What happens when the lawyer makes a mistake?

Charles Wagner

Sometimes even professionals drop the ball. Imagine walking into your lawyer’s office and asking him to make a few changes to your will. Instead of typing in a bequest of $2,500, the lawyer types $25,000. The will is signed and no one notices the mistake until after the testator dies. That is what happened in

Nugent v. Lang (http://bit.ly/dhnN8J). The lawyer admitted the error was his and he testified that the testator wanted the bequest to be $2,500. It should be simple, right? Not so fast. The plaintiff asked the court to fix the mistake. The legal term for this request is ‘Rectification.’ Courts use this equitable remedy very carefully. Exactly what type of evidence a judge may consider is being debated in the courts. How sure does the court have to be to fix the mistake? Is the court limited in how it can fix the mistake? In exercising the remedy is the court limited to only being able to delete certain parts of the will? Can a judge add missing words? In this case the court rectified the draftsman’s error and changed the bequest from $25,000 to $2,500.

Cases like Lipson v Lipson, (http://bit.ly/IpjGsn), Binkley Estate v. Lang, (2009) 50 E.T.R. (3d) 44 (http://www.canlii.org/en/on/onscc/doc/20100100nscc3484/20100100nscc3484.html?fn0) and Balaz v Balaz (http://bit.ly/cq8bJ) all involve situations where the courts fixed some form of lawyer mistake. Either there was an accidental slip or omission because of a typographical or clerical error, the testator’s instructions had been misunderstood, or the testator’s instructions had not been carried out. Despite these recent cases where judges fixed mistakes made in the will it is very important to remember that not every error will be rectified by the courts.

In Re Estate of Blanca Esther Robinson (http://bit.ly/9x5g0B) the court refused to fix the mistake. In that case the testator signed a will dealing with her European property. She also signed a Canadian will dealing with her Canadian property. Years later, she made a new Canadian will but did not tell her new lawyer about the Spanish will. Since the lawyer had no knowledge about the Spanish will, the solicitor included the standard provision revoking all previous wills. The beneficiaries asked the court to fix the mistake. The court refused. The judge stated, “…if no errors were made by the solicitor and the words in the will were reviewed and approved by the testator, rectification will not be available simply because the testator was mistaken about their legal effect.” So it seems that not every mistake will be rectified.

This short review of the case law on rectification should not be taken as legal advice. Based on my experience in dealing with these cases, they often turn on the specific facts. If you have a legal question relating to something similar, you are best advised to seek out competent legal counsel to determine your best course of action.

Remembrance and Thank You

One of the Grade 8 classes at Netivot Hatorah Day School poses for a shot at an assembly to mark Remembrance Day, which included a presentation on Operation Thank You by Anita Bromberg, national director, legal affairs, B’nai Brith Canada. Featured in the picture is Tyler Hall, a reservist with the Canadian Army and Balaz v Balaz (http://bit.ly/cq8bJ) the court refused to rectify the draftsman’s error and changed the will. Since the lawyer had no knowledge about the Spanish will, the solicitor included the standard provision revoking all previous wills. The beneficiaries asked the court to fix the mistake. The court refused. The judge stated, “…if no errors were made by the solicitor and the words in the will were reviewed and approved by the testator, rectification will not be available simply because the testator was mistaken about their legal effect.” So it seems that not every mistake will be rectified.

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