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INTERPRETATION "ISSUES" By Nick Esterbauer

Some terms that frequently appear within testamentary documents have meanings that remain unchanged from many years ago, while the definitions behind others continue to develop over time.

Current and Historical Interpretations of Issue

The term "issue" frequently appears in Last Wills and Testaments and other testamentary documents. At present, its ordinary legal meaning within the context of wills and estates is "lineal descendants"[1], without qualification.

However, the word "issue" has evolved over time to reflect developing social values, and was historically subject to certain limitations. For example, in Ontario, the rights of adopted children were not recognized to the same degree as those of naturally-born children until the 1970s. In the 1978 decision of *Re Fulton*[2], the Ontario Court of Appeal clarified that the 1970 amendments to the *Child Welfare Act*[3] provided that adopted children would fall within the meaning of the word "issue", when appearing in a Last Will and Testament, regardless of when the Will was executed.

Ontario's *Succession Law Reform Act* (the "**SLRA**")[4] recognizes the historical exemption of children born "out of wedlock" from the class of individuals who are considered to qualify as issue. Subsections 1(3) and (4) of the SLRA read as follows:

> *Relationship of persons born outside marriage*
>
> (3) In this Act, and in any will unless a contrary intention is shown in the will, a reference to a person in terms of a relationship to another person determined by blood or marriage shall be deemed to include a person who comes within the description despite the fact that he or she or any other person through whom the relationship is traced was born outside marriage.
>
> *Application of subs. (3)*
>
> (4) Subsection (3) applies in respect of wills made on or after the 31st day of March, 1978.[5]

Typically, when a term like this appears in a Will or other estate planning document, the ordinary meaning at the testator's date of death will apply. While the legislation reflects the current ordinary meaning of the word "issue", this amendment to the SLRA was prospective in operation – the former meaning of the term currently applies in respect of the interpretation of Wills executed in March 1978 or earlier.

Koziarski Estate v Sullivan

Earlier this year, in *Koziarski v Sullivan*[6], Justice Gray of the Ontario Superior Court of Justice considered the Court to be bound by subsections 1(3) and (4) of the *Succession Law Reform Act* in applying what is obviously an outdated interpretation of the concept of issue.

The respondent was the surviving grandson of the deceased. The deceased had left a Will dated December 14, 1977, in which she directed that the residue of her estate be distributed to her sons or to their issue if either son predeceased her. The respondent's father (being the deceased's son) was not married to the respondent's mother. The respondent's father later died in 2013 and the Court accepted that the respondent would have been entitled to a share in his grandmother's estate, but

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for the fact that her Will was executed prior to March 31, 1978.

The decision of Justice Gray was not appealed, nor does it appear that the Court reviewed the issue of compatibility of subsections 1(3) and (4) of the SLRA with Section 7 of the Canadian *Charter of Rights and Freedoms.*[7] Courts in other Canadian provinces however, have examined similar statutory limitations to the rights of children born outside of marriage and deemed them to be constitutionally invalid.[8]

Recent Developments Affecting the Definition of Issue

The SLRA was recently amended to specifically recognize the ability of a surviving spouse to conceive a child who will fall under the definition of "issue".[9] For a child conceived after death to be treated as issue, the SLRA requires (1) that notice of the surviving spouse's intention to conceive a child using genetic materials left by the deceased be provided to the Estate Registrar for Ontario within six months of date of death, (2) that the child must be born within three years of the deceased's death (unless the court grants an extension), and (3) a court must make a declaration of parentage in respect of the posthumously-conceived child.[10] The conditions set out within the *Assisted Human Reproduction Act*[11] and its Regulations will apply in determining whether stored genetic materials can legally be used in the conception of a child post-mortem. Most notably, written consent (in accordance with the Act's regulations) to the use of the materials to conceive a child in the event of the predeceasing spouse's death must be provided.[12]

The *All Families Are Equal Act,* 2016[13] was recently introduced to eliminate much of the prior legal uncertainty with respect to the circumstances in which a parent-child relationship is established. The *All Families Are Equal Act* expanded the class of individuals who may qualify as a parent, regardless of marital status, gender, or biological relatedness. This development may have opened the door to expanding "issue" to situations where the child of a non-adoptive, non-biological parent nevertheless has the same rights in respect of his or her parent's biological or adopted children, as issue.

Practical Implications for Drafting Solicitors

When issues of interpretation arise, they can result in litigation for which the costs are typically borne by the estate, limiting the assets ultimately available for distribution.

It is important for drafting solicitors to remain aware of developments in the ordinary definitions of terms common to estate planning documents. Drafting solicitors should take the time to properly explain these terms to clients in an effort to ensure that planning documents reflect their wishes to either include or exclude certain individuals as beneficiaries.

In light of the evolution of terms like “issue”, both recent and decades old, interpretation issues should remain top of mind for estate solicitors. When older planning documents are being reviewed with clients, any terms that may give rise to interpretation issues should be addressed with clients to ensure that their effect remains consistent with the testator's intentions, especially in consideration of developments in the meaning of the wording that appears within the document.

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[1] *Black's Law Dictionary,* 9th ed, *sub verbo* "issue".
[2] 19 OR (2d) 458, 1978 CarswellOnt 514.
[3] RSO 1980, c 66.
[4] RSO 1990, c S.26.
[5] *Ibid,* ss 1(3), (4).
[6] 2017 ONSC 2704 (CanLII).
[7] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[8] See, for example, *Milne (Doherty) v Alberta (AG),* [1990] 5 WWR 650, 74 DLR (4th) 403 (ABQB); *P (CE) v V (G)* (1993), 101 DLR (4th) 726, 15 CRR (2d) 108 (SKQB); and *Surette v Harris Estate,* [1989] NSJ No 262, 16 ACWS (3d) 256, (NSSC (TD)).
[9] *Supra* note 4, ss 1(1), 1.1.
[10] *Ibid,* s 1.1(1).
[11] SC 2004, c 2.
[12] *Ibid,* s 8(2). This general requirement appears to be subject to certain exceptions (see, for example, *KLW v Genesis Fertility Centre,* 2016 BCSC 1621 (CanLII)).
[13] SO, 2016, C.23.

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