THE CANADIAN LAW OF WILLS: CONSTRUCTION

By Thomas G. Feeney
Toronto: Butterworths, 1978.
lxii and 397 pp. $40.00

CAMERON HARVEY *

This is the promised companion piece to the author's book *The Canadian Law of Wills: Probate*, which was published in 1975.[1] Very generally, this second volume is much more substantial and much better in several respects than the first volume on probate.

According to the author, this book was written with law students especially in mind in connection with not only their Wills or Succession course but also their Property and Trust courses.[2] Professor Feeney appeared to be writing primarily for law students in his first volume too. I think that law students are well served by both volumes and particularly by this second volume. Whereas the first volume seemed to be simply a compendium of the law, this second volume seems to contain much more discussion of the law. Indeed the author quite frankly states that one of his aims is to proselytize his readers to the subjective approach of the interpreting or construing of wills. In this regard, the author writes

> Although the author has not done so, he believes that if one were to take a tally of Canadian judges past and present. . .the results would probably indicate a marked adherence to'the nineteenth-century [objective] view'. . . It is therefore heartening to detect a definite shift in favour of the subjective approach in most of the more recent Canadian cases. This shift will hopefully result in more liberal and common sense interpretations than the old objective approach, an approach that so often resulted in strict interpretations that were obviously contrary to the testator's true or actual intention.[3]

In this mission on behalf of the armchair approach reference to and quotation from Lord Denning's judgment in *Re Rowland*[4] is made frequently. For the time being, while we are in a period where there are two strongly advocated opposing approaches, the situation is a boon to lawyers; for regardless of their personal inclination, as is the case with the interpretation of statutes, the fact that there are two basic approaches plus a smorgasbord of presumptions and rules enables them in many instances to argue relatively easily whatever case they must for the client.

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1. See my review in (1978), 8 Man. L.J. 615.
2. This is obviously so with Chapters 7-9 which deal with "Conditional Gifts and Other Restrictions on Giving," "Postponed Gifts, Vested or Contingent," and "The Rule Against Perpetuities."
3. T. Feeney, *The Canadian Law of Wills: Construction* (1978) 4-5.
4. [1963] 1 Ch. 1 (C.A.).

I do not recommend the first volume to my students for purchase, because of the horrendous printing job and because it provides only a gloss for topics which I think can be best covered by having the students read cases, focussed by my other materials and discourse. However, I shall urge them to buy this second volume and, whether they buy it or not, I have re-structured my coverage of the topics canvassed in the book so that they shall want to read large portions of it. In my view it is virtually an impossible task to select a collection of cases which in themselves can introduce students adequately to the various areas of wills construction without overwhelming them. With this book, I can limit my selection to half a dozen cases.

Although this volume and the first one may be most appropriate for law students, this second volume should prove interesting and be quite useful to practitioners, much more so than the probate volume. I want to point out also to any practitioners who might happen to read this review that similar to the first volume the second is very readable; picking up this second volume in your spare time and gradually reading your way through it will undoubtedly be found to be both a rewarding and a pleasant experience.

The book commences with a Chapter entitled "General Principles of Construction"; in my opinion this Chapter is not as successful as it might have been in clearly providing a context of the basic approaches, and miscellaneous presumptions, rules, and canons. They are all there, but either an overture or a reprise might have assisted. The next two Chapters deal with the ordinary meaning rule, bases of departure from it, the meaning of some particular words, and rules for dealing with some specific ambiguities, such as where a gift is made to two or more people without an indication as to the nature of their co-ownership. Chapters 4-6 are among the best in the book, dealing neatly with lapse, class gifts, and ademption. I have alluded to the last three chapters of the book earlier. The book concludes with five appendices, the last four of which deserve at least a glance; they deal with Ontario's succession reform legislation and the matters of legitimacy,[5] common law spouses, *commorientes,* and perpetuities.

5. The Law Amendments Committee of the Legislative Assembly of Manitoba is currently studying a bill which if enacted will enable illegitimate children to make applications for relief under the *The Testators Family Maintenance Act,* R.S.M. 1970, c. T70. *The Winnipeg Tribune,* April 7, 1979, reported that the suggestion was made in the name of sensitivity (or was it in the name of using 20 words where one will do?) that the word "illegitimate" should be removed from the bill and replaced with "a child of whom the testator and another person to whom the testator was not married are the natural parents". Firstly, as Charlie Brown would say, "good grief." Secondly, since the *Act* deals with both testate and intestate situations, the word "deceased" and not "testator" should be used. Thirdly, this reform, to enable illegitimates to apply under the *Act,* is not the appropriate one to be made. The *Act* has been changed by the courts in recent years from a dependents relief statute to a forced heirship statute. Currently, the qualification to make application by virtue of s. 2 (a) and (b) and judicial interpretation is that the applicant is the lawful wife or child of the deceased. This should be changed to enable any person, who can demonstrate that prior to the death of deceased they were financially dependent upon the deceased to some extent, and only those persons, to apply. This would enable not only illegitimates to apply, but also common law spouses, co-habiting persons, parents, etc.