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Estates & Wills & Trusts

A tightly drafted will can spare litigation

By AdvocateDaily.com Staff

A recent Alberta will challenge illustrates the danger of a loosely drafted will, says Toronto-area estates litigator Charles B. Ticker.

The province's Court of Appeal upheld a trial judge's decision to include personal items located on the deceased's property as part of the award to his surviving daughters, to whom he had bequeathed his "home." That was over the objections of the dead man's brother, who hoped to inherit the disputed items as the beneficiary of the estate's residue.

But Ticker, who practises estates litigation and mediation at Charles B. Ticker Law Office, says a more clearly drafted will — or one that defined what was meant by "home" — could have saved the time and expense associated with the entire court proceeding.

"I'm not sure there would have been any need for the case if the drafting lawyer had done a better job on the will," he tells AdvocateDaily.com. "Most wills have a clause dealing with personal property, but this one didn't appear to have one. It was the ambiguity about what was meant by the word 'home' that opened the door to the judge to take the approach of getting more information to find out about the testator's thinking when he made the will."

The testator died in 2014, a decade after signing a will that left his home to his two daughters, with the residue of the estate to go to his younger brother and business partner, who was also named executor of the estate.

When a dispute arose over whether the meaning of "home" should be construed to include personal property of the deceased, a judge ruled in favour of the daughters, concluding that they could inherit four motorcycles, a motorcycle trailer, truck and other property in the garage at their father's place.

The unanimous three-judge appeal court panel found the trial judge made no reversible errors in his decision and was within his rights to accept extrinsic evidence from a friend of the deceased, as well as to interpret the word "home" broadly to include personal property that contributes to its enjoyment.

"There is ample evidence to support the court's conclusion that the testator intended 'home' to be interpreted broadly. This interpretation is the best match for the testator's object of financially assisting his daughters after his death," the appeal court decision reads.

Ticker feels the trial judge made the right call and says the appeal court decision is a useful summation of the law of will interpretation.

Although Alberta's *Wills and Succession Act* provides a more permissive regime for the introduction of extrinsic evidence to interpret wills than Ontario, Ticker says it's likely an Ontario court would have allowed its admission faced with similar facts and reached the same result.

In Ontario, the common law, rather than statutory law, gives judges the right to admit extrinsic evidence in order to shed light on the testator's intentions at the time the will was signed. However, case law suggests that extrinsic evidence is only allowed when the contents of the will reveal some ambiguity over the testator's intentions.

For example, in one landmark case, Ontario's appeal court ruled against a woman who claimed her father's will was invalid for public policy reasons because he disinherited her for racist reasons. Because the will's contents were unambiguous, the appeal court found there were no grounds for admitting the evidence of the deceased's carer, who supported the daughter's claim of racism. Leave to appeal to the Supreme Court of Canada was dismissed, says Ticker.

However, in the Alberta case, he says the multiple meanings of the word "home" would likely have crossed the threshold for admission of extrinsic evidence in Ontario.

"There is ambiguity there," he says. "It's a very well written decision, and although not binding in Ontario, I think it will be referred to and relied upon by courts in this province."

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