WILLS AND ESTATE PLANNING

MATERIALS
ON
WILLS AND SUCCESSION TO PROPERTY

1996-97

Professor R.E. Scane

Faculty of Law
University of Toronto
WILLS AND ESTATE PLANNING

MATERIALS
ON
WILLS AND SUCCESSION TO PROPERTY

1996-97

Professor R.E. Scane

Faculty of Law
University of Toronto
TABLE OF CONTENTS

SECTION A: CONTROLS ON THE RIGHT OF DISPOSITION OF PROPERTY ON DEATH

Part 1: Rights and Elections of Surviving "Spouses" on Death of a "Spouse" regarding "Net Family Property"

Family Law Act, R.S.O. 1990, c. F.3, ss. 1, 2(10), 4-7, 14-16 A.1.1
Rondberg Estate v. Rondberg Estate, (1989), 70 O.R. (2d) 146 A.1.6

Part 2: Protection of Dependents

(A) The Succession Law Reform Act
Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 1(1-3), 57-79 A.2.1

(B) The Applicant
Family Law Act, R.S.O. 1990, c. F.3, ss. 1(1), 29-32 A.2.7
Re Cooper, (1980), 30 O.R. (2d) 113 A.2.8

(C) The Nature and Extent of the Relief Granted
Re Davies and Davies, (1979), 27 O.R. (2d) 98 A.2.13
Re Dentinger, (1982), 128 D.L.R. (3d) 613 A.2.27

(D) Contracts and the Legislation

(E) The Assets Available to Satisfy an Award
Re Urquhart Estate, (1990), 74 O.R. (2d) 42 A.2.50
Dunn v. Dunn Estate, (1992), 8 O.R. (3d) 95 A.2.55
Dunn v. Dunn Estate, (1993), 12 O.R. (3d) 601 (Divisional Court) A.2.59


(F) The Power to Vary an Order A.2.65

(G) Applicability of Part V of S.L.R.A. A.2.65

SECTION B: INTESTATE SUCCESSION IN ONTARIO

Part 1: Introduction

Devolution upon the Personal Representative B.1.1

Estates Administration Act, R.S.O. 1990, c. E.22, s. 2 B.1.2

Part 2: Distribution of Property and Intestacy: Deaths Before March 31, 1978

(A) The Spouse B.2.1

(i) Wife - Preferential Share B.2.1

(ii) Husband - Preferential Share B.2.2

(iii) No Preferential Share where Deceased Survived by Child of Former Marriage B.2.2

(iv) Distributive Share of Wife
"Legal Representatives" B.2.4
- "per Stirpes" distributions B.2.4

(v) Distributive Share of Husband B.2.6

(vi) Effect of Dower on Share of Wife B.2.7

(vii) Effect of Curtesy on Share of Husband B.2.8

(B) The Lineal Descendants B.2.9

- "Advancements" to Children B.2.9

(C) Lineal Ascendants and Collaterals B.2.10

- Counting Degrees of Relationship B.2.10

- "Representation" B.2.11

- "per capita" distributions B.2.15
Illegitimate Children
The Legitimacy Act, R.S.O. 1970, c. 242

B.2.16

Where No Next of Kin Can be Ascertained
Appendix to Part 2:
- A Short Note on "Curtesy" and "Dower"

B.2.18

Part 3: Distribution of Property on Intestacy: Deaths On and After March 31, 1978

The Succession Law Reform Act
The Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 44-49

B.3.1

Spouses

B.3.3

Children and More Remote Issue

B.3.5

Ascendants and Collaterals

B.3.6

Children Born Out of Wedlock

B.3.9

(i) Abolition of "Illegitimacy"

Children's Law Reform Act, R.S.O. 1990, c. C.12, ss. 1-2

B.3.10

(ii) Enquiries

Estate Administration Act, R.S.O. 1990, c. E.22, s. 24

B.3.12

(iii) Proof

Children's Law Reform Act, R.S.O. 1990, c. C.12, ss. 3-10, 12

B.3.13

Adopted Children

Child and Family Services Act, R.S.O. 1990, c. C.11, ss. 158-159

B.3.17

SECTION C: WILLS - THE MAKING AND REVOCATION OF TESTAMENTARY DOCUMENTS

Part 1: General

Succession Law Reform Act

(i) General Definitions

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 1

C.1.1
(ii) *What May Be Given by Will*

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 2  
C.1.2

(iii) *Applicability of Part 1 of the Act*

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 43  
C.1.2

(iv) *The Testamentary Act*

C.1.3

C.1.6

C.1.10

Part 2: Testamentary Capacity, Undue Influence, and Fraud

(A) *Age*

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 8  
C.2.1

(B) *The "Sound, Disposing Mind"

*Banks v. Goodfellow* (1870), L.R. 5 Q.B.D. 549  
C.2.1

C.2.10

**Re Davis,** [1963] 2 O.R. 666  
C.2.15

**Parker v. Felgate** (1883), 8 P.D. 171  
C.2.24

C.2.26

(C) *Onus of Proof as to Testamentary Capacity*

**Barry v. Butlin** (1838), 2 Moo. P.C. 480, 12 E.R. 1089 (P.C.)  
C.2.33

(D) *Undue Influence, Fraud and "Suspicious Circumstances"*

**Wingrove v. Wingrove** (1885), 11 P.D. 81  
C.2.35

**Craig v. Lamoureux,** [1920] A.C. 349 (P.C.)  
C.2.36

**Crompton v. Williams,** [1938] O.R. 543  
C.2.41

**MacGregor v. Ryan** (1965), 53 D.L.R. (2d) 126  
C.2.64
Wintle v. Nye, [1959] 1 W.L.R. 284 C.2.84
Russell v. Fraser (1981), 118 D.L.R. (3d) 733 C.2.95
Re Worrell, [1970] 1 O.R. 184 C.2.102

Part 3: Making of a Will - Formal Requirements

(A) Conflict of Laws

(i) The Succession Law Reform Act

Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 34-41 C.3.1

(ii) The "International Will"

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 42 C.3.2

(B) Special Situations

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 5 C.3.6

(C) "Formal" Wills

Succession Law Reform Act, R.S.O. 1990, c.S.26, ss. 3, 4, 7 C.3.7

(i) "In Writing"

Murray v. Haylow, (1927), 60 O.L.R. 535 C.3.8

(ii) Signed at End "by the testator or by some other person in his or her presence and by his or her direction"

Re White, [1948] 1 D.L.R. 572 C.3.9
Re Deeley and Green (1929), 64 O.L.R. 535 C.3.13

(iii) Attestation

Chesline v. Hermiston (1928), 62 O.L.R. 575 C.3.14
Smith v. Smith (1866), 1 P. & D. 143 C.3.16
Re Gunstan (1882), 7 P.D. 102 C.3.17
Re Chalcroft, [1948] P. 222 C.3.24

(iv) Witnesses

Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 11-14 C.3.31
Re Trotter, [1899] 1 Ch. 764 C.3.32
Thorpe v. Bestwick (1881), 6 Q.B.D. 311 C.3.34
Re Ray's Will Trusts, [1936] 1 Ch. 521 C.3.35

(D) Holograph Wills

Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 6,7 C.2.37
Re Austin (1967), 61 D.L.R. (2d) 582 C.3.43
Re Philip (1979), 100 D.L.R. (2d) 582 C.3.48
Re Forest (1979), 5 E.T.R. 144 C.3.52

(E) Incorporation by Reference

In the Goods of Smart [1902] P.238 C.3.60
Re Mihalopulos (1956), 5 D.L.R. (2d) 628 C.3.62
Re Coate (1987) 26 E.T.R. 161

Part 4: Revocation or Alteration of Wills

(A) General

Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 15-17 (i) C.4.1

(B) Revocation by Operation of Law

(i) Subsequent Marriage

Re Langston, [1953] P. 100 C.4.2
(vii)

Re Pluto (1969), 6 D.L.R. (3d) 541  
C.4.4

Re Coleman, [1976] Ch. 1  
C.4.6

Layer v. Burns Philp Trustee Co. Ltd., (1986), 6 N.S.W.L.R. 60  
C.4.11

(ii) Wills Made in Exercise of a Power of Appointment

Re Paul, [1921] 2 Ch. 1  
C.4.16

Re Gilligan, [1949] 2 All E.R. 401 (P.D.)  
C.4.18

(iii) Divorce

Re Majetka (1984), 8 D.L.R. (4th) 481  
C.4.20

Page Estate v. Sachs (1933), 12 O.R. (3d) 371  
C.4.23

(C) Revocation by Act of the Testator

(i) By Subsequent Testamentary Document: Express or Implied Revocation

Re Davies, [1928] 1 Ch. 24  
C.4.26

Re Robinson, [1930] 2 Ch. 332  
C.4.29

Re Bryan, [1907] p. 125  
C.4.31

(ii) By Physical Act

Cheese v. Lovejoy (1887), L.R. 2 P.D. 251  
C.4.34

C.4.35

Re Kruschel Estate (1991), 40 E.T.R. 129  
C.4.37

C.4.41

(iii) By Alteration to the Will Document

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 18  
C.4.42

Re Itter, [1950] P. 130  
C.4.43

King Estate v. King-Fleming (Dec. 11, 1995)  
C.4.45

(D) Revocation by Act of the Testator: Conditional Revocation
( Including Herein the Revival of Previously Revoked Wills)

C.4.48
Re Southerden, [1925] P.177 C.4.49
Re Sorenson (1982), 10 E.T.R. 282 C.4.52
Re Service, [1964] 1 O.R. 197 C.4.57
Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 19 C.4.60
Re Hodgkinson, [1893] P. 339 (C.A.) C.4.61
Re Ott, [1972] 2 O.R. 5 C.4.62
Re Jones, [1976] 1 Ch. 201 C.4.65

Part 5: Curative Statutory Provisions

Re Langseth Estate (1990), 39 E.T.R. 217 C.5.1

Part 6: Correction of Mistakes in the Will: The Probate Jurisdiction
(This Part is omitted in 1996-97 Materials)

(A) The Common Law Jurisdiction

Guardhouse v. Blackburn (1866), L.R. 1 P.&D. 109 C.6.1
Re Horrocks, [1939] P. 198 C.6.5
Re Doner (1931), 40 O.W.N. 120 C.6.10
Re Brander, [1952] 4 D.L.R. 688 C.6.16
Re Reynette-James, [1976] 1 W.L.R. 161 C.6.23
Re Phelan, [1972] Fam. 33 C.6.26
Re Tait, [1957] V.R. 405 C.6.27

(B) A Statutory Remedy

Administration of Justice Act 1982 (U.K.), 1982, c. 53, s.20 C.6.33
### Section D: The Construction of Valid Testamentary Documents

#### Part 1: General Principles

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Perrin v. Morgan, [1943] A.C. 399</td>
<td></td>
<td>D.1.1</td>
</tr>
<tr>
<td>Re Price, [1955] O.W.N. 18</td>
<td></td>
<td>D.1.6</td>
</tr>
<tr>
<td>Re Helliwell, [1916] 2 Ch. 580</td>
<td></td>
<td>D.1.8</td>
</tr>
<tr>
<td>Re Cook, [1948] 1 Ch. 213</td>
<td></td>
<td>D.1.10</td>
</tr>
</tbody>
</table>

#### Part 2: The Testator’s Armchair

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Higgins v. Dawson, [1902] A.C. 1</td>
<td></td>
<td>D.2.1</td>
</tr>
<tr>
<td>Re Glassington, [1906] 2 Ch. 305</td>
<td></td>
<td>D.2.8</td>
</tr>
<tr>
<td>Re Ofner, [1909] 1 Ch. 60</td>
<td></td>
<td>D.2.10</td>
</tr>
<tr>
<td>Re Smalley, [1929] 2 Ch. 113</td>
<td></td>
<td>D.2.14</td>
</tr>
<tr>
<td>Re Jeffery, [1914] 1 Ch. 375</td>
<td></td>
<td>D.2.21</td>
</tr>
<tr>
<td>Re Ottewell (1970), 9 D.L.R. (3d) 314</td>
<td></td>
<td>D.2.22</td>
</tr>
</tbody>
</table>
Part 3: Direct Evidence of Intention

(1836), 2 M. & W. 363; 150 E.R. 698  
D.3.1

Doe d. Simon Hiscocks v. John Hiscocks (1839), 5 M. & W. 363;  
151 E.R. 154  
151 E.R. 154  
D.3.2

Re Gray. [1934] O.W.N. 17  
D.3.3

Re Ray. [1916] 1 Ch. 461  
D.3.5

Administration of Justice Act, 1982 (U.K.), 1982, c. 53, s. 21  
D.3.7

Re Williams, [1985] 1 W.L.R. 905  
D.3.8

Part 4: Problems as to Nature of Property Disposed of By the Will

(A) The Classification of Legacies, and the Consequences Thereof: Ademption and Abatement

Note: Problems Relating to the Disposition of Property Described in the Will  
D.4.1

Re Willcocks, [1921] 2 Ch. 327  
D.4.4

Re Millar (1927), 60 O.L.R. 434  
D.4.5

Page v. Leapingwell (1812), 18 Ves. Jn. 463; 34 E.R. 392  
D.4.7

Re Webster, [1937] 1 All E.R. 602  
D.4.9

Re Culbertson (1967), 62 D.L.R. (2d) 134 (Saskatchewan Court of Appeal)  
D.4.11

Re Hunter (1975), 8 O.R. (2d) 399  
D.4.13

Mental Health Act, R.S.O. 1990, c. M.7, s. 64  
D.4.15

Mental Incompetency Act, R.S.O. 1990, c. M.9, s. 18 (1)  
D.4.15

Substitute Decisions Act, S.O. 1992, c. 30, s. 36  
D.4.15

Advocacy, Consent and Substitute Decisions Statute Law Amendment Act, 1996  
D.4.15

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 20  
D.4.16

(B) The Time from Which a Will "Speaks" with Respect to Property

Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 21, 22  
D.4.17

Goodland v. Burnett (1885), 1 K. & J. 341; 69 E.R. 489  
D.4.17
Re Thompson (1919), 45 O.L.R. 520 D.4.19
Re Sikes, [1927] 1 Ch. 365 D.4.22
Re Rutherford (1918), 42 O.L.R. 405 D.4.23
Re Portal and Lamb (1885), 30 Ch. D. 50 D.4.24
Morrison v. Morrison (1885), 10 O.R. 303 D.4.27
Re Forbes (1956), 3 D.L.R. (2d) 653 D.4.31

(C) The Possible Effect of the Equitable Doctrine of Conversion

Hicks v. McClure (1922), 64 S.C.R. 361 D.4.39
Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 20 D.4.40

(D) Is the Property Really Gone, or Just Disguised?

Re Clifford, [1912] 1 Ch. 29 D.4.41
Re Brems, [1963] 1 O.R. 122 D.4.43
Re Cudeck (1977), 16 O.R. (2d) 337 (C.A.) D.4.44

Part 5: Some Problems Arising as Change Affects Beneficiaries

(A) Where a Beneficiary Named in the Will Predeceases the Testator: The Doctrine of Lapse

Note on the Doctrine of Lapse D.5.1
Re Ladd, [1932] 2 Ch.219 D.5.5
Re Mackie (1986), 54 O.R. (2d) 784 D.5.8
Re Greenwood, [1912] 1 Ch.392 D.5.11
Re Cousen's Will Trusts, [1937] 1 Ch. 381 D.5.13
Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 13 D.5.18
Re Gamble (1906), 13 O.L.R. 299 D.5.18
Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 31 D.5.19
Doucette v. Fedoruk Estate (1993), 49 E.T.R. 199 D.5.20
(B) *Commorientes Legislation*

Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 55, 56  
Insurance Act, R.S.O. 1990, c. I.8, ss. 215, 194  
Insurance Act, R.S.O. 1990, c. I.8, ss. 319, 314(1), 314(2)

(C) *Class Gifts*

(i) **General**

Note: Gifts to Classes

(ii) **Is the Gift a "Class Gift"?**

*Re Jackson* (1880), 25 Ch.D.162  
*Re Telfer*, [1964] 1 O.R. 373  
*Re Hutton* (1983), 39 O.R. (2d) 622  
*Re Burgess* (1968), 67 D.L.R. (2d) 526

(iii) **Determining the Membership of the Class: the "Class-Closing Rules"**

*Re Chartres*, [1927] 1 Ch. 466  
*Re Bleckly*, [1951] 1 Ch. 740  
*Latta v. Lowry* (1886), 11 O.R. 517  
*Re Clifford’s Settlement Trusts*, [1981] 1 Ch. 63.  
*Rogers v. Mutch* (1878), 10 Ch. D. 25  
The Perpetuities Act, R.S.O. 1990, c. P.9, s. 7  
The Trustee Act, R.S.O. 1990, c. T.23, s. 65