THE CANADIAN LAW OF WILLS: PROBATE

Thomas G. Feeney, Butterworths, 1976, 174 pp., Indices 51 pp.

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I have mixed feelings about this book. As a law teacher I find the book very comforting for it seems to touch all the bases and generally to confirm the course which I have been teaching for the past several years. I am not a practising lawyer and thus I cannot really speak for that constituency; however, I wonder whether they will find this apparently thin tome to be a laudable advance on the notes which have been available for many years in Sheard and Hull's "Canadian Forms of Wills" and in Macdonell, Sheard and Hull's "Probate Practice"[1]? It appears that the book was written more with the law student and layman in mind than the practising lawyer, judging for instance by the opening chapter insofar as the language and content are concerned. Nonetheless, those practitioners who turn to this book will probably find it to be at the very least a quite readable refresher.

With respect to the technical aspect of the book, assuming that it is the publisher who must take responsibility here, my heart goes out to Tom Feeney, because unfortunately an incredibly bad job of the printing of this book was done. Immediately on opening the book the reader's eye is caught by a pink full page insert of corrections. But that is only the beginning, for additional printing blunders appear repeatedly throughout the book.[2]

I have some quarrels with, and some comments that I wish to make on, some points in the book. To begin, the definition of a will on page six is arguably too narrow, for it would not include testamentary documents that might be executed, to appoint or change personal representatives or guardians, or to revoke prior testamentary dispositions in part or wholly so as to die intestate, but which contain no testamentary dispositions.

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1. Also, I might add for those who were under the mistaken impression that this book fills a gaping void in Canadian legal literature that, in addition to the aforementioned texts, several casebooks have been available, produced over the years in various regions of the country by Willis, by Gosse and Amighetti, by Bale, Asplund and Alexandrowicz, by Harvey, by MacIntyre and Reutlinger, and by Bowker and Anderson, to name most of them.

   I think that a useful purpose could have been served by the author if he had taken two or three pages at the outset to survey the available literature relating to succession, including wills, trusts, and estate planning and administration

2. For instance: the name of the *Thompson* case in footnote 15 on p. 5 is incorrectly given; on p. 49, second last line "in" instead of "is" appears; the citation for the case in footnote 56 on p. 60 incorrectly uses round instead of square brackets; on pp. 61 and 62 reference is made to Jarmen rather than to Jarman, a leading English text; on p. 101 the first mention of "unexecuted obliteration" appears as "unexpected obliteration"; in footnote 36 on p. 117 "seemed" amusingly appears as "swwmwd"; on p. 119 in the sixth last line "seem" instead of "seen" was printed; there is no page reference included in footnote 49 on p. 120; "remuneration" is misspelled as "renumeration" on pp. 161-62; on p. 170 reference is made to "demonstration", rather than "demonstrative", legacies. The list is virtually endless.

Concerning mental capacity, I question the statement on page twenty-six "that the standard of mental capacity required by the law for wills is high". From my reading, I think that the courts generally take a very liberal, generous approach when assessing mental capacity, so as to preserve testamentary capacity for as many people as possible. I cannot agree at all with the statement on page thirty-one that "mental capacity must be proved beyond "reasonable doubt"; surely it is the civil standard of proof that governs. In outlining the kinds of cases involving an attack on the basis of lack of capacity on page twenty-seven, no mention is made of those situations where the testator may have been generally deficient, from birth or due to some accident or the onset of some disease. In this regard this thought of some psychiatrists may be of interest, that if the law is concerned with ability to understand and to make judgements then lawyers ought to broaden their focus to include not only those testators who may be suffering from delusions or from senile dementia but also those testators suffering from other mental maladies which affect the powers of understanding and judgment, such as a straight-forward case of severe depression.

On page twenty-nine in connection with *Re Bohrman*, the author refers to Dr. Wright's comment, but he does not refer also to the very fine comment of D.M. Gordon.[3] On page thirty-one the following appears:

> The relevant time for having capacity to make a will is when instructions are given. If a person has capacity then, he may make a good will later, so long as he knows he is executing a will for which he has previously given instructions and is physically capable of showing his assent thereto."

The substance of those sentences is no doubt correct, based upon the authorities cited; however, I disagree with the emphasis given to the time of giving instructions. In general the relevant time for judging capacity is the time of execution; the authorities cited by Mr. Feeney for his statement might be characterized as especially liberal decisions relating to particular fact situations.

When I deal with the doctrine of suspicion with my students I treat it somewhat differently than does Tom Feeney, beginning on page thirty-four. I think that the doctrine is essentially unnecessary if the concept of onus of proof is understood and applied correctly. In any event, the doctrine has to do with situations where there may be questions about any one of the three aspects of a valid will, namely capacity, knowledge and approval, and due execution. As for undue influence, I do not agree with the application of the doctrine there, for that can result in an unfair increase in the standard of proof that a

3. (1972), 18 McGill L.J. 122

propounder has to meet in fulfilling the onus on him or her. when the validity of a will is contested on more than one basis, the court ought to deal with an issue of undue influence separately from the other issues in connection with which the overriding onus is on the propounder, as did the court in *Harmes* v. *Hinkson*.[4]

Reference might have been made in footnote 57 on page forty-three to the New Zealand decision of *Guardian Trust* v. *Inwood*[5] upon which to a large extent the judge in *Re Brander* based his decision.

On page sixty-two, when mentioning the care that ought to be taken in selecting witnesses, mention might have been made of the practice, current at least in Manitoba, of taking an affidavit of execution from one of attesting witnesses at the time of execution of the will. I wonder about the statement on page sixty-three concerning the common legislative provision about the witness of a will who "was at the time of its execution, or afterward has become incompetent"? Mr. Feeney's interpretation is certainly one that can be made, but arguably another, albeit difficult, interpretation can be made. Surely, a better provision could be drafted to accomplish the purpose. Reference might have been made to the case of *Dougon* v. *Allan*[6] on page sixty-three in connection with the advisability of having a medical person act as a witness; also it would have been of interest either at this point or earlier on page twenty-seven for there to have been some discussion of the pros and cons of obtaining a psychiatric evaluation of a testator or testatrix at the time a will is being drawn up and executed.[6a]

The section of *The Wills Act* of Manitoba[7] requiring attestation by witness does not have the concluding words "no form of attestation shall be necessary", to which reference is made on page sixty-four. There is a Manitoba decision, *Re Harvie*[8], which states that there need not be any attestation clause; however, when that case was decided the section of the then *Wills Act* of Manitoba was different, namely the words "no form of attestation shall be necessary" were in the section as the concluding words. I wonder if an argument could be made successfully that the Legislature by dropping those words must have intended[9] that wills, to be valid, now have to set out some form of attestation?

4. (1946), 62 T.L.R. 445
5. [1946] N.Z.L.R. 614
6. (1914), 6 O.W.N. 713; see also (1953), 31 C.B.R. 353, at pp. 353-56, and *Re Simpson*, (February 1977, unreported, Ch. D. Templeman J.), noted in (1977), 127 New L.J. 487

6a. Howard Fink discussed in an article entitled Ante-Mortem Probate Revisited, (1976), 37 Ohio S.L.J. 264 the interesting idea of allowing a testator or testatrix, while alive, to obtain a judicial declaration as to the validity of his or her will.

7. R.S.M. 1970, c. W150, s. 5(c)
8. (1907), 17 Man. R. 259
9. Notwithstanding s. 27 of *The Interpretation Act*, R.S.M. 1970, c. I 80.

I did not see any reference to ss. 31 — 32 of the *National Defence Act*[10], on pages seventy-one and two, with respect to wills of members of the Canadian Forces. Surely those sections are relevant to the question of being on "active service". Finally, in connection with chapter 4 on Due Execution, I did not see any reference to J.H. Langbein's excellent article "Substantial Compliance with the Wills Act".[11] A discussion of this doctrine and of the wisdom that there might be in legislating it into effect would have been most welcome.

Lawyers ought to note the case of *Hall* v. *Meyrick*, discussed on pages seventy-nine to eighty-one, and think about their potential liability in other respects. For instance, is there an obligation on a lawyer to advise a client, for whom a will has been drawn, of subsequent legislative changes?

It may be worth noting in passing that the case of *Bell* v. *Mathewman*, to which reference is made on page eighty-seven, would have been decided differently in a province such as Manitoba; that act of revocation would probably be valid in Manitoba and this follows from what is explained by Mr. Feeney on pages eighty-one and ninety-one.[12] Back to page eighty-seven, for a moment. I think that *Perkes* v. *Perkes*[13], rather than *Cheese* v. *Lovejoy*, should have been cited for the proposition that a symbolic tearing or burning can be a sufficient revocation.

The book's treatment of the evidence that is admissible in cases of mistaken inclusion and mistaken revocation, beginning on page one hundred and seven is excellent, but in general it was my impression that the treatment of the doctrine of dependent relative revocation should have been fuller.

To the list of important effects of republication on page one hundred and thirteen could be added the situation where there is an attempt to incorporate another document by reference; mention is made subsequently to the inter-action of the two doctrines of republication and incorporation by reference on page one hundred and twenty-one.

In dealing with republication and its effects for witnesses who are beneficiaries, Mr. Feeney canvasses some of the cases including *Trotter* v. *Trotter*, on pages one hundred and fifteen and one hundred and sixteen. I wish that he had indicated his view as to the propriety of the decisions in those cases for they

10. R.S.C. 1970, c. N 4.

11. (1975), 88 H.L.R. 489

12. There is an argument to be made, I suppose, that a simple cancellation of a provision of a will in this way not only effects a revocation of the provision but also amounts to an alteration of the will and thus it must be in compliance with the alteration section of *The Wills Act*, *supra*, note 7; in Manitoba, such a cancellation — alteration is arguably invalid by virtue of the wording of 19(2), and *Re Cotterell* (1951), 2 W.W.R. 247, although it complies with the revocation provision, s. 16(b) or (c)

13. (1820), 106 E.R. 740

seem questionable in principle to me. Similarly, I feel that the treatment of the case law regarding survivorship and insurance proceeds was less than adequate;[14] there is no reference to the very thoughtful case comment by K.B. Potter on*Re Biln*[15], let alone any questioning of the correctness of the prevailing judicial opinion.

It should be noted about the intestate succession law of Manitoba, regarding the description on page one hundred and fity, that nephews and nieces share next in priority after brothers and sisters, i.e. ahead of grandparents and uncles and aunts. Lastly, the statement on page one hundred and sixty-four that a personal representative "must employ" a solicitor to apply for letters probate should not be taken literally in Manitoba; indeed, the experience lately of the Surrogate office is that more and more people are attempting to apply for letters probate on their own without using the services of a lawyer.

Given the horrendous printing job of this first edition, and the shortcomings of the book which I am hopeful the author will consider overcoming, I shall be looking forward with interest to the second edition.

14. at pp. 138-39
15. (1969), 7 Alta. L.R. 323