

Minimal Evidentiary Threshold Caselaw Review

TBLA Fall Conference

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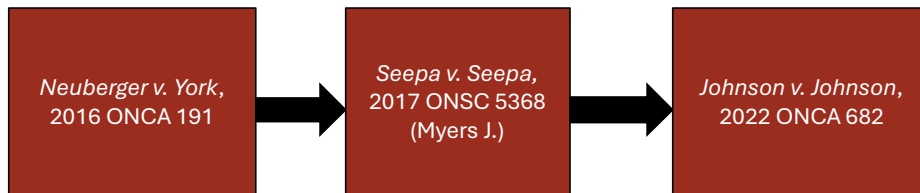
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Minimal Evidentiary Threshold

Trilogy Cases



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MINIMAL EVIDENTIARY THRESHOLD CASES

- **Giann v. Giannopoulos, 2023 ONSC 5412 – Under Appeal**
 - Threshold NOT met
- **Whitfield v. Glover, 2024 ONSC 1226**
 - Threshold NOT met
- **Carinci v. Carinci, 2023 ONSC 6094**
 - Threshold met
- **Graham v. McNally Estate and Blais, 2024 ONSC 4006**
 - Threshold NOT met
- **Dinally v. Dinally, 2023 ONSC 6178**
 - Threshold met
- **Fanelli v. Fanelli-Bruno, 2023 ONSC 6501**
 - Costs
- **White v. White, 2023 ONSC 3740 and 2023 ONSC 7286**
 - Threshold met – VERY FACT SPECIFIC
- **Gilbert v. Girouard, 2023 ONSC 4445**
 - Local decision
 - Threshold met on undue influence but NOT on capacity

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Giann v. Giannopoulos, 2023 ONSC 5412

Basis for Will Challenge - Allegations

- Deceased father lacked requisite testamentary capacity
- Deceased unduly influenced by son (Nick) and a friend/caregiver (Yoita), when made certain property transfers and new Will which benefited one son more than the other children

Findings

- Assertions made by son/brother (Bobby) and daughter/sister (Bessie) not supported by the facts that they adduced
- No unanswered evidence to call into question Deceased's capacity at time Deceased made Will or to credibly raise an issue of undue influence
- Minimal evidentiary threshold not met

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Giann v. Giannopoulos, 2023 ONSC 5412

Why Minimal Evidentiary Threshold Not Met:

- Any raised suspicions were answered fully and completely
- Did not cross-examine or submit reply evidence
- Cherry-picked evidence – medical records/text messages
- Made incredible allegations with no substance – highlights difference between evidence and “spin”

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Carinci v. Carinci, 2023 ONSC 6094

Basis for Will Challenge

- Deceased (Mother) lacked requisite testamentary capacity; and
- Deceased unduly influenced by daughter/sister (Sonya) to only give son/brother (Steven) legacy of \$200,000 (multi-million dollar estate)

Finding

- Evidence surmounts the minimum evidentiary threshold to put into issue the capacity of the Mother and whether Sonya exercised undue influence over Mother

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Carinci v. Carinci, 2023 ONSC 6094

What Evidence Met Minimal Evidentiary Threshold

- Lawyer kept a video recording of will signing ceremony
 - Mother shows confusion and cannot answer certain question asked by lawyer – looks for help
 - Audibly coached by someone to answer a certain way, but then Mother denies someone in room
 - Lawyer asked leading questions; not open-ended questions
 - Did not inquire about whether Mother was being unduly influenced by Sonya
 - Mother had trouble dating Wills

- Sonya was cross-examined – made medical and financial documentation relevant

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Dinally v. Dinally, 2023 ONSC 6178

Basis for Will Challenge

- Deceased (Father) lacked requisite testamentary capacity; and
- Deceased unduly influenced by daughter/sister (Yasmin) to make Will and transfer property so as to exclude son/brother (Larry) from receiving an equal inheritance

Finding

- Larry succeeds in putting into issue the validity of his father's Will based on undue influence
- Yasmin's answer on incapacity is cogent, but not complete

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Dinally v. Dinally, 2023 ONSC 6178

What Evidence Met Minimal Evidentiary Threshold

- Evidence that the family's long-time lawyer refused to accept a retainer that would transfer Property to Yasmin alone
- Yasmin put into evidence Declaration from lawyer who did Will and property transfer
 - Lawyer advised counsel for Larry that he took no notes and has no file – showed that Lawyer's recollection and his ability to test capacity and undue influence was less than determinative at this stage
- Severance of joint property transfer just weeks after creating it showed that Deceased's testamentary desires were malleable

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Dinally v. Dinally, 2023 ONSC 6178

What Evidence Met The Threshold Cont'd

- Yasmin produced some medical records to defend against third party production which indicated that:
 - Deceased was suffering from some dementia (e.g. could not tell doctor how much money he had)
- Will was made after Deceased being deprived of phone/TV/walks outside while complaining to his doctor's that Yasmin controls his life and that he is unable to argue with her

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White v. White, 2023 ONSC 3740 and 2023 ONSC 7286

Main Issue

- Whether it is possible to compel disclosure of documents in the Deceased's lawyer's file to look for any paper or writing that might be recognized as a Will under the new s. 21.1 of the *Succession Law Reform Act*

Take Away

- Yes – BUT very fact specific

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Gilbert v. Girouard, 2023 ONSC 4445

Basis for Will Challenge

- Deceased father lacked testamentary capacity and was unduly influenced by respondent daughter

Finding

- The court analyzed the threshold for capacity and undue influence separately
- Threshold established on undue influence but not on capacity

What Evidence Met the Threshold of Undue Influence

- Deceased's reliance on daughter at time Wills were made

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Gilbert v. Girouard, 2023 ONSC 4445

No Evidence of Incapacity

- Wills made when Deceased undergoing medical treatment does not meet the test
- Drafting lawyer's file a complete answer

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Whitfield v. Glover, 2024 ONSC 1266

Basis for Will Challenge

- Deceased lacked testamentary capacity and was unduly influenced by common law spouse

Finding

- The court analyzed the threshold for capacity and undue influence separately
- Threshold not met on either
- All suspicions and concerns were answered by evidence

No Evidence of Incapacity

- Deceased continued working up until one month before death
- Deceased prepared will herself, told other of her intentions several years prior
- Affidavits made conclusory statements about capacity but failed to adduce any real evidence
- Court found evidence of capacity

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Whitfield v. Glover, 2024 ONSC 1266

No Evidence of Undue Influence

- Evidence that Deceased was strong-willed
- Evidence of strained relationship with Deceased's niece
- No evidence of Murray involved in Deceased's financial affairs

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Graham v. McNally Estate and Blais, 2024 ONSC 4006

Basis for Will Challenge

- Deceased lacked testamentary capacity, was unduly influenced by friend and suspicious circumstances surrounding execution of Will
- Motion to dismiss application for not meeting minimal evidentiary threshold

Finding

- Threshold NOT met
- Will challenge dismissed in its entirety

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Graham v. McNally Estate and Blais, 2024 ONSC 4006

No Evidence of Incapacity

- No evidence to support assertions made in Notice of Application
- No evidence of the Deceased's mental or emotional state including at the time Will was executed
- No anecdotal evidence on cross-examination of Deceased's condition prior to death
- Evidence relied on in support of incapacity not substantiated by any objective evidence – nothing more than speculation
- Katherine's evidence withstood test of cross-examination

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Graham v. McNally Estate and Blais, 2024 ONSC 4006

No Evidence of Undue Influence

- No dependency
- Consistent prior Will

No Evidence of Suspicious Circumstances

- No evidence that the Will wasn't executed without formalities
- No evidence to rebut presumption that Deceased had knowledge of an approved of contents of Will
- Katherine's uncontradicted evidence sufficient to dispel any suspicion

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Fanelli v. Fanelli-Bruno, 2023 ONSC 6501

Another Will Challenge

- Deceased executed new Will one year before death which divided residue into four equal shares between her two adult children, Damiano and Sonia and Sonia's two minor children
- Previous Will divided residue equally between Damiano and Sonia
- Damiano brought application to challenge the Will on basis of incapacity and undue influence
- Estate worth \$320,000
- If successful, Damiano stood to increase his inheritance by approx. \$85,000
- Litigation settled except for costs

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Fanelli v. Fanelli-Bruno, 2023 ONSC 6501

Costs

- Sonia, as ET, sought costs on substantial indemnity basis in sum of \$75,000
- Estate assets preserved during litigation. Sonia paid out of pocket – did not want Estate to reimburse her which would result in her and her children bearing 75% of costs
- Damiano incurred his own legal fees of almost \$60,000 to chase a maximum claim of \$85,000

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Fanelli v. Fanelli-Bruno, 2023 ONSC 6501

J. Myers

- “This case is an example of the very harm inherent in the ‘motion for directions’ process”
- “The feared outcome is exactly what happened here.”
- “This litigation is an example of scorched earth litigation”
- “It’s a lose-lose all around unless the applicant [Damiano] pays the respondent’s [Sonia’s] costs.”
- Damiano ordered to pay substantial indemnity costs in the amount of \$75,000

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Fanelli v. Fanelli-Bruno, 2023 ONSC 6501

Decision

- “Bringing a case like this, making allegations of undue influence, forcing a massive expenditure on an estate in an effort to scorch the earth, i.e. destroy what you cannot have yourself, is reprehensible litigation behaviour.”
- J. Myers – considered whether Sonia should bear some costs because she agreed to a broad order for directions BUT consent orders are needed in this field. The Estate Trustee should not be faulted for being cooperative.

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Key Takeaways/Trends

- **Should not become an advanced battleground for the war to come**
 - Stay away from lengthy affidavits filled with subjective speculation, nasty allegations and innuendo
- **Should be “surgical” – pointing to a few key pieces of relevant evidence**
 - Need some objective, corroborated evidence of relevant events around the time of the challenged Will
 - Evidence needs to make it more or less likely that an inference that a fact exists or existed
- **Not a motion for summary judgment requiring proof of the case on its merits or meeting the standard of a genuine issue requiring a trial**
 - However, does not mean there is no credibility assessment involved or that the judge cannot make findings of fact

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Thank you!

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Estate Litigation Update

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Overview of Limitation Periods in Estate Litigation

Key statutes to consider for assessing limitation periods in the context of estate litigation:

- *Limitations Act*, 2002, S.O. 2002, c. 24 Sched. B
- *Succession Law Reform Act*, R.S.O. 1990, c. S. 26
- *Family Law Act*, R.S.O. 1990, c. F.3
- *Real Property Limitations Act*, R.S.O. 1990, c. L15
- *Estates Act*, R.S.O. 1990, c. E.21
- *Estates Administration Act*, R.S.O. 1990, c. E22
- *Trustee Act*, R.S.O. 1990, c. T.23

Common Limitation Periods in Estate Litigation

Will Challenges

- *Leibel v. Leibel*, 2014 ONSC 4516

Limitation Period for Will Challenges of **two years** begins to run from date of death subject to the principle of discoverability.

→ Limitation period could run from a date earlier than date of death if the plaintiff had knowledge of the impugned will earlier. See *Leibel v. Leibel* 2014 ONCS 4516.

Common Limitation Periods in Estate Litigation

Dependant's Support Relief Claim

- *Succession Law Reform Act*, R.S.O. 1990, c. S.26 at s.61 [SLRA].

Limitation Period to commence an application for support under Part V of the SLRA is **6 months from the grant of a Certificate of Appointment of Estate Trustee**.

Exception: The Court may allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.

Common Limitation Periods in Estate Litigation

Family Law Act Elections

- *Family Law Act*, R.S.O. 1990, c. F.3 at ss. 6(10) & 7(3) [FLA].

The Limitation Period for a surviving spouse to make an election is six months after the first spouse's death.

Common Limitation Periods in Estate Litigation

Estate Trustees: Claims on behalf of or against a Deceased

- *Trustee Act*, R.S.O. 1990, c. T.23 at s. 38(1).

Estate Trustees have a limitation period of two years from the date of death to bring or manage actions that the Deceased may have been involved in.

A person wronged by a Deceased may bring or maintain an action against the Estate's legal representative but such right expires after two years from the Deceased's date of death.

Exception: Libel & Slander

Common Limitation Periods in Estate Litigation

Estate Trustee Accounting: Applications to Pass Accounts, Estate Trustee's Claim for Compensation & Objections to Accounts

- *Armitage v. The Salvation Army*, 2016 ONCA 971 [*Armitage*].
 - *Wall v. Shaw*, 2018 ONCA 929 [*Wall*].
 - *Estates Act, R.S.O. 1990, c. E. 21* at s. 49(3).
- An Application to Pass Accounts is not a “Claim” as anticipated by the *Limitations Act* and therefore is not subject to the two-year limitation Period (*Armitage*).
- No two-year limitation applies to the filing of an Objection to Accounts (*Wall*).

Limitation Periods in Equitable Trust Claims

Legislative Limitation Periods to Consider:

- *Real Property Limitations Act*, RSO 1990, c L. 15 at s. 4: 10-year limitation period
- *Limitations Act, 2002, S.O. 2002, c. 24, Sch B. & Trustee Act*, RSO 1990, c. T.23 at s. 38(3): 2-year limitation period

Limitation Periods in Equitable Trust Claims

Estate of William Robert Waters v. Gillian Henry et al., 2014 ONSC 4190

- \$30 Million Dollars from deceased to his former intimate lover, Gillian, including \$2.85 from his wife's accounts over a 10-year period.
- Transfers stopped in 2019, William died on July 28, 2021.
- Estate Trustee sought to recover *inter vivos* transfers.
- Some monetary transfers subject to two-year limitation period.
- Some monetary transfers for the purchase or renovation of real property was subject to the 10-year limitation period.
- All but an 80% interest in a horse stable was retained by Gillian.

Limitation Periods in Equitable Trust Claims

Ingram v. Kulynych Estate, 2024 ONCA 678

- Alleged common-law relationship 1999- 2017.
- Deceased died in 2017.
- Common-law spouse commenced a claim against the Estate in 2021 on the basis of constructive trust and unjust enrichment.
- Motion Judge allowed the claim to proceed under the RPLA.
- ONCA disagreed, ruling that the two-year limitation period applies.
- Nature of the claim on alleged unjust enrichment and constitute a “wrong” and making it subject to the *Trustee Act* not the RPLA.

Review of recent application of Substantial Compliance Legislation in Ontario

Section 21.1 of the *Succession Law Reform Act, RSO 1990, c. S. 26* shifted Ontario from a strict compliance to substantial compliance regime for deceased persons to died on or after January 1, 2022

Prerequisites for substantial compliance: The Court must be satisfied on a balance of probabilities that:

- 1) The document is authentic
- 2) It reflects the testator's testamentary intentions being a "fixed and final expression" of the testator's intentions regarding the distribution of their property upon death

No Electronic documents

Emerging Judicial Guidance on the Application of Substantial Compliance

Recent Case Law Developments

- *Vojska v Ostrowski*, 2023 ONSC 3894
- *Cruz v Public Guardian and Trustee*, 2023 ONSC 3629
- *Grattan v Grattan Estate*, 1 February 2023, Ontario 22-054 (ONSC)
- *Groskopf v Rogers et al*, 2023 ONSC 5312
- *White v White*, 2023 ONSC 3740
- *Allan et al. v. Thunder Bay Regional et al.* 2024 ONSC 3260
- *Re Estate of Harold Franklin Campbell*, 2023 ONSC 4315

QUESTIONS?

2024 TBLA Fall Conference: Estate Litigation Update¹

Limitation Periods in Estate Litigation

1. *Leibel v. Leibel*, 2014 ONSC 4516
2. *Armitage v. The Salvation Army*, 2016 ONCA 971
3. *Wall v. Shaw*, 2018 ONCA 929
4. *Estate of William Robert Waters v. Gillian Henry et al.*, 2014 ONSC 4190
5. *Ingram v. Kulynych Estate*, 2024 ONCA 678 (CanLII)

Substantial Compliance

1. *Vojska v Ostrowski*, 2023 ONSC 3894
2. *Cruz v Public Guardian and Trustee*, 2023 ONSC 3629
3. *Grattan v Grattan Estate*, 1 February 2023, Ontario 22-054 (ONSC)
4. *Groskopf v Rogers et al.*, 2023 ONSC 5312
5. *White v White*, 2023 ONSC 3740
6. *Allan et al. v. Thunder Bay Regional et al.* 2024 ONSC 3260
7. *Re Estate of Harold Franklin Campbell*, 2023 ONSC 4315

Minimal Evidentiary Threshold in Will Challenges

1. *Neuberger v. York*, 2016 ONCA 191
2. *Seepa v. Seepa*, 2017 ONSC 5368
3. *Johnson v. Johnson*, 2022 ONCA 682
4. *Giann v. Giannopoulos*, 2023 ONSC 5412
 - Under Appeal
 - Threshold not met
5. *Carinci v. Carinci*, 2023 ONSC 6094
 - Threshold met
6. *Dinally v. Dinally*, 2023 ONSC 6178
 - Threshold met
7. *White v. White*, 2023 ONSC 3740 and 2023 ONSC 7286
 - Threshold met but very fact specific
8. *Gilbert v. Girouard*, 2023 ONSC 4445
 - Threshold met on undue influence but not on capacity
9. *Whitfield v. Glover*, 2024 ONSC 1266
 - Threshold not met
10. *Graham v. McNally Estate and Blais*, 2024 ONSC 4006
 - Threshold not met
11. *Fanelli v. Fanelli-Bruno*, 2023 ONSC 6501
 - Threshold considered in determining costs

¹ Hannah J. M. Gladstone, Carrel + Partners LLP and Karen J. Hagman, MayLex Litigation P.C.
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