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How to Interpret a Will, or "Motorcycles make a House a Home"

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Case Commented On: *Hicklin Estate v Hicklin*, 2019 ABCA 136 (CanLII)

Hicklin Estate is a judgment interpreting one word in a will – the word "home." It is also a judgment with 138 paragraphs and 90 footnotes saying, in the end, that the chambers judge committed no palpable or overriding error in using extrinsic evidence to broadly interpret "home" to include the contents of the house and the garage. Not only was the sole issue a relatively narrow one, but the applicable law appears to be uncontroversial. It does not seem to be a case that calls for any more elaboration of the law than that given it by the lower court in what the Court of Appeal called a "careful review" of the jurisprudence (at para 40). Nevertheless, lawyers seem to love this lengthy Court of Appeal judgment, applauding its "interesting hypotheticals (which heavily feature vintage Rolls-Royce automobiles)" and calling it a "delight to read, for it is an erudite and learned disquisition" and "a model of stylistic clarity." However, the stylistic clarity seems to have distracted readers' attention from problems with the substance of the judgment.

There are three substantive problems with the Court of Appeal decision. First, it does not pay enough attention to the primary rule of the interpretation of a will, namely, that the interpretation must give effect to the testator's *subjective* intent. Some of the other rules and principles set out in the judgment need to be harmonized with that rule. Second, it basically ignores the statutory provision about the admission of extrinsic evidence in the *Wills and Succession Act*, SA 2010, c W-12.2. There is no interpretation of the sub-clauses of section 26 that set out the types of evidence that may be admitted. Third, it is confusing because the analysis incorporates so much that is irrelevant to the issue before the Court. How to interpret a will gets mixed up with how to interpret a contract and legislation – neither of which involve subjective intent. Long lists of cases decided in the UK, Australia, New Zealand, and a few of the US states, as well as in lower courts in other provinces, fill footnotes that take up three-quarters of a page or more. If you want to use this opinion as a teaching tool for law students or as a guide for executors or beneficiaries in public legal education, it needs to be very heavily edited to make it as straight-forward and clear as its rhetoric charms readers into thinking it must be.

The Facts

The testator, Lorne Hicklin, named his two daughters and his brother as the beneficiaries of his will. The testator owned the parcel of land on which his house and his garage were located. He also owned four motorcycles, a motorcycle trailer, and a truck – all of which were parked in the garage – as well as scrap metal that was stored elsewhere, a tax-free savings account and other

bank accounts. Other assets were part of Hicklin Motors, a business that the testator and his brother appear to have operated as an unincorporated partnership.
According to the lawyer who drew the will, the testator said that he wanted to leave his "home" to his daughters and everything else to his brother. The gifts of his property were expressed in clause 3 of the will in the following terms:

> (B) To transfer my home to my daughters . . . in equal shares, absolutely.
>
> (C) To transfer the residue of my Estate to my brother . . . absolutely; …

The will appointed the testator's brother as the executor and trustee. After the testator died, his daughters and his brother could not agree on who inherited the contents of the house, the motorcycles, trailer and truck in the garage, the scrap metal, and the bank accounts. In his capacity as executor and trustee, the brother interpreted the word "home" to mean the parcel of land that included the testator's house and garage, as well as the contents of the house. That would mean that everything else fell into the residue of the estate, which the brother was to inherit. The daughters argued that their father wanted them to receive everything except his interest in Hicklin Motors.

One of the daughters sued, seeking an order for rectification of the will – i.e. a re-writing of the will to better conform to her father's intentions – as well as damages for what she alleged was a breach of trust or willful neglect by the executor.

The Statutory Provision

The entire case centered on the meaning of the word "home" in clause 3(B) of the will because the overarching rule about how to interpret wills is dictated by section 26 of the *Wills and Succession Act*. Section 26 states:

> 26 A will must be interpreted in a manner that gives effect to the intent of the testator, and in determining the testator's intent the Court may admit the following evidence:
>
> (a) evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will,
>
> (b) evidence as to the meaning of the provisions of the will in the context of the testator's circumstances at the time of the making of the will, and
>
> (c) evidence of the testator's intent with regard to the matters referred to in the will. (emphasis added)

The Court of Queen's Bench Decision

In *Hicklin Estate*, 2017 ABQB 318 (CanLII), Justice Keith Yamauchi first reviewed the applicable law (at paras 22-37). He then determined that there were two possible meanings of the

word "home," after looking at a number of dictionaries and a surprisingly large number of cases discussing the meaning of that word (at paras 38-47). A narrow interpretation would confine the meaning of "home" to the house, i.e. the physical structure. A broad interpretation would expand the interpretation to everything on the parcel of land. Justice Yamauchi resolved this indeterminacy by relying on the evidence of the testator's best friend, which indicated that the testator used the word "home" in a very broad sense to include the house, the garage, the land in which they were located, and the contents of the house and the garage (at para 56). As a result, all of that property went to the daughters. The scrap metal, the tax-free savings account and the other bank accounts fell into the residue of the estate and went to the brother.

The Court of Appeal Decision

In the Court of Appeal, the unanimous decision of Justices Dawn Pentelechuk, Kevin Feehan, and Thomas W. Wakeling appears to have been written by Justice Wakeling. His style is distinctive and this judgment has all the hallmarks of that style. See, for example, his concurring opinion in a different will interpretation case, *Lubberts Estate (Re*), 2014 ABCA 216 (CanLII). The Court cites this concurring opinion twelve times in *Hicklin Estate*, but refers to the case as *Hanson v Mercredi*, 2014 ABCA 216 (CanLII).

In *Hicklin Estate*, Part I: Introduction, Part II: Questions Presented, Part III: Brief Answers, Part IV: Statement of Fact, Part V: Relevant Statutory Provisions and Part VII: Conclusion are all clear and concise. The introduction to the four fundamental principles governing the interpretation of wills in Part III: Brief Answers is also clear and concise. With their plain language, short sentences, and tight organization, these six parts are appropriate for all of the audiences of judicial decisions: the parties to the dispute, the legal profession, and the public. They are also suitable as a teaching tool in a first-year property or upper year wills and estates course. Those six parts occupy paragraphs 1-46 and 137-138 of the judgment, as well as 34 of the 90 footnotes – just over one-third of both. The vast majority of those footnotes are bare citations, usually to a paragraph in the Queen's Bench judgment setting out the facts. As a result, in Parts IV and V, the footnotes are used primarily to keep the judgment's paragraphs short and simple, without any citation clutter or extraneous information. The opinion looks very much like a law reform commission report with its numbered paragraphs and its footnotes.

The plain language, straightforward sentence structure and use of subheadings to divide the discussion continues in Part VI: Analysis (at paras 47-136). However, the substance becomes a problem in this two-thirds of the judgment. The elaboration of the four fundamental principles for interpreting a will and their application to the case becomes confusing for the three reasons already set out in my introduction, which I will elaborate on here.

The Four Fundamental Principles

To begin their analysis, the Court set out what they call the four fundamental principles that govern the interpretation of wills (at paras 48-51):

> First, a will must be interpreted to give effect to the intention of the testator. No other principle is more important than this one.

> Second, a court must read the entire will, …
>
> Third, a court must assume that the testator intended the words and the will to have their ordinary meaning in the absence of a compelling reason not to do so.
>
> Fourth, a court may canvas extrinsic evidence to ascertain the testator's intention.

The first principle

The first and most important principle is mandated by section 26 of the *Wills and Succession Act*. A court must interpret a will "in a manner that gives effect to the intent of the testator". This requires a court to determine the testator's *subjective* intent. Subjective intent means that courts are looking for each individual testator's actual intent. However, the judgment devotes only eight words and two footnotes to this particular point:

> This is a subjective –and not an objective – undertaking. (at para 56; footnotes omitted)

Considering that the subjective nature of the intent that is to be given effect in interpreting a will is the fundamental way that interpreting wills differs from interpreting any other document, not enough attention is paid to the subjective nature of the intent. More attention might have avoided the conceptual difficulties that arise subsequently.

The second principle

The second fundamental principle – that a court must read the entire will – requires and received little attention. Its exposition occupies a mere four paragraphs, but accompanied by four much lengthier footnotes (at paras 58-61).

I have no quarrel with the use of footnotes in judicial opinions, although it is unusual in Canadian cases. I do have a problem with their use in this judicial opinion because so many of them contain so much irrelevant information.

The use of footnotes in American judicial opinions is much more common and a literature has sprung up around that practice. Compare Edward R. Becker's "In Praise of Footnotes" (1996) 74 Washington University Law Quarterly 1 (arguing footnotes in moderation are good), written while he was a judge of the United States Court of Appeals for the Third Circuit, with Abner J. Mikva, "Goodbye to Footnotes" (1985) 56 University of Colorado Law Review 647 (arguing footnotes are bad) and Bryan A. Garner, "Clearing the Cobwebs from Judicial Opinions" (2001) 38 Court Review 4 (concluding substantive footnotes are bad, citational footnotes are good). I think it is evident from my previous comments about the "good" citational footnotes in Parts IV and V and my subsequent comments about the "bad" substantive and irrelevant footnotes in Part VI that – in general – I agree with the American lawyer and lexicographer, Professor Garner. One of the main problems with substantive footnotes instead of in-text citations is that the separation of the former from the text allows them to be much longer. In the text, a 37 line citation is a graphically obvious impediment to readability.

The third principle

The third fundamental principle is that a court must assume a testator intended to give the words in their will their ordinary meaning unless there is a good reason not to do so. This principle is also only briefly elaborated, with four paragraphs and four footnotes (at paras 62-65). The largest part of the elaboration is a confusing discussion of what is referred to as the theoretical basis for this assumption. Quoting Justice Wakeling's concurring opinion in *Hanson v Mercredi*, the Court asserts that "[t]his assumption is made because our experience reveals that most people in the community will express themselves in language to which others in the community attach the same sense as a speaker" (at para 63). What "community"? The relevant footnote contains a quotation from another decision by Justice Wakeling – *Lay v Lay*, 2019 ABCA 21 (at para 63) – that asserts that "dictionaries compile the ordinary meanings of words that those who use the language correctly understand words to have." But dictionaries do not compile meanings for each community, whether that refers to friends of the deceased, motorcycle shop owners or residents of Nanton, or Alberta, or Canada in this particular case. And who are those who use language correctly? What does correct understanding or community sense have to do with "ordinary meaning"?

The third principle does lead to the fourth, which is the only somewhat controversial principle of the four. If a court must assume testators intended to give the words in their will their ordinary meaning unless there is a good reason not to do so, where does the "good reason not to do so" come from?

The fourth principle

The fourth principle is that a court may admit extrinsic evidence that will help it ascertain the testator's intention. This principle is, like the first one, now found in section 26 of the *Wills and Succession Act*.

The focus of the Court's discussion of the fourth principle is on when a court should admit extrinsic material (at para 67). However, even though the sub-clauses of section 26 specify three types of extrinsic evidence, the Court does not discuss those sub-clauses. Instead, they entered into a lengthy and heavily footnoted discussion of the different schools of thought on whether or not a court may admit and review extrinsic evidence without first concluding there is an ambiguity (at paras 68-79). This section of the judgment is a repetition of the information in the Alberta Law Reform Institute's report entitled Wills and the Legal Effects of Changed Circumstances, Final Report No. 98, August 2010, which deals extensively with the "Admission of Extrinsic Evidence" in Chapter 5.

(Those who want to know how the sub-clauses of section 26 have been interpreted can consult *Ryrie v Ryrie*, 2013 ABQB 370 (CanLII) (at paras 45 and 47), which very simply noted that neither subsections 26(b) or (c) required that the wording of the will must show ambiguity before extrinsic evidence can be admitted. See also *Warren Estate (Re)*, 2015 ABQB 420 (CanLII) (at paras 59-60) for another straightforward discussion of the statute and its lack of a requirement for ambiguity before admitting extrinsic evidence.)

After setting out several extended examples to show the difference between latent and patent ambiguity and the potential helpfulness of extrinsic evidence (at paras 70-72, 82-85), the Court concludes that allowing "extrinsic evidence of the kind described in s. 26 of the Wills and Succession Act" is the "correct" approach (at para 76). They justify their approval of the legislature's approach by asserting it is "theoretically sound" (at para 77) and "practical" (at para 78). It is practical apparently because they foresee few disputes about whether or not extrinsic evidence will be admitted. This point seems to indicate that that the Court is reading section 26, and especially section 26(c), expansively, but they do not say so.

That ends the discussion of the four principles for interpreting a will.

The Court goes on to discuss the factors that will affect the weight to be given to the admitted extrinsic evidence (at para 80-89), although they omit any reference to section 11 of *Alberta Evidence Act*, RSA 2000, c A-18, which requires that extrinsic evidence provided by "an opposed or interest party" must be corroborated.

The Court then applies the law to the facts. While seemingly lamenting a change in the standard of review on appeals involving the interpretation of wills from a correctness standard to a requirement of a palpable and overriding error in the lower court judgment (at paras 90-104), they nevertheless conclude that Justice Yamauchi made no reversible error. But rather than leaving it at that, the Court did go on, in 17 paragraphs with 10 footnotes (at paras 109-136), to discuss the meaning of "home" in the testator's will, drawing numerous inferences from the "incontrovertible facts" extrinsic evidence. Those 17 paragraphs are introduced with a sentence that simply states: "we wish to make several points" (at para 108). No reasons are offered for this discussion of what the correct interpretation of "home" is in this particular case.

Comment on Judicial Economy

The inclusion of irrelevancies starts early in Part VI: Analysis. For example, the introduction of the second principle of statutory interpretation contains an unnecessary analogy that reoccurs throughout, without any obvious purpose but with confusing consequences. The second principle is stated in the following terms:

> Second, the court must read the entire will, just the same way an adjudicator interpreting a contract or a statute must read the whole contract or statute. (at para 49; emphasis added)

That analogy suggests that the interpretation of wills is similar to the interpretation of contracts and statutes. The problem is that the first and most fundamental principle of the interpretation of wills is *not* similar to the interpretation of contracts and statutes. A discussion focused on how to interpret a will – and not contracts and legislation as well – would have been shorter and less confusing.

A second example is the lengthy discussion about the two approaches that courts have taken to whether or not ambiguity is required before a court can admit extrinsic evidence. The Alberta

Law Reform Institute's report covers the same history and does it better. A simple referral to their report might have helped put the focus on the statutory provision that governed.

A third example, that the law in Alberta is the same as the law in other provinces or countries, also seems irrelevant, especially on well settled points. Why bother to state that the most important principle, embodied in section 26 of the *Wills and Succession Act*, is consistent with the understanding of courts in other countries (at para 55 and footnote 37)? Even if it was not, section 26 would still govern. Surely this information is readily found in any standard Canadian textbook on wills, such as *Feeney's Canadian Law of Wills* (4th ed loose-leaf), which is cited (at footnote 37). This type of surplusage detracts readers' attention from the main points.

The approach of the majority of the Court of Appeal in *Hanson v Mercredi* is preferable to that in the *Hicklin Estate* case. In *Hanson v Mercredi*, Justices Picard and Veldhuis reached the same result as did Justice Wakeling, but disagreed with how he got there, writing:

> We agree with the conclusion reached by Justice Wakeling that the decision of Justice Ross (2012 ABQB 506 (CanLII)) is well written and carefully reasoned, and that this appeal must be dismissed. We find her decision sufficient to dispose of all issues and thus, it is unnecessary to consider the other matters discussed in the memorandum of judgment of Justice Wakeling. (at para 80; emphasis added)

Justices Picard and Veldhuis were in favour of judicial economy, refusing to endorse Justice Wakeling's extended discussions of irrelevant points.

I have written before about judicial economy, in "Judicial Economy, Judicial Extravagance and Pension Splitting under a Matrimonial Property Order" in the context of a concurring judgment of Justice Thomas Wakeling, as well as in "Disagreement in the Court of Appeal about the Wisdom of Judicial Economy." As I wrote in the former post, "judicial economy" refers to a sort of judicial minimalism, or judicial restraint, i.e., saying no more than necessary to justify an outcome. One of the arguments in favor of judicial economy it that it reduces the burdens of judicial decisions, especially on multi-member courts. It might mean, for example, fewer concurring decisions. Decisions take time to research and write. The Court of Appeal's approach in *Hicklin Estate* – where two other judges sign on to what appears to be a judgment authored by Justice Wakeling - seems out of step with the "culture shift" signaled by *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87, and the subsequent emphasis on proportionality.

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