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Distribution under ambiguous disposition provision in Will made on a *per stirpes* basis

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A Last Will and Testament is an important document that, among other things, permits the smooth distribution of a person's estate after his or her death. It is, of course, strongly recommended that every adult should consider making a Will. For persons who die without making a Will or, in legal parlance, intestate, their assets are distributed pursuant to the *Succession Law Reform Act*. Under this statute, a distribution may be made in a manner that may have otherwise been intended by a deceased if a Will had been made. But sometimes Wills are not drafted with perfection, leaving a trustee with significant doubts about a testator's intent. In these circumstances, the trustee of a testator's estate will often seek direction from the court to help interpret the Will and its disposition.

This is what happened in *Moola Estate v. Rundle*, 2021 ONSC 7488 (CanLII). In this case, the testator made a Will in which he had left all of the residue of his property to his siblings, nephews and nieces, except for $25,000 which he bequeathed to an individual, SR. At the time of his death, the testator was 76 years old and was survived by five brothers and sisters and a total of 36 nieces and nephews.

The testator was predeceased by five other brothers and sisters as well.

Since the date of his death, one of]\the five surviving brothers and sister also died.

The trustee for the testator was unsure how to distribute estate because there was a lack of punctuation in the dispositive paragraph of the Will. The dispositive paragraph gave the residue of the testator's estate to:

> my brothers sisters late brothers sisters nephews and nieces.

Accordingly, the trustee believed that there three ways in which to interpret the Will.

Continued on page 2

The first way was to distribute the estate in 10 equal shares with five shares to be paid to each of the five brothers and sisters who survived the testator and one share to be divided equally among the children of each predeceased sibling.

The second way was to divide the estate into 46 equal shares with one share to be given to each of the five surviving brothers and sister, one share to be given to each of the five predeceased siblings, and one share to be given to each of the nephews and nieces living at the time of the testator's death.]

The third way was to divide the estate into 41 equal parts among the testator's five brothers and sisters and 36 nephews and nieces who survived him.

The trustee, although not advocating a specific interpretation, favoured the first interpretation. The court agreed.

In the Reasons for Decision, the court explained that the primary purpose of judicial construction of wills was to determine the intention of the testator based on the natural and ordinary meaning to the words used. Where this could not be done, the court was required to resort to the rules of construction developed in cases such as *National Trust Co. v. Fleury*, [1965] S.C.R. 817, 1965 CanLII 18 (SCC).

Those rules provided that there was a presumption against intestacy and that the court should attempt to ascertain, if possible, the testator's actual intent as opposed to an objective intent presumed by law. A hypothetical standard should not be used. As determined in *Moyls Estate (Re)*, 2010 BCSC 1150 (CanLII) at paragraph 31, the court was required to consider the testator's peculiar and unique use of language, all of the circumstances surrounding his or her life and all the things known to the testator at the time the Will was made which might bear on the type of dispositions he or she actually intended to make.

The court was to put itself in the place of the testator, assuming the same knowledge the testator had, at the time of making the Will, in regard to the nature and extent of his assets, the makeup of his family, and his relationship to his family members. This "armchair" rule represented the over-arching framework for the construction of a Will.

As well, extraneous subjective evidence of the testator's intention was to be, in general, disregarded.

In this case, the conflict in interpretations was whether the testator's estate was intended to be distributed *per stirpes* (i.e. among his brothers and sisters, with the knowledge that some of them had died and their share would go to their children) or *per capita* (i.e. either among the surviving brothers, sisters, nephews and nieces, or the testator's surviving brothers and sisters, deceased siblings and surviving nephews and nieces). A general rule of interpretation favoured a *per capita* distribution.

However in the circumstances here, the court found that the general rule of a *per capita* distribution had to yield to a *per stirpital* distribution, which is often the favoured distribution in cases of family distribution.

The words used by the testator focused on family; brothers, sisters, nephews and nieces. Furthermore, the evidence showed that the testator was devoted to his siblings and to their families. When the testator made his Will, he knew that some of his siblings had predeceased

him, and it was only, and immediately, after reference to his "late" brother and sisters that reference was made to "nephews and nieces". This construction supported the notion that the testator thought about his nephews and nieces in the context of the sibling familial units or households.

This interpretation also did not lead to peculiar results and the receipt of disproportionate shares, which would have occurred if any of the other interpretations had been chosen by the court.

Representation by Gardiner Roberts LLP
The executor of the testator's estate was represented by Howard Wolch, a senior partner in Gardiner Roberts LLP's dispute resolution group.

He was assisted throughout by Lindsay Histrop, a senior partner in the firm's Tax and Trusts Group, and Eli Bordman, a junior associate in the firm's dispute resolution group.

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