d) 545 (Ont. C.A.), 41 O.R. (3d) (S.C.C.) the court held that publicity, being a form of intangible property akin to copyright, should descend to a celebrity's heirs, but because there was a public interest in knowing more about one of Canada's musical geniuses, no right of personality in Gould had been unlawfully appropriated by the defendants. This decision was commented upon in detail in R.G. Howell, "Publicity Rights in the Common Law Provinces in Canada", (1998) 18 Loyola of Los Angeles Ent. L. J. No. 3,at 502–506.

3 *The Marital Property Act*, R.S.M. 1987, c. F20 and *The Homesteads Act*, S.M. 1992, c. 46-Cap. H80 also constrain testamentary freedom through the operation of fixed statutory formulas, as opposed to the exercise of judicial discretion.

4 M.J. Mossman, "Toward 'New Property and New Scholarship," in M.J. Mossman & W.F. Flanegan eds., *Property Law: Cases and Commentary* (Toronto: Emond Montgomery Publications Limited, 1998) 758 at 767.

5 *The Dependants Relief Act*, S.M. 1989-90, c. 42-Cap. D37. See also C. Harvey, *The Law of Dependants Relief in Canada* (Scarborough: Carswell, 1999) as an up-to-date reference source respecting dependants relief proceedings in Canada.

6 In O.W. Holmes, Jr., "The Path of Law" (1897) 8 Harv. L. Rev. 457, the author argued that the function of a lawyer is to predict the outcome of a judicial proceeding. *The Wills Act*, reflects positive law enacted by the state to provide a mechanism for the disposition of property after death. For a discussion of the jurisprudence underlying law, see for example, J. Austin, "The Province of Jurisprudence Determined" in M.D.A. Freeman, ed., *Lloyds In-*

II. THE RECTIFICATION OF WILLS AT PROBATE

IN ORDER TO UNDERSTAND THE LAW OF WILLS RECTIFICATION, it is of assistance to review the historical development of the formal requirements for wills execution.

The law of England as appropriate for Rupertsland was received by Manitoba in 1870 upon entering Confederation.[7] Before the Norman Conquest of England in 1066 A.D., Anglo-Saxon folk law permitted wills of land and chattels.[8] After the Conquest, wills of land were abolished, although wills of chattels continued to be administered by the church courts. The Normans imposed a feudal order upon Anglo-Saxon society, which replaced testamentary freedom with rigid rules. This prevented a landowner from voluntarily disposing of his land after death, and preserved the land's unitary integrity and the feudal bond between the donee, his successors, and the donor (mainly the crown).

During the thirteenth century, landlords began to place their land into uses, to circumvent the feudal rules of succession, specifically male primogeniture, and to control its use and enjoyment after death.[9] The use divided the legal title

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troduction to Jurisprudence, 6th ed. (London: Sweet & Maxwell Ltd., 1994) 251–264; J. Bentham, "An Introduction to the Principles of Morals and Legislation" in M.D.A. Freeman, *Lloyds Introduction to Jurisprudence, supra*, 229–233; H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593.

7 *An Act Respecting the Court of Queen's Bench in Manitoba*, (1874), 38 Vict., c. 12, s. 1. This included the *English Wills Act* of 1837; *An Act for the Amendment of Laws with Respect to Wills*,1837, (U.K.), 1 Vict., c. 26, 4 *Chitty, Collection of All the Statutes* (928). Provisions of that English *Wills Act* were formally adopted by the Manitoba legislature in 1871 and with few exceptions remain in force to this day; *An Act Relating to Wills* (1871), 34 Vict., c. 4; Manitoba, *Report of the Law Reform Commission on* The Wills Act *and the Doctrine of Substantial Compliance* (Winnipeg: Queen's Printer Office, 1980) (C.H.C. Edwards, Q.C., Chairman) at 2. It is arguable that English law was received by Manitoba on 2 May 1670, because "The Hudson's Bay Company Charter of 2 May 1670 provided that the law of England applied to the territory presumably of that date"; A.H. Oosterhoff & W.B. Rayner, *Anger and Honsberger Law of Real Property*, Volume 1, 2nd ed.(Toronto: Canada Law Book Company, 1985) at 53, note 2. Professor Howell, however, has stated that there is "authority favouring the date a local legislature was established in the province," and has concluded that the reception date for English law in Manitoba was 15 July 1870: R. G. Howell, "Important Aspects of Canadian Law and Canadian Legal Systems and Institutions of Interest to Law Libraries" in *Law Libraries in Canada: Essays to Honour Diana M. Priestly* (Carswell: Toronto, 1988) at 63–65.

8 M.M. Sheehan, *The Will in Medieval England* (Toronto: Pontifical Institute of Medieval Studies, 1963) at 83.

9 A. Reppy & L.J. Tompkins, *Historical and Statutory Background of the Law of Wills* (Chicago: Callaghan and Company, 1928) at 4; E. Jenks, *A Short History of English Law*, 2nd ed. (London: Methuen & Co. Ltd., 1920) at 96. For a detailed discussion of the rules related to the transfer of land during the feudal era, see generally, D.H. Brown, "Historical Perspectives on the Statute of Uses" (1979) 4 Man. L. J. 409; E.W. Ives, "The Genesis of the Stat-

from the beneficial enjoyment of landed property, and enabled landlords to control the benefits of their property including rents, crops, and profits after death through a series of successive uses. The incidents of feudal tenure could not attach to the *Cestui Que Use* and fees related to land transfers stopped flowing, defeated by the use.[10] In order to replenish royal coffers, the *Statute of Uses* was passed.[11] It transferred the legal estate to the equitable estate and abolished a property holder's ability to decide who could use and enjoy his land after death.[12]

The inability to dispose of land after death caused significant unhappiness in England, and in 1540 the crown agreed to a compromise in the *Statute of Wills*.[13] It provided that all land held in socage tenure, and two thirds of land held in knight service, could be disposed of by a written will. It did not have to be in the handwriting of a deceased, signed by him, or attested by witnesses, but did require a written will. This statute transformed the English land law of succession from a system based on rules to one based on volition, through a written will, which paralleled the several previous centuries of the English law of chattel succession probated in ecclesiastical courts.

The form of the written will created by the *Statute of Wills* (1540) provided a method of "channelling" the disposition of property after death, but it did not provide reliable evidence, or safeguard a testator from imposition or impulsive conduct.[14] *The Statute of Frauds* (1677) was enacted in response to these con-

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ute of Uses" (1967) 82 E.H.R. 677; A.W.B. Simpson, *An Introduction to the History of the Land Law*, (London: Oxford University Press, 1961); J.L. Baker, "Use upon a Use in Equity" (1977) 93 L. Q. Rev. 33; J.L. Barton, "Medieval Use" (1965) 81 L. Q. Rev. 562; J.L. Barton, "Rise of the Fee Simple" (1976) 92 L. Q. Rev. 108; Sir K.E. Digby, *An Introduction to the History of the Law of Real Property*, (London: McMillan & Co., 1875); Sir W. Holdsworth, *A History of English Law*, Volume IV (London: Methuen & Co. Ltd.; Sweet & Maxwell Ltd., 1966); C.D. Spinoza, "The Legal Reasoning Behind the Common Collusive Recovery: Taltarum's Case (1472)" (1992) 36 Am. J. L.Hist.70; S.E. Thorne, "English Feudalism and Estates in Land" (1959) Camb. L. J. 193; T. G. Watkin, "Feudal Theory, Social Needs and the Rise of the Heritable Fee" (1979) 10 Cam. L. Rev. 39.

10 Brown, *ibid.* Male primogeniture, 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 willed by a deceased to a beneficiary of his choice.

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

12 E.H. Burn, *Cheshire's Modern Law of Real Property*, 12th ed. (London: Butterworths, 1976), at 54–55.

13 *Statute of Wills*, 1540, (U.K.), 32 Henry VIII, c.1, 3 Statutes of the Realm (744) [hereinafter *Statute of Wills* (1540)].

14 J.H. Langbein, "Substantial Compliance with the *Wills Act*" (1975) 88 Harv. L. Rev. 489, at 492–496. See also L.L. Fuller, "Consideration and Form" (1941) Colum. L. Rev. 759; and A.G. Gulliver & C. Tilson, "Classification of Gratuitous transfers" (1941) 51 Yale L. J. 1.

cerns.[15] It required that all wills of land be in writing, signed by a testator and attested by three witnesses who subscribed their name to the document.[16] This Act also restricted the use of oral (nuncupative) and holograph wills of chattels.[17] These formal requirements[18] were further refined by *The Wills Act*(1837) which provided a uniform method of disposition for land and chattels.[19] The legislation merged the substantive law of wills and testaments, and eliminated the use of holograph wills, except for soldiers and sailors.[20] It provided that a will of land or chattels had to be in writing, signed, with that signature attested by two independent witnesses.[21] By the middle of the nineteenth century, subject to the rights of dower, the rigid rules of feudalism had been completely circumvented by the formal requirements for wills execution.[22]

Although the law of wills is both ancient and medieval in origin, the law developed by the English courts of probate during the mid-nineteenth century is of immediate relevance. It served as the basis for development of the Canadian law of probate during the twentieth century. After 1837, and even before, an

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15 *Statute of Frauds*, 1677, (U.K.), 29 Charles II, c. 3, 5 Statutes of the Realm (839).

16 *Ibid.* at s. 5.

17 *Ibid.* at s. 18.

18 For a discussion of the importance of the development of formulary requirements in English law, see D.J. Guth, "Introduction: Formulary and Literacy as Keys to Unlocking Late-Medieval Law" in K. Fianu et D. J. Guth eds., *Ecrit et Pouvoir Dans Les Chancelleries Medievales: Espace Francais, Espace Anglais* (Louvaine-La Neuve: Fédération Internationale des Instituts d'Études Médévales, 1997) at 1–12.

19 *An Act for the Amendment of Laws with Respect to Wills*, (1837), 1 Vict., c. 26, 4 Chitty, Collection of All the Statutes (928) [hereinafter *The Wills Act* (1837)]. The procedural law related to wills and testaments was merged by *An Act to Amend the Law Relating to Probate and Letters of Administration in England*, 1857, (U.K.), 20 & 21 Vict. 77, 4 Chitty, Collection of All the Statutes (592).

20 *The Wills Act* (1837), *ibid.* at ss. 1 and 11. The historical cleavage between the disposition of land and chattels after death is discussed in detail in Reppy & Tompkins, *supra* note 9. For a discussion of the relevance of conducting a comparative historical analysis in the study of law, see R. Pound, "What do we ask of Legal History" (1962) 11 Am. U. L. Rev. 117; J. Reid, "Touch of History—The Historical Method of the Common Law Judge" (1962) 8 Am. J. L. Hist. 157; C.V. Wedgwood, *The Sense of the Past* (New York: Collier books, 1960); V. Windeyer, "History in Law and Law in History" (1973) 11 Alta. L. Rev. 123.

21 The witnesses do not actually read the will, but are only required to witness the testator signing it; *Smith* v. *Smith* (1866), L.R. 1 P. & D. 143 (Prob. Ct.).

22 Indeed, the feudal order formally died in 1660 with the abolition of knight service when the *Tenures Abolition Act*, 1660, (U.K.), 12 Charles II, c. 24, 5 Statutes of the Realm (259) was passed, and it had had little life for a century plus before that, after the *Statute of Wills* (1540), *supra* note 13, was enacted.

English Court of Probate determined which documents and words comprised a will and whether a testatrix knew and approved of a will's contents.[23]

In the leading case of *Guardhouse* v. *Blackburn*, the English Probate Court adopted a strict approach to wills rectification which provided that a will could only be altered in compliance with formal statutory requirements.[24] The reading-over of a will by a deceased constituted "conclusive evidence" that a deceased knew and approved of a will's contents, and with the exception of fraud or inadvertent error, a Court of Probate had no jurisdiction to add or delete words from a will.[25]

This rigid approach to wills rectification in nineteenth century England was tempered with a more relaxed judicial approach in England and Canada during the twentieth century. The nineteenth century English approach contained a logical inconsistency, because a mere execution of a will could only establish that a deceased signed a will; it could not confirm that she knew or approved of its contents at the time of execution.

The twentieth century approach to wills rectification for mistake in England and Canada came with the decision of the English Court of Chancery in *Re Morris*.[26] There a testatrix read over a will before executing it "in the sense of casting her eye over it;" but the will contained an inadvertent error, which was not discovered until after she died.[27] 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 altering those clauses. The solicitor revoked the totality of those clauses in error and substituted other gifts in their place. The court held that the deletion of Clause 7 in its entirety was an inadvertent error made without the knowledge of the solicitor or the testatrix. Therefore a court could not impute to a testatrix knowledge and approval of a solicitor, which a 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 intentions.

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[23] For a discussion of the function of a court of probate generally, see T.G. Feeney, *The Canadian Law of Wills*, Volume One, Probate, Third Edition (Toronto: Butterworths, 1987); C. Harvey, *Materials on Wills and Estates* (Winnipeg: Faculty of Law, University of Manitoba, 1999); A.B. Mellows, *The Law of Succession*, 5th ed. by C.V. Margrave-Jones (London: Butterworths, 1983); Sir D.H. Parry, *The Law of Succession* (London: Sweet & Maxwell Limited, 1972); *The Law Society of Manitoba, Thirty Second Bar Admission Course* 1998–1999: Wills and Estates (Winnipeg: The Law Society of Manitoba, 1998); S. Cretney & G. Dworkin, *Theobald on Wills*, 13th ed. (London: Stevens & Sons, 1971).

[24] *Guardhouse* v. *Blackburn* (1866), L. R. 1 P.& D. 109 (Prob. Ct).

[25] *Ibid.* at 116. See also, *Rhodes* v. *Rhodes* (1882), 7 A. C. 192 (P.C.).

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

[27] *Ibid.* at 1061.

The court considered the rule of evidence that a competent testatrix who read over a will, or had it read over to her, is deemed to have knowledge and approval of its contents unless there is fraud. The court also considered the rule of law, which bound a testatrix to her solicitor's error. The court held that these traditional rules were no longer absolute, and that the twentieth century required a more liberal approach to rectification to arrive at the truth of a testatrix's intentions.[28]

The court noted that the twentieth century approach was correctly stated by Lord Justice Sachs in an unreported 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.[29]

The court found that an effective reading, or reading-over of a will, constituted more than a mere physical act of reading. A testatrix must consciously understand the contents of a will. The court found that, although the testatrix duly executed the will, she did not know and approve its contents. The court then turned to the question of whether a testatrix could be bound by a solicitor's error of which she was not aware.

On the one hand, the court considered the plaintiff's argument that, if a drafter inserts words in a will which are outside of a testator's instructions, he is acting beyond the scope of his authority. In such circumstances, a testator should not be bound by an error unless it is brought to his attention and he expressly adopts it.[30] On the other hand, the court also 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.[31] The court considered the argument that if a drafter inserts words inadvertently because he misunderstands a testator's instructions, and a testator executes a will, a testator should be bound by an error unless there is fraud. However, if a drafter inserts words by inadvertence, and a testator executes a will without noticing an error, a testator should not be bound by any words introduced by such inadvertence.[32] A court has the

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[28] *Ibid.* at 1063.

[29] *Ibid.* at 1065.

[30] *Ibid.* at 1066.

[31] See also C. Mortimer & H.H.H. Cootes, *The Law and Practice of the Probate Division of the High Court of Justice*, 2nd ed. (London: Sweet & Maxwell Ltd.; Stevens & Sons, Ltd., 1927) at 91–92.

[32] *Re Morris*, *supra* note 26 at 1067.

power to delete words by omission where words are inserted *per incuriam* by a solicitor and constitute "a mere clerical error on his part, a slip."[33]

The court concluded that a testatrix would be bound by words, which a drafter inserts intentionally in a will, but will not be bound by words, which are inadvertently inserted in a will without notice to a drafter or a deceased.[34] A deceased will not be bound by an inadvertent error inserted by a drafter unless a deceased is aware of it and adopts it. Although a court may delete words in the event of inadvertent error, a court of probate has no jurisdiction to add words to a will regardless of the source of a mistake.[35] Accordingly, if a deceased intended to gift half of his shares in a limited corporation to his son, but by inadvertence refers to all of his shares in his will, a court of probate may delete the word "all"; but it does not have the jurisdiction to insert the word "half," in order to rectify the mistake at probate.

Although, there have been some limited exceptions in Manitoba and Canada to *Re Morris*, involving mutual or "mirror" wills,[36] it remains the leading authority in relation to the rectification of wills at probate. The problem, however, is that *Re Morris* has not been consistently applied, and it is difficult for an ordinary client to predict the outcome of a rectification proceeding.[37] The principle,

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[33] *Ibid.* at 1067.

[34] *Ibid.* at 1067.

[35] *Ibid.* at 1067.

[36] In *Re Thorleifson Estate* (1954), 13 W.W.R.(N.S.) 515 (Man. Surr. Ct.); *Re Brandner*, [1952] 6 W.W.R. (N.S.) 702 (B.C.S.C.). Although Professor Feeney referred to these wills as "mutual wills," in T.G. Feeney, *The Canadian Law of Wills*, 3rd ed., Volume One, Probate (Toronto: Butterworths, 1987) at 57, Professor Oosterhoff has characterized these wills as "mirror" wills: A.H. Oosterhoff, "Testamentary Capacity, Suspicious Circumstances and Undue Influence", (1999) 18 E.T.& P.J. 369 at 373. See also *Shewchuk* v. *Preteau* (1999) 136 Man. R. (2d) 229 (Man. Q.B.), and G. Kennedy, "Case Comment" (1953) 31 Can. Bar Rev. 185.

[37] In *Re Rapp Estate* (1991), 42 E.T.R. 222 (B.C.S.C.) the court rectified a will drawn by a notary public submitted for probate which contained two errors by deleting reference to a residuary bequest which depended on a sister predeceasing a testatrix and by adding language to a will by substituting the number 16 for 18 as the number of residual beneficiaries. In *Wagg* v. *Bradley* (1996), 11 E.T.R. (2d) 313 (B.C.S.C.), presumably a construction case, a court added the words "all my estate" to a home drawn will contained within a printed will form after the name of a beneficiary in the course of construing the document. In *Owen* v. *Owen* (1996), 14 E.T.R. (2d) 108 (B.C.S.C.), a will created a life interest for a widow without providing for a disposition of capital upon the widow's death; and the court dismissed the application to rectify the will by deleting the words "during her lifetime" on the basis that the will contained clear and unequivocal language. 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. 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*,

which does emerge from the Canadian case law, however, is that in the absence of legislation expressly permitting the addition of language to a will, the statutory requirements of writing, signature, and attestation contained in *The Wills Act* prevent a court of probate from adding language to a will regardless of the cause of a mistake, including inadvertent error.[38]

The decision in *Re Morris* reflected a shift in social policy in the twentieth century from the strict requirements of form towards an emphasis upon the substance of a testator's intentions. This shift from form to substance was further exemplified by the enactment of judicial dispensation legislation in Manitoba in 1983.

Before judicial dispensation legislation was passed in Manitoba, courts of probate had encountered difficulties with wills which did not comply with the formal requirements for wills execution. If a testator did not make or acknowledge his signature in the presence of both witnesses,[39] or forgot to sign a will,[40] a will would be declared void. If only one witness to a will signed a will,[41] or if a deceased was too sick to watch a witnesses sign,[42] or was not able to sign,[43] a will would also be declared void. A will had to be signed at its end.[44] If a will was executed and subsequently altered, the alterations had to be signed by a testator and witnessed by both witnesses.[45] Concerning the selection of witnesses, where a will provides a gift to a beneficiary or the spouse of a beneficiary who also witnessed a will, the gift will be void.[46]

R.S.M. 1987, c. E150, ss. 80–81; *The Law Society Act*, R.S.M. 1987, c. L100, s. 56(2)(a)(iv). See also T.G. Youdan, "Case Comment: *Re Rapp Estate*" (1992) 42 E.T.R. 229.

38 In *Alexander Estate* v. *Adams* (1998), 20 E.T.R. (2d) 294 (B.C.S.C.), an executor applied for a court order to rectify a will by deleting a phrase and adding words to it. Burnyeat, J. noted that, following the *Nineteenth Report of the English Law Reform Committee on Interpretation of Wills, 1973*, s. 20(1) of the *English Administration of Justice Act* (1982) was enacted which, effective 1 January 1983, provided a court with jurisdiction to rectify a will which fails to carry out a testator's intention, due to 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 continue to apply. See also *The Wills Act*, R.S.M. 1988, c. W150, s. 3, 4(a), (b), and (c).

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

40 *Re Bean*, [1944] 2 All E.R. 348 (Prob. Div.).

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

42 *Re Wozciechowicz*, [1931] 3 W.W.R. 283 (Alta. S.C., App. Div.).

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

44 *Re Beadle*, [1974] 1 All E.R. 493 (Ch. Div.).

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

46 *Whittingham* v. *Crease & Company*, [1978] 5 W.W.R. 95 (B.C.S.C.).

Apart from formally executed wills, stationers' will forms, which were partly printed and partly in the handwriting of a deceased had also proved troublesome for the courts. Manitoba's first *Wills Act*, provided that "a holograph will wholly written and signed by the testator will be subject to no particular form,"[47] and a revised form of this provision is currently located in s. 6 of the *Act*.[48] Holograph wills presented challenges for probate courts because it was difficult to reconcile the requirements for execution of holograph wills with those of formally executed wills.[49] In *Currie* v. *Potter and Public Trustee of Manitoba*,[50] the Manitoba courts recognised that holograph wills traced their origin to Roman law, and Manitoba possessed a tri-partite English, French, and Scottish heritage.[51] Accordingly, it was "illogical to apply or attempt to apply to a holograph will any of the rules of execution which the legislature provided for the English will."[52] Problems of execution could arise if a testatrix completed a printed will form but forgot to sign it at its end or failed to have her signature witnessed and attested by two independent witnesses. If a printed will form was not executed properly, it would not qualify as a holograph will because, as a printed will form, it was not wholly in the deceased's handwriting.[53] It might not qualify as a for-

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47 *The Wills Act*, 1871, 34 Vict., c. 4, s. 15.

48 W.J. Lindal, "Holograph Writings, Wills, Codicils, Revocations and Alterations" (1954) 26 Man. Bar N. 1. The legislative history was reviewed in detail by Montague J. in *Re Eames Estate*, [1934] 3 W.W.R. 354 (Man. Q.B.), at 371–372. See also, *Oliver Estate* v. *Reid* (1994), 4 E.T.R. (2d) 105 (Nfld. C.A.), where Mr. Justice Marshall reviewed the history of nuncupative and written wills in England from the passage of the *Statute of Frauds* (1677) until the enactment of the *Wills Act* (1837).

49 *Re Tachibana* (1968), 66 D.L.R. (2d) 567 (Man. C.A.) [hereinafter *Tachibana*].

50 [1981] 6 W.W.R. 377 (Man. Q.B.) [hereinafter *Currie*].

51 *In Re Eames Estate*, [1934] 3 W.W.R. 354 (Man. K.B.); *Re Philip* (1978), 4 E.T.R. 1 (Man. Surr. Ct.), rev'd (1979), 100 D.L.R. (3d) 209 (Man. C.A.); In *Re Scott Estate*, [1938] 3 W.W.R. 278 (Man. Surr.Ct.); *Currie*, *ibid.*; and In *Re Nesbitt Estate*, [1933] 3 W.W.R. 171 (Man. K.B.).

52 *Currie*, *ibid.* at 378–379. The problems inherent in applying Scottish case law to the formal requirements of wills execution were also discussed in *Re Coete Estate* (1987), 26 E.T.R. 161 (Ont. Surr. Ct.). See also, M.J. Sweatman, "Holograph Testamentary Instruments: Where are We?" (1995) 15 E.T.J. 176; Annotation to *Re Philip* "Validity of Holograph Wills on Printed Will Forms" (1979), 5 E.T.R. 83; C. Harvey, "Stationer's Will Forms: *Re Philip* and other Cases" (1983), 6 E.T.Q. 45 at 50, where Harvey commented upon Philp C.J.'s (as he then was) "thoughtful and soundly reasoned judgment" in *Re Philp* and the problem of the applicability of Scottish case law.

53 *The Wills Act*, *supra* note 38 at s. 6. See also, C.T. Onions, *The Oxford Dictionary of English Etymology* (Oxford: Oxford University Press, 1966) at 445; and the decision in *Re Rigden Estate*, [1941] 1 W.W.R. 566 (Sask. Surr. Ct.) at 568, where McPhee J. stated that "holograph" is described in *Wharton's Law Lexicon* as derived from two Greek words "all" and "to write," and it is a deed or writing entirely by the grantor himself." See also Robert K. Barn-

mally executed English will, if it was not written, signed and attested by two independent witnesses.[54]

In order to save wills plagued by problems in execution, before 1983 the Manitoba probate courts had held that a holograph will was not required to comply with all of the formal requirements of ordinary wills.[55] If a testatrix did not intend to incorporate or adopt the printed words on a stationer's will form, but only intended to use them as a guide, then only the words written in a deceased's own handwriting would constitute her will.[56] These principles were, however, subject to an overriding rule that a document placed before a court had to "contain a deliberate, fixed and final expression as to the disposition of the property of the deceased on her death."[57]

In 1983 the Manitoba legislature enacted legislation which provided a court with the jurisdiction to dispense with the formal requirements related to wills execution, if a court was satisfied that a document represented a deceased's will.[58] This legislation provided a remedy for the problems of execution related to formally executed wills, holograph wills, and stationers' printed will forms. Initially, a court required "some compliance" or attempts to comply with the formal requirements of the Act,[59] but in 1995, the legislation was amended,[60]

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hart, *The Barnhart Dictionary of Etymology* (Bronxville, New York: The H. W. Wilson Company, 1988) at page 487.

54 *The Wills Act*, *ibid.* at ss. 3, 4, and 12. For a discussion of the differences between civilian and common law systems, in order to contextualise the distinctions between English and holograph wills, see also, F.H. Lawson, *A Common Lawyer Looks at the Civil Law* (Ann Arbor: University of Michigan Law School, 1955); F.H. Lawson, *The Rational Strength of English Law* (London: Stevens & Sons Limited, 1951); and for a more recent treatment of the topic stemming from Canada, see G.L. Gall, *The Canadian Legal System*, 3rd. ed. (Toronto: Carswell, 1990) at 172–174.

55 *Tachibana*, *supra* note 49. See also *Manuel* v. *Manuel* (1959–60), 30 W.W.R. 513 (Alta. S.C.) at 552, where Riley J. stated that "the statute encourages testators to draw their own wills. That being so, the statute and any such will should be construed benignly and every effort made to avoid the construction that would invalidate the will." But not all courts have been in favour of this policy. In *Sunrise Gospel Hour and Halpenny (Austin Estate)* v. *Twiss* (1967), 59 W.W.R. 321 (Alta. S.C., App. Div.), McDiarmid J., in a dissenting judgment, stated at page 336 that "... it is usually better that property descend according to law rather than by holograph wills which are generally conceived in ignorance and written in haste." See also, S. Peck, "Case Comment" (1968) 7 Alta. L. Rev. 153.

56 *Re Philip*, *supra* note 51.

57 *Bennett* v. *Toronto General Trusts Corporation* (1958), 14 D.L.R. (2nd) 1 (S.C.C.); *Canada Permanent Trust* v. *Bowman* (1962), 34 D.L.R. (2d) 106 (S.C.C.).

58 *The Wills Act*, *supra* note 38 at s. 23.

59 *Langseth* v. *Gardiner*, [1991] 1 W.W.R. 481 (Man. C.A.) [hereinafter *Langseth*]. The courts generally accorded Section 23 a broad and liberal interpretation before the 1995 amendments. Wills that were altered without compliance with formal statutory requirements were admitted to probate; *National Trust Company* v. *Sutton*, [1984] 5 W.W.R. 765 (Man. Q.B.).

and judicial discretion was broadened.[61] As a result, a Manitoba court of probate may now order that a document or writing not executed in compliance with "any or all of the formal requirements" imposed by the *The Wills Act*, such as signature, witnesses, or attestation may be admitted to probate, if a court is satisfied that it constitutes the deceased's will.[62] There are similar legislative provisions 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 wills "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 will made in the presence of witnesses that does not meet all the requirements of that form is nevertheless valid if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased."[63] Outside the law of wills, rectification is a discretionary equitable remedy sparingly used by a court to ascertain the intentions of parties to an agreement. Historically courts have cautiously applied rectification in the law of contract,[64] requiring an applicant to discharge a heavy onus to prove that there is no fair and reasonable doubt as to what the parties intended.[65] In more recent years, however, courts have held that proof beyond a reasonable doubt is not required,[66] and the need for a special onus of

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Wills signed at the beginning, and not the end, were admitted to probate, as were holograph wills which were not signed at all; *Re Briggs Estate* (1985), 37 Man. R. (2d) 172 (Man. Q.B.); *Re Myers Estate* (1993), 87 Man. R. (2d) 200 (Man. Q.B.). Before 1997, witnesses had to attest that they witnessed a testator sign a document, rather than simply subscribe their signature to the foot of the will; *Re Chersak Estate* (1995), 99 Man. R. (2d) 169 (Man. Q.B.), although in the subsequent decision of *George* v. *Daily*, the Manitoba Court of Appeal concluded that *Re Chersak* was wrongly decided. There had to be some compliance, however, so an unsigned, undated memorandum clipped to a printed will form was not admitted to probate; *Montreal Trust Co. of Canada* v. *Andrejewski Estate* (1994), 98 Man. R. (2d) 218 (Man. Q.B.).

60 *Shorrock Estate* v. *Shorrock* (1996), 109 Man. R. (2d) 104 (Man. Q.B.).

61 *Ibid.*

62 *George* v. *Daily* (1997), 115 Man. R. 27 (Man. C.A.); *Beber* v. *Fleury* (1999), 139 Man. R. (2d) 149 (Man. Q.B.).

63 Art. 712–714, C.C.Q. See also J.E.C. Brierly & R.A. McDonald, *Quebec Civil Law* (Toronto: Emond Montgomery Publications Limited, 1993) at 350–360.

64 G.H.L. Fridman, *The Law of Contract in Canada*, 3d ed. (Scarborough: Carswell, 1994), at 822–823.

65 *Hart* v. *Boutilier* (1916), 56 D.L.R. 620 at 630 (S.C.C.).

66 *Peter Pan Drive-in Ltd.* v. *Flambro Realty Ltd.* (1978), 93 D.L.R. (3d) 221 (Ont. H.C.J.), aff'd. 106 D.L.R. (3d) 576 (Ont. C.A.), [1980] 1 S.C.R. xi.

proof greater than the ordinary civil standard of a balance of probabilities now "seems doubtful."[67]

Rectification will not allow a contracting party out of a bad bargain any more than it will allow a winner or loser to remake a testator's will. In both the laws of contract and wills, extrinsic evidence must be admitted in the course of rectification. In contract law, this consists of parol evidence surrounding the making of an agreement, while in the law of wills, this consists of direct and indirect evidence of intention surrounding the making of a will, such as a witnessed promise made by a deceased to his son before a will was signed. The principles of wills rectification should be consistent with the law related to wills execution and contract rectification. Rectification should allow a court to remake a will by adding or deleting words which have not been written, signed and attested, provided a court may consider extrinsic evidence from outside a will's four corners. A court should be allowed to admit both direct and indirect extrinsic evidence of intention at probate, weigh the evidence, and make appropriate findings of fact.

It is important to distinguish between weighing extrinsic evidence of intention, and the standard of proof that must be met in the course of a rectification proceeding. Langbein and Waggoner have argued in favour of the admissibility of extrinsic evidence despite the statutory requirements of writing, signature, and attestation. They have recommended implementation of a higher standard of proof than on a balance of probabilities, in order to safeguard the evidentiary process.[68]

Langbein and Waggoner argued that historically, the impediments to the rectification of wills have been "remedial rather than evidentiary."[69] The problems confronting courts have not centered on the availability of evidence to prove the mistake; rather, they have concerned developing a theory of rectification which will enable a court to correct a mistake in a will in a manner which complies with the formal requirements of wills execution.[70] In the absence of a rational theory of wills rectification, the statutory requirements of writing, signature and attestation prevent a court of probate from adding language to a will from outside of its four corners.

Langbein and Waggoner argued that in order to circumvent the problem of "unattested language,"[71] courts developed a series of devices which have been

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67 S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book Inc., 1999) at 238.

68 J. Langbein & L. Waggoner, "*Reformation of Wills on the Ground of Mistake: Changing Direction in American Law*" (1982) 130 U. Pa. L. Rev. 521.

69 *Ibid.* at 528.

70 *Ibid.* at 528.

71 *Ibid.* at 528.

used in wills construction.[72] By referring to three probate cases decided by the American courts during the late 1970s and early 1980s,[73] Langbein and Waggoner argued that courts are "confident"[74] about their ability to deal with the evidence of mistake, but require a theory to address the problem of unattested language. It is inconsistent for the law to permit rectification of non-probate transactions, such as lifetime trusts or life insurance, which transfer property upon death, while precluding the rectification of wills.[75] In the law of contract, courts have allowed transactions, which did not comply with the *Statute of Frauds* (1677), by requiring a higher standard of proof than the ordinary civil standard.[76] In wills, unlike contract, although the most material witness is deceased, there is no need to consider the reasonable expectations of any other party, because a will is a "unilateral" transaction.[77] On this basis, Langbein and Waggoner concluded that courts of probate should raise the standard of proof to "clear and convincing" evidence.[78] This would exceed the standard used in ordinary civil litigation, but would remain below the "reasonable doubt" standard required by criminal law.

On the one hand, Langbein and Waggoner's approach would safeguard the evidentiary process by raising the standard of proof in wills rectification proceedings. On the other hand, consistency in the law requires that extrinsic evidence of intention or surrounding circumstances should not be tested against a higher standard of proof in wills rectification than in other areas of the law of wills. For example, judicial dispensation regarding strict compliance with due execution,[79] the doctrine of suspicion,[80] and proving the contents of a lost will, all require proof on a balance of probabilities.[81] Establishment of a different

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[72] *Ibid.* at 528–554. These construction techniques include construing an ambiguity contained in a will; interpreting the personal usage of a testator; discerning the implications of future interests contained in a will; construing wills apparently lacking testamentary intent; the doctrine of dependant relative revocation; reformation of a will to cure a perpetuity violation; and reformation of a will to gain a tax benefit.

[73] *Ibid.* at 555–566. The cases referred to were: *Estate of Taff* 63 Cal. App. 3d 319, 133 Cal. Rptr. 737 (1976); Also see *Re: Siegel* 74 N.J. 287, 377 A. 2d 892 (1977); *Re Snide* 52 N.Y. 2d 193, 418 N.E. 2d 656, 437 N.Y.S. 2d 63 (1981).

[74] *Ibid.* at 555.

[75] *Ibid.* at 524.

[76] *Ibid.* at 568.

[77] *Ibid.* at 569.

[78] *Ibid.* at 579.

[79] *Langseth*, *supra* note 59.

[80] *Vout* v. *Hay*, [1995] 2 S.C.R. 876.

[81] A.H. Oosterhoff, *Oosterhoff on Wills and Succession, Text, Commentary and Cases*, 4th ed. (Scarborough: Carswell, 1995) at 316.

standard of proof in rectification cases would increase complexity in the law of wills and make it more difficult for an ordinary client to predict the outcome of a rectification proceeding. The standard of proof under judicial dispensation legislation is the ordinary standard applicable in civil proceedings, namely on a balance of probabilities. 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; and the focus of law reform should be upon the admissibility and weighing of extrinsic evidence, not on increasing the standard of proof in a proceeding.

There have been several proposals for reform developed by legislatures and law reform commissions throughout the Commonwealth.[82] These proposals have considered when rectification may be permitted, the nature of the evidence which may be admitted, the basis on which a court should consider the evidence, and the standard of proof a court should impose. Legislation should delegate to a court the jurisdiction to rectify a will if a court is satisfied on a balance of probabilities that a will contains an error or does not otherwise reflect a testatrix's intentions.[83] This will permit a court to rectify a will when a deceased carelessly reads words, which she believes, should be contained in a will to the detriment of her surviving spouse, children, other family members, or beneficiaries. A court, so the argument goes, can then safeguard the evidentiary function, which the statutory requirements of writing, signature and attestation were intended to fulfill, if it can add and delete words, which it finds accurately, express the deceased's intention. These reforms should make the law more consistent, certain and predictable, while enabling courts to more reliably exercise their discretion in determining the language and documents which comprise a will. The proposed legislation 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 a will does not give effect to the intentions of a testator because:

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82 England, *Nineteenth Report of the English Law Reform Committee on the Interpretation of Wills* (London: Her Majesty's Stationary Office, 1973) (The Right Honourable Lord Pearson, C.B.E.) [hereinafter England]; *Administration of Justice Act*, (U.K.) 1982, c. 53, s. 20; *Wills Act*, 1968, Australian Capital Territory ss. 12A(1), (2) [hereinafter Australian Capital Territory]; New South Wales, *Report of the Law Reform Commission on Uniform Succession Laws* (Sydney, New South Wales Law Reform Commission, 1998) (The Honourable Justice D. Hodgson, Commissioner-in-Charge) at 104–108 [hereinafter New South Wales]. The provisions contained in Section 20 of the *Administration of Justice Act*, supra, were considered in *Wordingham* v. *Royal Exchange Trust Co. Ltd.*, [1992] 3 All E.R. 204 (Ch.) and *Re Segelman*, [1995] 3 All E.R. 676 (Ch.).

83 New South Wales Law Reform Commission, *supra* note 82. See also O. Kahn-Freund, "*On Uses and Misuses of Comparative Law*" (1974) 37 M.L.R. 1; A.H. Oosterhoff, "*Succession Law in the Antipodes: Proposals for Reform in New Zealand*" (1997) E.T.J.&P. 230.

(a) a clerical error was made, or
(b) a will does not reflect a testator's intentions at the time it was made.

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

III. THE REMAKING OF A WILL BY A COURT IN THE COURSE OF CONSTRUCTION

IF THE LANGUAGE CONTAINED IN A WILL IS NOT CLEAR, there are a number of rules and presumptions, which may assist a court in construing a will.[84] During the late nineteenth and early twentieth centuries, English courts required that a will be construed by focusing on the language contained within its four corners, because examining evidence from outside its four corners violated the statutory requirements of writing, signature, and attestation.[85] If a will contained ambiguous language, then a court sat in the "armchair" of a deceased to determine the meaning of ambiguous words.[86] If the ambiguity was patent,[87] such as a reference in a will to a child as "my favourite son," a court could only admit evidence of circumstances surrounding the execution of a will in order to determine which son a deceased intended to benefit. If the ambiguity was latent,[88] however, such as a reference to "my friend 'Bill'," and a deceased had more than one friend named "Bill" at the time of his death, then a court could also admit direct evidence of testamentary intention, in order to determine which "Bill" a

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[84] See T.G. Feeney, *The Canadian Law of Wills, Volume Two, Construction*, 3rd ed. (Toronto: Butterworths, 1987); Manitoba, *Report of the Law Reform Commission on Sections 33 and 34 of The Wills Act* (Winnipeg: Queen's Printer Office, 1986)(C.H.C. Edwards, Q.C., Chairman).

[85] *Higgins* v. *Dawson*, [1902] A.C. 1 (H.L.). See also *Boyce* v. *Cook* (1880), 14 Ch. D. 53 (Ch.); *Hamilton* v. *Ritchie*, [1894] A.C. 310 (H.L.). In the recent decision of *Canada Trust* v. *Off Estate* (2000), 30 E.T.R. 133 (Ont. S.C.J.), at 188–189, the Court distinguished the rule in *Higgins* v. *Dawson* from the "more modern rule" of determining the ordinary meaning of the words by placing oneself in the "armchair" of the testator at the time the will was made.

[86] The "armchair" rule still applies in Manitoba, as referred to by Mr. Justice Twaddle in *Mulligan Estate* v. *Minaker* (1995), 102 Man. R. (2nd) 283 (Man. C.A.) at 286. In Manitoba, the Court of Queen's Bench has jurisdiction to sit in both probate and construction matters; *The Court of Queen's Bench Surrogate Practices Act*, R.S.M. 1987, c. 290, s.6.

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

[88] *Sparks Estate* v. *Wenham* (1993), 1 E.T.R. (2d) 212 (Man. Q.B.) [hereinafter *Sparks Estate*].

deceased intended to benefit. If despite extrinsic evidence, a will remained ambiguous, it was void for uncertainty and the property passed as on an intestacy.

The strict, objective approach of the English courts during the late nineteenth and early twentieth centuries yielded to a more liberal approach by English and Canadian courts in the twentieth century. In *Marks* v. *Marks*, the Supreme Court of Canada held that extrinsic evidence is admissible in wills construction in the case of patent ambiguity or in any other instance.[89] This subjective approach was followed by the Saskatchewan Court of Appeal in *Haidl* v. *Sacher*, which has increasingly become a starting point for wills construction in Canada.[90]

In *Haidl* v. *Sacher*, the court stated that extrinsic evidence of surrounding circumstances is admissible at the commencement of the wills construction process even if there is no ambiguity in a will. Although a court does not have the jurisdiction to add or delete language from a will, it may read a will as if words have been added or deleted. The problem, however, is that *Haidl* v. *Sacher* has not been consistently followed by courts in Canada, and it is difficult for an ordinary client to predict how the rules of construction may be applied. There is no hard and fast rule for assessing whether a court will conclude that a will is clear and unambiguous.[91] At times, courts have confused approaches to construction taken in the nineteenth and twentieth centuries,[92] and have erroneously applied principles of construction in the context of rectification proceedings.[93]

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."[94] Mr. Justice Morse 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 a testator at the time a will was made and endeavour to read the content of a will in the context of the circumstances then surrounding a 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.

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89 *Marks* v. *Marks* (1908), 40 S.C.R. 210 at 212.

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

91 *Sparks Estate*, *supra* note 88; *Stork Estate* v. *York* (1990), 38 E.T.R. 290 (Ont. S.C.).

92 *McDonald* v. *Brown Estate* (1995), 6 E.T.R. (2d) 160 (N.S.Q.B.); *Re Lenko Estate* (1997), 19 E.T.R. (2d) 314 (Sask. Q.B.).

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

94 *Ibid.*

On the one hand, *Bergey* v. *Cassel* was properly decided, in that the court admitted extrinsic evidence in order to arrive at the truth of the testator's intentions. On the other hand, it is problematic because the court did not distinguish the function of a court of probate from the role of a court of construction. The judgment begins with the phrase "the applicant has applied for an order 'rectifying' the will ...";[95] but the court applied *Haidl* v. *Sacher* which applies in construction, not rectification proceedings. 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, may construe them as if words have been added or deleted. The text of the decision confirms that, whenever a court construes a will, it is effectively "rectifying" it by correcting and re-making it. As a result, a clear, consistent and principled set of legal rules are needed in Manitoba as to when a court may exercise and justify its discretion to re-make a will.

The courts have not consistently applied the meaning ascribed to judicially defined words such as *per stirpes*,[96] and the distinction between direct and indirect evidence has not always been clear. 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.[97] 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 a shareholders' loan was to be distributed to the twenty beneficiaries, or whether it was to fall into residue. The court considered whether direct extrinsic evidence of a solicitor who drew the will was admissible. The court acknowledged that, although the approach in *Haidl* v. *Sacher* was appropriate, it only dealt with indirect evidence of surrounding circumstances: to admit direct evidence there must be latent ambiguity. The court refused to admit direct evidence, and stated:

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[95] *Ibid.* at 161. See also *Re Hall Estate* (1999), 140 Man. R. (2d) 146 (Man. Q.B.) at 153, where Mr. Justice MacInnis stated that "the first principle of construction is to give effect to the intention of the testatrix as expressed in the words of the will, that intention being drawn from the entire will". Unfortunately his Lordship did not make any reference to *Haidl* v. *Sacher* or the approach to construction referred to in that decision. Similarly, in *Baines Estate* v. *Baines* (2000), 30 E.T.R. 133 (Ont. S.C.) at 135, McDermid, J. stated that "my understanding of the law is that if the intention of the testator is clear from the will, then it is not necessary to resort to the rules of construction."

[96] *Kernahan Estate* v. *Hanson* (1990), 39 E.T.R. 243 (Sask. Q.B.), rev'd. (1990), 39 E.T.R. 249 (Sask.C.A.); *Jackson Estate* v. *Jackson* (1994), 4 E.T.R. (2d) 245 (B.C.S.C.). See also, B. MacIvor, "Case Comment: *Re Kernahan*. Admission of Extrinsic Evidence in Aid of the Interpretation of Wills" (1990) 39 E.T.R. 253.

[97] *Re Bruce Estate* (1998), 24 E.T.R. (2d) 44 (Yukon T.S.C.).

> I have no doubt that direct evidence as to the 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.[98]

The court 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 almost constituted direct evidence of intention.[99] *Re Bruce Estate* addressed the viability of the distinction between direct and indirect evidence, because Mr. Justice Vertes would have preferred to admit direct evidence of intention, and was concerned that he had inadvertently allowed such evidence to form part of the record. This case demonstrates that the traditional distinction between direct and indirect evidence may hamstring a court and potentially defeat a testator's intention in a construction proceeding.

The admissibility of extrinsic evidence of surrounding circumstances at the commencement of the wills construction process signifies that, during the twentieth century, ascertaining the subjective intention of a testator superseded the statutory requirements of writing, signature and attestation. In contrast to the law of contract, however, where parties to an agreement may assist a court with evidence, in construing a will the most material witness is deceased. A court of construction must protect the authenticity of a will in the face of evidence that may alter it by language which has not been written, signed and attested by a deceased.

A series of law reform commission and legislative developments stemming from various Commonwealth nations have attempted to address this problem.[100] These approaches focussed on whether extrinsic evidence should be admissible in construing a will, the nature of the evidence, which may be admissible, the distinctions between direct and indirect evidence, and the effect of statements made by a deceased before, during and after a will's execution. These approaches recognised that there should be no blending of the probate and construction functions, and that some documents may remain ambiguous or meaningless despite the admissibility of extrinsic evidence.

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98 *Ibid.* at 49.

99 *Ibid.* at 50.

100 England, *supra* note 82; *Administration of Justice Act*, *supra* note 82; *Irish Succession Act*, 1965 at s. 90; New South Wales, *supra* note 82; Australian Capital Territory, *supra* note 82; British Columbia Attorney General, *Report of the Law Reform Commission on the Interpretation of Wills* (Vancouver, Queen's Printer for British Columbia, 1982) (J.S. Aikins, Chairman) at 25. The provisions of s. 21 of the *Administration of Justice Act* were considered in *Re Williams, Wiles* v. *Magden*, [1985] 1 All E.R. 964 (Ch.) and the provisions in s. 90 of the *Irish Succession Act* were considered in *Rowe* v. *Law*, [1978] Irish Reports 55 (H.C.), aff'd [1978] Irish Reports 62 (S.C.).

The problem of wills construction arises because lawyers or clients occasionally draw wills containing words that are meaningless, uncertain, or ambiguous. This may arise, for example, when a will contains words such as "my house" or "my best friend," and it is difficult to determine at the time of the deceased's death which "house" and which "best friend" a deceased was referring to when the will was made. The size of gifts and identification of beneficiaries may be affected because a court of construction may redistribute property from one beneficiary to another, or from a beneficiary under a will to one who may take under intestacy. On the one hand, the Manitoba legislature should confer jurisdiction upon a court to admit and weigh extrinsic evidence so that the authenticity of a will is protected and the intentions of a deceased are fulfilled. The distinction between direct and indirect evidence should be eliminated and all extrinsic evidence of intention should be admitted in a construction proceeding. On the other hand, the requirements of writing, signature and attestation add certainty to the concept of a will and the legislature should not replace those requirements with an oral will, or undermine probated wills by alterations based on oral statements of a deceased after a will is executed. Although extrinsic evidence should be admitted in construction, it should not be admitted if it arises after a will is signed and contradicts the express provisions contained in 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.

IV. THE JUDICIAL RECONSTRUCTION OF WILLS UNDER *THE DEPENDANTS RELIEF ACT*

THE DEPENDANTS RELIEF ACT ENABLES A COURT to order reasonable provision out of a testatrix's estate to provide for her family's maintenance and support. Relief is contingent upon a family member's need and status,[101] and the *Act*

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[101] *The Dependants Relief Act*, *supra* note 5 at s. 1, definition of "dependant". 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*. The defined class includes spouses, former spouses, children, grandchildren, parents, grandparents, and siblings of a 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 a deceased under age eighteen at the time of a deceased's death; a child who, by reason of illness, disability or other cause was unable at the time of a deceased's death to withdraw from the charge of the deceased or provide himself with the necessaries of life;

causes the deceased's obligation to support her family to continue after her death.[102] *The Dependants Relief Act* does not provide a fixed statutory formula but operates on the basis of judicial discretion.[103] The Act requires an applicant for relief to establish financial need. 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 a the dependant, may order that reasonable provision be made out of the estate of the deceased or for the maintenance and support of the dependant.[104]

Accordingly, an award is not automatic, but if a court grants relief, it will redistribute property from a beneficiary designated by will to one whose entitlement depends upon status.[105]

Family provision legislation was enacted in jurisdictions such as Manitoba which received the English law of succession but did not receive English social customs such as marriage settlements, or continental, civilian pre-nuptial contracts, which provided protection for family members.[106] Dependant's relief legislation represents one of several constraints imposed by the common law on freedom of testation since the Norman Conquest. It is in harmony with other aspects of the law which reduce testamentary freedom, including the law related to dower,[107] courtesy, taxation,[108] testamentary age, and mental capacity[109] and

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and a child who was substantially dependant on a deceased at the time of the deceased's death.

[102] The obligations of a deceased to support her spouse and children during her lifetime are provided by statutes stemming from family law including *The Family Maintenance Act*, R.S.M. 1987, c. F20 and *The Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

[103] *The Marital Property Act*, *supra* note 3, confers an entitlement to an equalisation payment upon separation, divorce, or death, and *The Homesteads Act*; *supra* note 3 confers entitlement to a life interest in the homestead upon death. Both of these statutes create an entitlement based on the operation of fixed formulas, as opposed to the exercise of judicial discretion.

[104] *The Dependants Relief Act*, *supra* note 5 at s. 2(1). 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.

[105] *The Dependants Relief Act*, *ibid.*

[106] L. Amighetti, *The Law of Dependants Relief in British Columbia* (Scarborough, Carswell, 1991) at 5.

[107] Currently in Manitoba, s. 21 of *The Homesteads Act*, *supra* note 3, 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 ss. 25–45 of *The Marital Property Act*, *supra* note 3, provides a surviving legally married spouse with a right to elect for an accounting and equalisation of assets upon the death of the other spouse. Although Manitoba has never possessed strict dower rights as existed at common law, it did receive the *English Dower Act* (1833), upon entering confederation; and the subsequent *The Manitoba Dower Act* and re-

the rules designed to prevent the removal of property from circulation for lengthy periods of time.[110]

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lated successor legislation provided for rights in a surviving spouse similar to dower which restricted testamentary freedom; *Chricton* v. *Zelenitsky*, [1946] 2 W.W.R. 209 at 232–233 (Man. C.A.); *The Dower Act*, R.S.M. 1988, c. D100. For a detailed study of the history of dower in western Canada, see R.E. Hawkins, "*Dower Abolition in Western Canada: How Reform Failed*" (1995) 24 Man. L. J. 635 at 643–648. See also Manitoba, *Report of the Law Reform Commission on an Examination of the Dower Act* (Winnipeg: Queen's Printer Office, 1984) (C.H.C. Edwards, Q.C., Chairman); F.E. Farrer, "*Tenant by Curtesy of England*" (1927) CLXLX L.Q. Rev. 87; G.L. Haskins, "The Development of Common Law Dower" (1948) 62 Harv. L. Rev. 42.

[108] *Income Tax Act*, R.S.C. 1985, ch. 1 (5th Supp.), as am., s. 70; G.B. Conway & J.G. Smith, *Studies of the Royal Commission on Taxation Number 19B: The Law Concerning Capital Gains* (Ottawa: Queen's Printer and Controller of the Stationary, 1967); W.D. Goodman, Q.C., "*Death Taxes in Canada, in the Past and in the Possible Future*" (1995) 43 Can. Tax. J. 1360; M.A. Kornhauser, "The Rhetoric of the Anti-Progressive Income Tax Movement: A Typically Male Reaction" (1987) 86 Mich. L. Rev. 465; M.A. Maloney, "Distributive Justice: That is the Wealth Tax Issue" (1988) 20 Ottawa L. Rev. 601; M.A. Maloney, "Capital Gains Taxation: Marching (Oh So Slowly) into the Future" (1988) 17 Man. L.J. 299; M.Cullity, C. Brown & C. Rajan, *Taxation and Estate Planning*, 3rd. ed. (Scarborough: Thomson Canada Limited, 1997).

[109] The rules related to testamentary age capacity are located in *The Wills Act*, *supra* note 38 at s. 8, while the doctrine of testamentary mental capacity is based upon case law: *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549 at 563 (H.L.). See also M.D. Green, "Proof of Mental Incompetency and the Unexpressed Major Premise" (1944) Yale L. J. at 271 and A.H. Oosterhoff, "Testamentary Capacity, Suspicious circumstances and Undue Influence", *supra* note 36.

[110] 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 Ch. Rep. 85 (C.A.). 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 Ch. Cases 1, 22 Eng. Rep. 931 (H.L.); *Miller* v. *Travers* (1832), 8 Bing. 244, 1 L.J. Ch. 157, 131 E.R. 395 (Ch. D.); *Cadell* v. *Palmer* (1833), 1 Clarke & Finn. 372, 6 Eng. Rep. 956 (H.L.); Thelluson v. *Woodford* (1798), 4 Ves. Jun. 227; (1805), 11 Ves. Jun. 112; 31 E.R. 117, 32 E.R. 1030 (H.L.); and *Pells* v. *Brown* (1620), 1 Cro. Jac. 590, 79 E.R. 395 (Ch. D.), where the germ of the "modern" rule was planted. The "old" and the "modern" rules against perpetuities have been abolished in Manitoba; *The Perpetuities and Accumulations Act*, R.S.M., 1987, c. P33, ss. 2–3. But see *The Trustee Act*, R.S.M. 1987, c. T160, s. 59, which abolished the rule in *Saunders* v. *Vautier* (1841), 4 Beav. 115, 49 E.R. 282 (M.R.), and reposed jurisdiction in a court to vary or terminate a trust on application; *Brown* v. *The National Victoria and Grey Trust Company* (12 November 1985), 341/85 (Man. C.A.); *Knox United Church* v. *Royal Trust Corporation of Canada* (1996), 110 Man. R. (2d) 81 (Man. C.A.); *Re Charlesworth Estate* (1996), 108 Man. R. (2d) 228 (Man. Q.B.); *Re Teichman Estate* (1996), 110 Man. R. (2d) 114 (Man. C.A.); and *May* v. *May* (1994), 96 Man. R. (2d) 268 (Man. Q.B.). See also Manitoba, *Report of the Law Reform Commission of the Rule in Saunders* v. *Vautier* (Winni-

There are several gaps contained within Manitoba's *Dependants Relief Act*. These include will substitutes, which enable a testator to dispose of property after death without a will; the ability to contract out of the *Act*; and the inability to advance a moral claim based upon services provided to a deceased. These deficiencies collectively limit a court's ability to protect a deceased's family. Will substitutes reduce the assets available in an estate. Releases and waivers eliminate the scope of an estate's obligations, while the elimination of fair share morality restricts the nature and scope of available relief.

Will substitutes dispose of assets on death other than by will. These devices include jointly held property with a right of survivorship, life insurance,[111] or registered retirement savings plans[112] with a designated beneficiary, lifetime trusts with remainder provisions, and absolute gifts made during a deceased's lifetime. The term "estate" is not defined by the *Act*, and a testatrix may construct an estate plan which leaves no assets remaining in her estate on death. Various jurisdictions in Canada have passed legislation designed to prevent the deceased from placing assets beyond the reach of family provision legislation.[113]

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peg: Queen's Printer Office, 1975) (F.C. Muldoon, Chairman); Manitoba, *Report of the Law Reform Commission on the Rule Against Perpetuities* (Winnipeg: Queen's Printer Office, 1982) (C.C. Edwards, Q.C., Chairman); J.M. Glenn, *"Perpetuities to Purfey"* (1984) 62 Can. Bar. Rev. 618; A.J. McClean, *"The Rule Against Perpetuities, Saunders v. Vautier and Legal Future Interests Abolished"* (1983) 13 Man. L. J. 245; J.H.C. Morris and W.B. Leach, *The Rule Against Perpetuities*, 2nd ed. (London: Stevens & Sons Limited, 1962); A.W.B. Simpson, "Entails and Perpetuities", in A.W.B. Simpson, ed., *Legal Theory and Legal History* (London and Ronceverte: The Hambledon Press, 1987); D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: The Carswell Company Limited, 1984) at 979–980.

111 *King* v. *King* (1990), 68 Man. R. (2d) 253 (Man. Q.B.). See also *The Insurance Act*, R.S.M. 1987, c. 140 and *Klassen Estate* v. *Klassen* (1998), 131 Man. R. (2d) 158 (Man. C.A.).

112 *Daniel* v. *Daniel* (1986), 41 Man. R. (2d) 66 (Man. Q.B.). When a testator dies, the proceeds of life insurance and registered retirement savings plans will, by contract, vest in those beneficiaries designated by the plans. But see *The Retirement Plan Beneficiaries Act*, S.M. 1992, c. 31-Cap. R138, where s. 5 provides that if a will specifically or generally identifies a retirement plan and it is executed subsequent to the designation of the retirement plan instrument, then the proceeds of the retirement plan will be disposed of by will and pass through the testator's estate. *The Power of Attorney Act*, S.M. 1996, c. 62-Cap. P97, ss. 5(1)–5(2) provides that a power given for valuable consideration may be irrevocable on death, thereby providing for a further mode of disposition after death.

113 *Succession Law Reform Act*, R.S.O. 1990, c. S26, s. 72 [hereinafter Ontario]; *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1988, c. D-7, s. 20(1) [hereinafter Prince Edward Island]; *Dependants Relief Act*, R.S.N.W.T. 1988, c. D-4, s. 21. The category of dependants in the Ontario legislation, which is defined in Section 57 of the *Succession Law Reform Act* is quite broad and includes the spouse of a deceased, a child of a deceased, or a brother of a deceased to whom a deceased was providing support or was under an obligation to provide support immediately before his death. Therefore, although the scope of s. 72 is quite wide ranging, the category of dependants is not so restrictive as to limit the application. The provisions contained in s. 72 apply in the event of dispositions after death. The *Act* also

These enactments deem the amount of certain dispositions to form part of a deceased's estate including gifts mortis causa, jointly held property, trusts, life insurance and absolute gifts. In some jurisdictions legislation permits a court to trace dispositions within a reasonable period of time before death, if there have been unusually large transactions and insufficient assets remain in an estate. Manitoba's *Dependants Relief Act* should be amended so that the amount of all assets disposed of by will substitutes are included in a deceased's estate and made subject to provisions of the Act and so that a court has the jurisdiction to trace unusually large dispositions of assets disposed of by a deceased within three years of his death. The proposed legislation should provide:

1. In this Act, "estate" includes:
   (a) any donatio mortis causa;[114]
   (b) any disposition of money or other property made by a deceased whereby the property is held at the date of his death by a deceased and another as joint tenants;
   (c) any disposition of property made by a 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 a deceased's estate within three years of the date of the deaceased's death;
   (d) any amount payable under a policy of life or accidental death insurance on the life of the deceased owned by a deceased or the deceased's employer.[115]

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provides, however, that dispositions made by a deceased in good faith and for value in 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 such provisions, a similar result has been obtained at common law, in the absence of legislation in *Zajic* v. *Chomiak Estate* (1990), 63 Man. R. (2d) 178 (Man. Q.B.). See also the *Uniform Probate Code*, 1993, North Dakota, c. 30.1–05, for a discussion of the concept of an "augmented estate" in the context of North Dakota's "forced share" legislation.

[114] This means a gift delivered by a donor to a donee in contemplation of the donor's death which reverts to the donor if he recovers; D.A. Dukelow & B. Nuse, *The Dictionary of Canadian Law*, 2nd ed. (Toronto: Carswell, 1995) at 354.

[115] See D.C. Simmonds, "*Succession Law Reform in Ontario: An Old Cat Needs a New Kick*" (1991) 10 E.T.R. 292, where the author noted that the Ontario family provision legislation should be drafted to ensure that a group policy of life insurance not "owned" by a deceased but by an employer may still be available to be charged with a dependants relief order. At the time his article was published, Mr. Simmonds noted that the decision in *Re Urquhart* Estate (1990), 74 O.R. (2d) 42 (H.C.J.), supp. reasons 22 A.C.W.S. (3d) 277, where this issue arose, was under appeal. The appeal was ultimately dismissed at *Re Urquhart Estate* (1991), 3 O.R. (d) 699 (Ont. Ct. G.D.).

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 a deceased's estate the court finds that there is insufficient property within the estate of a deceased to satisfy an order for the maintenance and support of a dependant and within three years of a deceased's death a 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.

V. PAYMENT FOR SERVICES PROVIDED IN GOOD FAITH

IN 1989, THE MANITOBA LEGISLATURE REPEALED *The Testators Family Maintenance Act*[116] and eliminated fair share morality as a basis for relief. Financial need is now the only basis for relief under the legislation.[117] On the one hand, the elimination of fair share morality was appropriate because the moral perspective of one judge may differ from that of another, and it is difficult for an ordinary client to predict the outcome of a judicial proceeding on moral grounds. On the other hand, the abandonment of morality has precluded relief under the *Act* where a member of a deceased's family has provided services to a deceased in the expectation of payment, or has assisted a deceased with the acquisition, maintenance, or enhancement of his estate. Older family members may promise adult children that, if they help them maintain or build their farm[118] or business,[119] or, take care of them in their advancing years, they will

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[116] *The Testators Family Maintenance Act*, R.S.M. 1988, c. T50. Manitoba enacted its first dependants relief legislation in 1946; *The Testator's Family Maintenance Act*, S.M. 1946, c. 64. 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; *Barr* v. *Barr*, [1992] 2 W.W.R. 346 (Man. C.A.) [hereinafter *Barr*]. In 1989, the Manitoba legislature significantly amended the legislation by removing fair share morality as one ground upon which a court could exercise its jurisdiction, and codified financial need as the only basis for the exercise of judicial discretion in an application for support. See also C. Harvey, "*Checklist for Dependants Relief Proceedings (Manitoba)*" (1983) 6 E.T.Q. 254; C. Harvey, "*The Continuing Relevance of Testator's Family Maintenance Act Cases*" (1997-98) 25 Man. L. J. 467.

[117] *The Dependants Relief Act*, *supra* note 5 at s. 2(1).

[118] *Re Walker's Will* (1963), 43 W.W.R. 321 (Man. Q.B.); *Barr*, *supra* note 116.

[119] *Re Steinberg* (1969), 3 D.L.R. 565 (Man. Q.B.).

compensate them through their wills. The initial motivation may be love or affection, but in the face of a promise, a child may develop a "legitimate expectation" of payment.[120] In the absence of morality as a basis for a claim, if a promise is not fulfilled and the child is not in financial need, the only remedy available may be to commence an action for unjust enrichment, claiming monetary compensation on the basis of *quantum meruit*, or, a proprietary interest in property a claimant helped a deceased maintain or acquire on the basis of constructive trust.[121] Some Canadian jurisdictions have enacted legislation enabling family members to claim against the estate of a deceased for housekeeping, child care or other domestic services,[122] or for assisting in maintaining or acquiring the assets of an estate.[123] Manitoba should amend its *Dependants Relief Act* to provide that a family member may advance a claim for payment out of an estate of a deceased where a family member has provided services to a deceased in consideration for a legitimate expectation of payment, unless a claimant has received a substantial gift from the deceased during his lifetime in compensation for services rendered to him.[124] In this regard, the proposed reform should provide as follows:

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120 *Peter* v. *Beblow*, [1993] 1 S.C.R. 980 at 990 (S.C.C.).

121 A. Gesser, "Disrespecting Your Elders or Getting What is Rightfully Yours? Unjust Enrichment in Estate Litigation" (1997) E.T. & P.J. 37 at 54. There have been two recent decisions of the Manitoba Court of Appeal addressing claims of this nature. *Somers Estate* v. *Maxwell* (1995), 107 Man. R. (2d) 221 (Man. C.A.) and *Single* v. *Macharski Estate* (1995), 107 Man. R. (2d) 291 (Man. C.A.). 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 continue to develop. If, however, the services are provided by a class of dependants who have been granted standing to apply for relief under the *Act*, then the *Act* should be amended to permit them to advance a claim for compensation for unremunerated services. Although at first blush this may result in the development of two different lines of judicial authority, namely case law under the *Act* and precedents at common law, it is necessary to maintain a distinction between claims against an estate by dependants, as defined by the *Act*, and claims by general creditors at common law. An order under the *Act* may provide for security for payment and priority over the claims of creditors at common law; *The Dependants Relief Act*, *supra* note 5 at s. 16(2). 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 focus of the legislation, which is on family provision.

122 *Family Relief Act*, R.S.,Nfld. 1990, c. F-3, s. 5(1)(g); *Testators Family Maintenance Act*, R.S.N.S. 1989, c. 465, s. 5(1)(g) [hereinafter Nova Scotia]; Ontario, *supra* note 113, s. 62(1)(r)(iv). See also New Zealand, *Preliminary Report of The Law Commission, Testamentary Claims* (Wellington, New Zealand Law Commission, 1996).

123 Ontario, *supra* note 113, s. 62(1)(i).

124 This is consistent with section 8(1)(j) of Manitoba's *Dependants Relief Act*, *supra* note 5, which enables a court to consider "any provision which the deceased while living made for

> 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 a 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.
>
> 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.

VI. PROTECTION FROM CONTRACTING OUT RIGHTS

THE DEPENDANTS RELIEF ACT IS DESIGNED to prevent members of a deceased's family from becoming public charges by redistributing private property among family members based on financial need. Beneficiaries may, however, contract out of the *Act's* protection and thereby defeat the intent of the legislation. The problem may arise in domestic litigation, if parties enter into a marriage (or cohabitation) separation agreement which contains a mutual release of all claims, including claims for dependants relief.[125] The courts have held that a release for valuable consideration given under independent legal advice serves as strong evidence of the parties' intentions; but this will not bar a claim for relief if circumstances have materially changed at the date of a deceased's death. [126] In as-

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the dependant and any other dependants" and is harmonious with the equitable presumption against double portions stemming from the law of wills referred to in *Hauck* v. *Schmaltz*, [1935] S.C.R. 478 (S.C.C.) and *Tucket-Lawry* v. *Lamoureaux* (1902), 1 O.L.R. 364 (Ont. H.C.), aff'd 3 O.L.R. 577 (Ont. C.A.) and the presumption of advancement provided by section 8(5) of *The Intestate Succession Act*, S.M. 1989–90, c. 185.

[125] See, for example, *Peters* v. *Gibbins*, [1979] 3 A.C.W.S. (Ont. S.C.); *Re Marquis Estate* (1980), 30 N.B.R. (2d) 93 (N.B.Q.B.); *McMaken* v. *McMaken* (1984), 18 E.T.R. 60 (Ont. S.C.); *Mealey* v. *Broadbent* (1984), 17 E.T.R. 160 (Ont. S.C.).

[126] *Wagner* v. *Wagner Estate* (1990), 39 E.T.R. 5 (B.C.S.C.), rev'd (1991), 62 B.C.L.R. (2d) 1 (C.A.), (1992); *Boulanger* v. *Singh* (1984), 18 E.T.R. 1 (B.C.C.A.); *Menrad* v. *Blowers* (1982), 137 D.L.R. (3d) 309 (Man. Q.B.). This may be contrasted with 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 independ-

sessing the impact of releases contained in separation agreements, the British Columbia Court of Appeal in *Wagner* v. *Wagner Estate* 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 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.[127]

The 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 person in need of public assistance. In addition, in *L.G.* v. *G.B.*,[128] L'Heureux-Dube, J., delivering 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

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ent 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: *Pelech* v. *Pelech*, [1987] 1 S.C.R. 801; *Richardson* v. *Richardson*, [1987] 1 S.C.R. 857; *Caron* v. *Caron*, [1987] 1 S.C.R. 892. These three decisions were pursuant to the *Divorce Act*, R.S.C. 1970, c. D-8. 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 a divorce is granted. Second, although a 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. 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 a separation agreement. 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.

127 *Wagner* v. *Wagner Estate* (1991), 62 B.C.L.R. (2d) 1 at 10–11 (B.C.C.A.). The reach of the trilogy of cases has also been limited in family law by specific legislative provisions contained in both the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.), and *The Family Maintenance Act*, R.S.M. 1987, c. 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."

128 (1995), 127 D.L.R. (4th) 385 (S.C.C.)

agree that this court, in an appropriate case, will have to review the application of the trilogy."

Some Canadian jurisdictions have enacted legislation providing that releases or waivers of claims under family provision legislation have no force or effect.[129] The Manitoba legislature should amend *The Dependants Relief Act* to provide that all dependants granted standing under the *Act* may only release or waive its protection with court approval.[130] If a releaser is granted court approval and later tries to claim for dependant's relief, she will have to demonstrate both financial need and a material change in circumstances from the date the release or waiver was approved. Although a court may always supercede prior judicial approval based upon a change in circumstances,[131] this approach may foster greater certainty and prevent freedom of contract from limiting the protection afforded by the legislation.

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.

VII. CONCLUSION

THE CASES SURROUNDING THE LAW OF RECTIFICATION, construction, and family provision demonstrate that courts do remake a testator's will in order to effect his intentions or protect his family. The common thread flowing through rectification, construction, and dependants relief applications concerns the extent to which freedom of testation should be constrained by judicial discretion, and whether fetters imposed by judicial discretion strike an appropriate balance between a need to safeguard a testator's family and to protect testamentary autonomy.

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[129] Ontario, *supra* note 113, Section 63(4); Prince Edward Island, *supra* note 113 at s. 16; Nova Scotia, *supra* note 122 at s. 16(2); Dependants Relief Act, R.S.Y.T. 1986, c. 44, s. 17. The Ontario legislation is unique because the definition of "dependant" to a certain extent, contradicts the language contained in s. 63(4) of the Ontario *Act*.

[130] New Zealand, *Law Commission Preliminary Report 24, Succession Law, Testamentary Claims* (Wellington: New Zealand Law Commission, 1996) at 184.

[131] *Re Edward Estate* (1961–62), 36 W.W.R. 605 (Alta. S.C., App. Div.) at 609.

In applications for rectification, construction, and dependants relief, courts often assert that they lack authority to make a new will for a testator. In *Tataryn* v. *Tataryn*,[132] Madam Justice McLachlin (as she then was) stated that "... only where the testator has chosen an option which falls below his or her obligation as defined by reference to legal and moral claims, should the court make an order which achieves the justice the testator failed to achieve ... ."[133] In making this comment, Madam Justice McLachlin recognised the historical reluctance of English and Canadian common law courts to disturb a scheme of distribution provided by a testator's will.

In reality, however, courts do re-make wills every time they rectify or construe a will, or grant relief under dependants relief legislation. In *Re Willan*, Mr. Justice Egbert noted that "... 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 principal which is palpably untrue ... ."[134]

Legislative reform would clarify the law and provide a coherent set of principles, which would enable ordinary clients to predict the outcome of a proceeding. Apart from legislative reform, however, courts should also abandon the fiction that they do not re-make a will for a testator. They should explicitly acknowledge that they reconstruct a deceased's will each time they grant an application for rectification, construction or family provision. The courts should admit that these proceedings result in a new will for a testator and should develop a consistent approach, which will enable ordinary clients to predict how judicial discretion may be exercised in a given case.[135] Legislation enabling the

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[132] [1994] 2 S.C.R. 807.

[133] *Ibid.* at 823. See also Harvey, *supra* note 5 at 166–169.

[134] *Ibid.* at 126.

[135] Conversely, the courts must be careful to ensure that they do not characterise the exercise of judicial discretion as judicial will-making when they are not in fact reconstructing a testator's will. If a testator fills out a printed will form, and forgets to sign it at its end or have it witnessed and attested by two witnesses, a court may admit the will to probate by invoking its jurisdiction under judicial dispensation legislation. The practical consequences of this exercise of judicial discretion may be to incorporate the printed portion of a will form into the handwritten portion of a will. The poblem, however, is that in the absence of legislation, the law of mistake and rectification at probate prevents a court from adding words to a will. A court of probate may delete words from a will but only if an applicant can demonstrate fraud, undue influence, or inadvertent error. This principle was recognised by Philp C.J. (as he then was) in *Re Philp* at first instance, and was commented on by Harvey, *supra* note 52 at page 50. In order to avoid confusion, the courts should explicitly acknowledge that, when they exercise their jurisdiction under judicial dispensation legislation and allow both the printed and handwritten portion of a will form to probate, they are not rectifying a will by adding language that has not been written, signed and attested. Instead, they

reconstruction of wills at probate and in construction, and correcting deficiencies under *The Dependants Relief Act* is necessary to enable a court to protect testamentary intention and ensure that reasonable provision is made for a deceased's family. In many cases, the only other remedies, which may be available, include an action in negligence against a solicitor who drew the will,[136] or an action in unjust enrichment against a party who received a windfall as a result of a blunder caused by a will's drafter. On the one hand, actions in negligence and unjust enrichment may be appropriate, in that a solicitor who drew a will may be available to assist a court with her evidence, and may also carry professional liability insurance to satisfy any judgment for damages arising out of a claim. On the other hand, claims in negligence and unjust enrichment can be lengthy, costly, and uncertain in outcome.[137] It may be difficult to establish liability if a deceased was aware of a mistake and took no steps to correct it, and it may be difficult to assess damages once an error has been discovered. A large damage award may exceed the amount of professional liability insurance that a solicitor may carry, and a mistake may be discovered long after a solicitor who drew a will ceased practising law or died.[138]

The rule of law provides that an individual should not be subject to a penalty unless she has transgressed a specific rule of public or private law.[139] If wills are drafted which contain mistakes, or if they do not protect dependants who are entitled to reasonable provision, then innocent parties may lose proprietary rights through no fault of their own. This violates the rule of law and may bring

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are dispensing with the formal requirements of wills execution in relation to language which already forms part of a will submitted for probate.

136 Although nineteenth century courts limited solicitors' liability on the basis of privity of contract, in the twentieth century the principles of tort liability enunciated in *McAlister (Donoghue)* v. *Stevenson*, [1932] All E.R. 1 (H.L.) and later in *Hedley Byrne & Co.* v. *Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.) were applied in circumstances where solicitors made mistakes in the course of preparing or attending upon the execution of wills. See, for example, *Whittingham* v. *Crease & Co.*, [1978] 5 W.W.R. 45 (B.C.S.C.), where a lawyer erroneously allowed a wife of a beneficiary designated in a will to attest the signature of a deceased at the time of execution; and *Earl* v. *Wilhelm* (1997), 160 Sask. L.R. 4 (Sask. Q.B.), with further reasons in 164 Sask.L.R. 4 (Sask. Q.B.); for further reasons, 166 Sask. L.R. 148(Sask. Q.B.), where a lawyer prepared a will providing for gifts of certain farm land which was owned by a corporation owned by a testator, as opposed to the testator himself. See also, *Ross* v. *Caunters*, [1979] 3 All E.R. 580 (Ch. D.) and *White* v. *Jones*, [1995] 1 All E.R. 691 at 717–718 (H.L.).

137 S.J. Sokol, *Mistakes in Wills in Canada* (Carswell: Scarborough, Ontario, 1995) at 50–51.

138 Langbein & Waggoner, *supra* note 68, at 588–590.

139 W.B. Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror" (1952) 65 Harv. L. R. 721 at 734.

the administration of justice into disrepute.[140] The legislative and judicial reforms proposed in this article cannot solve all of the problems related to the reconstruction of wills, such as meaningless or uncertain language, or a disposition of property during a deceased's lifetime. These proposals may, however, eliminate some of the uncertainty related to wills rectification and construction, and close some of the gaps related to family provision. This will enable the courts to reflect more fully the prevailing social priorities as the law of succession enters the twenty-first century.

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[140] The rule of law applies in Manitoba and is "a fundamental postulate of our constitutional structure": *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121 at 142.