Thunder Bay Law Association Wills & Estates Seminar
Estates Program – October 17, 2024
9:00 a.m. – 4:30 p.m.

Speakers: Ian M. Hull and Suzana Popovic-Montag – Hull & Hull LLP

TOPICS

1. Mental health issues and estates

2. Duty of disclosure in estate litigation – disclosure of estate assets

3. Dealing with emotional, grieving, and vulnerable clients in estates
    a) Elderly Clients and Unconscious Assumptions
    b) Growing Concerns for our Aging Population
    c) Navigating Family Turbulence: Mediation's Role in Power of Attorney Disputes
    d) On a Lawyer's Duty to Their Client

4. Impairment and testamentary capacity
    a) Mental Capacity
    b) Comparing Capacity Standards and Contingency Planning for Lawyers

5. Atypical probate applications – common errors
    a) What People Need to Know About Probate in Ontario
    b) Administration Bonds
    c) Planning for Unusual Assets (Part 1)
    d) Planning for Unusual Assets (Part 2)
    e) Planning for Personal Effects
    f) Estate Administration: First Steps

6. LawPRO practical tips
    a) A refresher on solicitor's negligence claims
    b) Covid-19 articles & resources
    c) PracticePro Guide to Resources
    d) Professional Liability Insurance During Mediation
    e) The Hull & Hull weekly webinar: a summary
    f) Virtual Witnessing of Wills and Powers of Attorney With Less Risk

7. Challenging wills in Ontario: minimal evidentiary threshold

8. The contentious passing of accounts

9. Searching for heirs – how far should you go?

10. Practical tips: Drafting to avoid disputes

11. Limitation periods in estate litigation

12. The power of beneficiaries to collectively extinguish a trust

13. Substantial compliance update
    a) Compliance in Modern Practice
    b) Substantial Compliance
    c) Proving Due Execution

14. When is a corporate executor necessary?

15. The use of majority clauses and protection against co-trustees
    a) Majority Rule Clauses & The Court's Supervisory Jurisdiction
    b) The Annotated Powers of Attorney for Property and for Personal Care 2024
    c) Less is More: When to use a shorter Will
    d) A Deeper Dig: Some Lesser Known provisions of the *Succession Law Reform Act*

16. Will Drafting Tips for the Appointment of Multiple Trustees: Handling Disagreements During an Estate Administration

17. Tips for Affidavits Attesting to Holograph Instruments

18. Caselaw Chart

Tab 1

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Enhancing the Wellbeing of Lawyers:

Practical Approaches to Supporting Mental Health in the Profession

Suzana Popovic-Montag
Managing Partner
Tel: (416) 369-1416
Fax: (416) 369-1517
Email: spopovic@hullandhull.com

Hull & Hull LLP
Barristers and Solicitors

TORONTO
141 Adelaide Street West, Suite 1700
Toronto, Ontario M5H 3L5
TEL: (416) 369-1140
FAX: (416) 369-1517

OAKVILLE
228 Lakeshore Road East
Oakville, Ontario L6J 5A2
TEL: (416) 369-1140
FAX: (416) 369-1517

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ENHANCING THE WELLBEING OF LAWYERS:

PRACTICAL APPROACHES TO SUPPORTING MENTAL HEALTH IN THE PROFESSION

Good mental health is increasingly recognized as being crucial to the practice of law. In keeping with this realization, a plethora of resources have become available over the last decade to assist individual lawyers and paralegals in protecting their mental health. Some of those resources are offered by formal organizations, including the Law Society of Ontario[1] and the Ontario Bar Association.[2] There are also comparatively informal mental health resources available to legal professionals,[3] in addition to tools intended for the general public,[4] making the pool of mental health resources to choose from quite plentiful.

While it is reassuring to see so many initiatives intended to help legal professionals protect their mental health, addressing this issue at a personal level only is bound to have limited success. As recognized by Chief Justice Strathy in an article published earlier this year,[5] the mental health issues faced by legal professionals are also a product of the way that lawyers currently practice. If we as a profession genuinely wish to improve and

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[1] See the Law Society of Ontario's Well-being Resource Centre, online: <https://www.lso.ca/lawyers/well-being-resource-centre>, which also includes the Member Assistance Program, online: <https://lso.ca/lawyers/well-being-resource-centre/member-assistance-program-(1)#counselling-5>. Similar resources are also available through other law societies and organizations. For example, see the Law Society of Alberta, Resource Centre, Wellness, online: <https://www.lawsociety.ab.ca/resource-centre/key-resources/wellness/>.

Similar resources are also available in the United States. See, for example, Lawyer Well-Being Massachusetts, online: <https://lawyerwellbeingma.org/>, an initiative of the Massachusetts Supreme Judicial Court Standing Committee on Lawyer Well-being, "[c]reated to help all Massachusetts lawyers achieve a healthy, positive, and productive balance of work, personal life, and health." Also see the Institute for Well-Being in Law, online: <https://lawyerwellbeing.net/> [Institute for Well-Being in Law], an American charitable organization that evolved from a National Task Force on Lawyer Well-Being. Also see Lawyers Concerned for Lawyers, online: LCL MA <https://www.lclma.org/>.

[2] See the Mindful Lawyer CPD series offered by the Ontario Bar Association, online: <https://www.oba.org/openingremarks/mindfullawyer>.

[3] See Lawyers with Depression, online: <https://www.lawyerswithdepression.com/>, a website which holds itself out as "a website for lawyers with depression created by a lawyer with depression."

[4] See, for example, the popular work of Dr. Nicole LePera, also known as the "Holistic Psychologist", online: <https://theholisticpsychologist.com/> and the work of Nick Wignall, a clinical psychologist whose work focuses on "Better Habits for Better Mental Health" <https://nickwignall.com>.

[5] Hon. George R. Strathy, "The Litigator and Mental Health" (29 April 2022), online (blog): Law Society of Ontario Gazette <https://lso.ca/gazette/blog/thelitigatorandmentalhealth> [Strathy].

protect mental health, it is time to examine what role law firms can play in supporting legal professionals, rather than putting full responsibility for addressing mental health concerns on the individual.

Without a doubt, it is incumbent on individual professionals to take steps to preserve their own wellbeing, such as engage in mindfulness practices (meditation, journaling, and yoga are popular), get enough sleep, eat well, use drugs and alcohol responsibly, and even attend therapy or utilize professional coaching. However, it is also incumbent on us as a profession to recognize that such initiatives will yield limited returns if individuals' work environments and the way they approach work continue to contribute to or exacerbate mental health issues. Identifying the role that law firms can play in regard to mental health ought to be a priority for all law firms - poor mental health can be experienced by all legal professionals, irrespective of whether they work at a global law firm, a regional entity, or a boutique practice.[6]

Justice Strathy's article recommends a number of steps that law firms can take to help address mental health, including:

- creating an environment in which mental health can be discussed openly and safely;
- giving lawyers an opportunity to disconnect; and
- letting go of the "gladiator" persona often associated with lawyers.[7]

This paper is intended to contribute to the discussion that Justice Strathy started, focusing specifically on steps that law firms can take to prioritize mental health, particularly creating an environment where mental health issues can be discussed openly and safely.

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[6] "Law Firms: 8 Practical Ways to Improve Staff Mental Health," online: Braving Boundaries <https://bravingboundaries.com/law-firms-8-ways-to-improve-your-staff-mental-health/> ["8 Practical Ways"].

[7] Strathy, *supra* note 5. At page 2, Strathy describes the stereotypical barrister as follows:

> ... a fearless gladiator, wielding a razor-sharp intellectual broadsword. Always in control of their emotions. Erudite and articulate. Powering through long hours of work with pride and not breaking a sweat under pressure. Sometimes wounded, but never defeated. Suffering in silence and quietly bandaging their own wounds, ready to fight another day.

Before discussing how law firms can prioritize mental health, however, this paper briefly explores the concept of mental health and why it is imperative that we as lawyers prioritize protecting this fundamental component of personal wellbeing.

Defining Mental Health

Mental health tends to be an amorphous, vague concept - it may not be clear what this term actually means. According to Merriam Webster, the term "mental health" has multiple components, defined as "a condition of being sound mentally and emotionally that is characterized by the absence of mental illness and by adequate adjustment especially as reflected in feeling comfortable about oneself, positive feelings about others, and the ability to meet the demands of daily life."[8]

Not surprisingly, the concept of mental health is defined similarly, yet differently, by other organizations. The World Health Organization, for example, defines mental health as a state of wellbeing, in which individuals realize their own abilities, can cope with the normal stresses of life, can work productively, and are able to make a contribution to their community.[9] An even more simplified definition is offered by Braving Boundaries, a lawyer coaching service: "Mental health is a state of well-being, something which everyone possesses, which can fluctuate from time to time."[10]

This paper was written with the definition of mental health proffered by Merriam Webster in mind, including both the absence of mental illness and being adequately adjusted. Speaking openly and honestly about mental health issues in our profession means recognizing that some professionals suffer from actual mental illnesses like depression, anxiety, schizophrenia, bipolar disorder, and panic disorders, to name a

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[8] *Merriam Webster*, Dictionary, sub verbo "mental health" (31 Aug 2022), online: <https://www.merriam-webster.com/dictionary/mental health>.

[9] World Health Organization, Mental health: strengthening our response (17 June 2022), online: WHO <https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response>; cited in Law Society of Ontario, Personal Management, *Practice Management Guidelines* (23 Feb 2022) at 8.6 Managing Mental Health and Wellness, online: LSO <https://lso.ca/lawyers/practice-supports-and-resources/practice-management-guidelines/personal-management> [*Practice Management Guidelines*].

[10] "The Fear Around Mental Health in the Legal World," online: Braving Boundaries <https://bravingboundaries.com/the-fear-around-mental-health-in-the-legal-world/> [Mental Health in the Legal World].

few.[11] However, the concept of being both mentally and emotionally sound is much broader and more complex. Difficulties with emotional regulation,[12] perfectionism,[13] trauma,[14] imposter syndrome,[15] and burn out,[16] for example, may not result in a formal diagnosis, but undeniably impact whether a legal professional is adequately adjusted and thereby mentally and emotionally sound. To be effective, any law firm strategy or approach to mental health must be sufficiently elastic to help legal professionals with formal diagnoses and professionals with mental health concerns that fall into the more amorphous, gray area. After all, a lawyer can have good mental health but be diagnosed with a mental illness, and *vice versa* - a lawyer can have poor mental health without having a mental illness.[17]

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[11] Justice Strathy eloquently discusses the distinction between mental health and mental illness, explaining, for example how mental illness tends to be episodic and is treatable. See Strathy, *supra* note 5 at 2-3.

[12] See Kendra Brodin, "Emotional Regulation: What It Is and Why Lawyers Need It," Law Practice Today (14 Dec. 2021), online: <https://www.lawpracticetoday.org/article/emotional-regulation-what-it-is-and-why-lawyers-need-it/>; "Managing Difficult Emotions in the Legal Work Place [Webinar]" (14 July 2022), online: Lawyer Well-Being & Mental Health: Massachusetts LAP Blog <https://www.lclma.org/2022/07/14/managing-difficult-emotions-in-the-legal-workplace-webinar/>; Rebecca Howlett and Cynthia Sharp, "The Legal Burnout Solution: How Childhood Trauma Impacts Lawyers and their Clients," American Bar Association (19 Apr. 2022), online: ABA <https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/april-2022/legal-burnout-solution-how-childhood-trauma-impacts-lawyers-their-clients/> [Howlett & Sharp].

[13] See Kirrily Schwartz, "The Problem with Perfection," *Law Society Journal* (6 Oct. 2021), online: LSJ online <https://lsj.com.au/articles/the-problem-with-perfection/>; Brook Greenberg, "Perfectionism, self-doubt and mental health in the legal profession," *Canadian Lawyer* (17 Dec. 2019), online: <https://www.canadianlawyermag.com/news/opinion/perfectionism-self-doubt-and-mental-health-in-the-legal-profession/324233> [Greenberg]; and Jordana Alter Confino, "Reigning in Perfectionism," Law Practice Today (14 Jan. 2019), online: <https://www.lawpracticetoday.org/article/reining-in-perfectionism/> [Confino].

[14] See Brandon Vogel, "Vicarious Trauma is Real… and Really, Really Common with Lawyers" New York State Bar Association (22 July 2020), online: NYSBA <https://nysba.org/vicarious-trauma-is-realand-really-really-common-with-lawyers/>; "Dealing with Secondary Trauma in the Legal Profession [Webinar]" (10 June 2022), online: Lawyer Well-Being & Mental Health: Massachusetts LAP Blog <https://www.lclma.org/2022/06/10/dealing-with-secondary-trauma-in-the-legal-profession-webinar/>; Howlett & Sharp, *supra* note 12.

[15] See Greenberg, *supra* note 13.

[16] See Howlett & Sharp, *supra* note 12.

[17] Mental Health in the Legal World, *supra* note 10. Also see Strathy, *supra* note 5 at 2, citing "Fast Facts about Mental Health and Mental Illness" (19 July 2021), online: Canadian Mental Health Association <www.cmha.ca/brochure/fast-facts-about-mental-illness/>.

The Link Between Mental Health and Professional Regulation

As pointed out by Justice Strathy, lawyers have been compelled to sweep mental health issues under the rug historically because of the stigma that accompanies mental illness and mental health problems: "Stereotypical thinking about mental health in the legal profession associates poor mental health or illness with an ability to control emotions or thoughts, a lack of judgment, the inability to work hard or withstand pressure, and unreliability."[18] Hiding mental health issues has also been feasible because such issues are typically internal, and may be concealed from our colleagues. For example, we cannot see depression and anxiety the way that we can see a broken arm. While mental health issues are distinct from physical ailments, without a doubt "Mental Health is Health", as aptly noted by the Centre for Addiction and Mental Health.[19]

It is imperative that our profession begin to have an open dialogue about mental health, not only to preserve the wellbeing of professionals, but also because of the ethical consequences that could follow if we continue to avoid facing these issues. It is now broadly accepted that mental health can impact a lawyer's ability to practice. The Law Society of Ontario expressly recognizes in its *Practice Management Guidelines* that challenges or stressors unique to a lawyer's work enhance vulnerability for mental health or wellness issues which, in turn, "have the potential to result in significant impairment that can compromise professional conduct, client interests and the administration of justice."[20] For example, if a lawyer suffers from substance abuse or a mental health issue, that individual may end up unable to provide competent service, even though he or she unquestionably possesses the knowledge and skill required of either a particular matter or their practice generally.[21]

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[18] Strathy, *ibid.* At 3, Justice Strathy adds that the stigma associated with mental illness "casts blame on the person who is unwell and makes them fearful and ashamed to ask for help, out of concern that it will impact their career."

[19] Centre for Addiction and Mental Health, online: CAMH <https://www.camh.ca/en/driving-change/mental-health-is-health>.

[20] *Practice Management Guidelines*, *supra* note 9 at 8.1 Introduction.

[21] See "Ethically Speaking: Competence and Wellness" (25 June 2021), online: Law Society of Alberta <https://www.lawsociety.ab.ca/ethically-speaking-competence-and-wellness/> ["Competence and Wellness"]. For discussion specifically focused on burnout, see "Ethically Speaking: Civility and Burnout"

According to Dr. Alex Yufik, an American attorney and forensic psychologist, "[u]ntreated mental illness, cognitive decline, and substance abuse can and often does lead to an inability to manage caseloads, case stagnation and neglect, and in more serious cases, real client harm."[22] Signs of impaired competence can include missed deadlines, missed meetings, procrastination, failure to respond to communications, low motivation, perpetual fatigue, and irrational anger.[23] Essentially, a lawyer's "ability to tolerate stress and cope with the everyday demands of clients, partners, opposing counsel, or judges becomes severely compromised to the point where the lawyer is unable to practice competently."[24]

Strictly speaking, a lawyer's ability to provide legal services is that individual's responsibility.[25] However, if mental health issues are impacting the capacity of lawyers or paralegals to provide competent legal services, their professional peers are obligated to report the matter to the Law Society, unless doing so would be unlawful or a breach of solicitor-client privilege.[26] With this obligation in mind, mental health issues clearly are not only the business of individual lawyers, but are also the business of law firms as well.

First Steps: When to Start a Conversation About Mental Health

Returning to Justice Strathy's article, it is suggested that "law firm leaders need to lift the façade of invincibility and be open and candid about their own mental health

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(May 2022), online: Law Society of Alberta <https://www.lawsociety.ab.ca/resource-centre/key-resources/wellness/ethically-speaking-civility-and-burnout/>.

[22] Dr. Alex Yufik, "Evaluating an Impaired Attorney's Fitness to Practice" (14 Sept. 2018), online: ABA Law Practice Today <https://www.lawpracticetoday.org/article/evaluating-impaired-attorneys/> [Yufik].

[23] Signs of impaired competence are not necessarily the same as signs of mental health, addiction, or wellness issues. For a more comprehensive list of signs of issues related to mental health, addiction, or wellness, see *Practice Management Guidelines*, *supra* note 9 at 8.4 Recognizing Signs of Mental Illness, Addiction and Wellness Issues.

[24] Yufik, *supra* note 22.

[25] "Competence and Wellness", *supra* note 21.

[26] *Practice Management Guidelines*, *supra* note 9 at 8.9 Duty to Report Substantial Questions of Capacity and Competency. Also see the Law Society of Ontario, *Rules of Professional Conduct* (Amendments current to February 2022), r. 7.1-3, online: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct> [*Rules of Professional Conduct*].

experiences and challenges and about how they learned to navigate those challenges."[27] The American Bar Association (the "ABA") endorses a similar approach, noting that "[t]he most effective way to reduce stigma [around mental health and addiction] is through direct contact with someone who has personally experienced a relevant disorder."[28]

While sharing and openness in the professional realm will no doubt make it easier to address mental health issues, the question remains - how can we start these kinds of conversations? In an ideal world, lawyers would open up about their experiences at a wellness retreat, or a workshop of some kind, or even after hours at the office. However, it is important to recognize that colleagues may not be ready to discuss all of their concerns around mental health despite being given an opportunity to do so, even if they are told that the firm is a safe space to discuss mental health issues. As noted in the Law Society of Ontario's *Practice Management Guidelines*, "[c]oncerns that legal careers will be permanently and negatively affected by disclosure of a mental health or addiction issue can affect a lawyer's willingness to openly discuss these issues and seek help, treatment and support."[29] Professionals with longstanding mental health issues may have spent years hiding these issues from colleagues, thinking that sharing a diagnosis or symptoms suffered when triggered will be a professional liability.[30] Simply being told that individuals can and should openly discuss mental health issues in the workplace - that they will not be judged after witnessing years of stigma around mental illness - may not result in a lawyer or paralegal discussing mental health concerns with candour.

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[27] Strathy, *supra* note 5 at 7.

[28] Anne M. Brafford, *Well-Being Toolkit for Lawyers and Legal Employers* (August 2018) at 19, online: American Bar Association <https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_well-being_toolkit_for_lawyers_legal_employers.pdf> [*Well-Being Toolkit*].

[29] *Practice Management Guidelines*, *supra* note 9 at 8.7 Reducing Stigma in the Legal Workplace.

[30] Strathy, *supra* note 5 at 5 cites a survey of working Canadians, 75% of whom "said that they would be reluctant, or would refuse, to disclose a mental illness to an employer or co-worker" due to fears of the potential consequences, including losing their job.

See also Andrew Flavelle Martin, "Mental Illness and Professional Regulation: The Duty to Report a Fellow Lawyer to the Law Society," (2021) 53:3 Alta. L.R. 659 at 660, online: 2021 CanLIIDocs 631 <https://canlii.ca/t/t2gz> [Martin].

Difficulties around discussing mental health issues in a supportive work environment have even been depicted in popular culture. In an episode of *Modern Love*, a television series based on columns published by the *New York Times*,[31] an entertainment lawyer named Lexi is fired by her law firm. As Lexi is leaving the firm after packing up her office, a colleague offers to take her for coffee.[32] The next scene shows the two lawyers at a restaurant, where Lexi admits to her former colleague that she is bipolar. When asked why Lexi never told her colleague about the diagnosis, Lexi explains, "Come on. Who wants to hire someone with a mental illness in entertainment law - aren't we crazy enough?"[33]

For an environment of openness to be effective, an opportunity to meaningfully discuss mental health issues must arise before the exit interview. There must be sufficient flexibility to start conversations about mental health issues and genuinely connect during day-to-day law firm operations, recognizing that events may occur during the workday that trigger such issues. For example, we may notice a colleague during office hours who appears to have been crying. Under these circumstances, we may be reluctant to take the time to gently (and discreetly) ask that person what's happening and if he or she is okay because the timing is inconvenient. If we have a tight schedule, reaching out to our colleague may mean that we have to make a client, another colleague, or opposing counsel wait, which could in turn impact how we are perceived. We may think that it would be better to talk with our colleague at a more convenient time, or to instead reach out to the firm's mental health committee (if one exists) to speak with our colleague.[34] However, carrying on with business as usual and walking away without making contact may not only make it harder to engage with our colleague in the future, but also undermine efforts

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[31] Amazon, *Modern Love*, Season 1, Episode 3 "Take Me as I Am, Whoever I Am" (17 October 2019), online (video): Amazon Prime Video <https://www.primevideo.com/detail/0KVQAAI5LR5DXQUXVFX8UZPCO4/>.

[32] *Ibid.* at 00h: 27m: 35s.

[33] A condensed version of this scene can be seen on Youtube; see Modern Love: Anne Hathaway's Mindblowing Final Scene | Prime Video (23 Oct 2019), online: <https://www.youtube.com/watch?v=uDwPNBshKgQ>.

[34] Pertinent considerations regarding law firm mental health committees are addressed below, starting at page 12.

to create a safe space in the work place where mental health concerns can be discussed openly.

Discussing Mental Health With Emotional Agility

Another obstacle that could prevent us from connecting with a colleague with mental health issues is the fact that these kinds of conversations may feel difficult or uncomfortable, requiring patience and empathy, and perhaps even tolerance of conduct that lawyers consider "unprofessional". To help make lawyers and paralegals more comfortable speaking about mental health issues, it would be ideal for law firms to invest in mental health training.[35] Unfortunately, such an investment may not be feasible for all law firms at the present time. With that in mind, the concept of emotional agility may be a tool that law firms can use to create a workspace where colleagues can meaningfully connect about mental health concerns, even during emotional conversations.

The concept of emotional agility is attributed to Harvard psychologist Dr. Susan David, and is premised on approaching our emotions in a mindful, values-driven and productive way.[36] Emotional agility counters typical, often rigid, stereotypes in the work place, such as "[t]he prevailing wisdom ... that difficult thoughts and feelings have no place at the office", and that professionals must "be either stoic or cheerful", must project confidence, and ought to suppress negativity.[37] According to Dr. David, these kinds of expectations "go against basic biology. All healthy humans have an inner stream of thoughts and feelings that include criticism, doubt, and fear. That's just our minds doing

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[35] Some Canadian law firms are already consulting with mental health professionals to address mental health and work-life balance issues. See Zena Olijnyk, "Lawyers' quest for perfection a challenge in creating work-life balance: registered psychotherapist" (27 Aug. 2021), online: Canadian Lawyer <https://www.canadianlawyermag.com/resources/practice-management/lawyers-quest-for-perfection-a-challenge-in-creating-work-life-balance-registered-psychotherapist/359317>.

The American Bar Association also recommends that legal employers "provide training on identifying, addressing, and supporting fellow professionals with mental health and substance use disorders." See the *Well-Being Toolkit*, *supra* note 28 at 18.

[36] See Susan David, *Emotional Agility* (New York: Avery, 2016) [*Emotional Agility* book].

[37] Susan David and Christina Congleton, "Emotional Agility" (November 2013), online: Harvard Business Review <https://hbr.org/2013/11/emotional-agility> [Emotional Agility article]. See also the *Emotional Agility* book, *ibid.* at Chapter 9.

the job they were designed to do: trying to anticipate and solve problems and avoid potential pitfalls."[38]

When faced with emotional challenges, Dr. David recommends four practices:

1. Recognizing your patterns, specifically when you've been hooked by your thoughts and feelings;
2. Labelling your thoughts and emotions as thoughts and emotions, to help consider the situation more objectively and have a broader perspective;
3. Accepting your thoughts and emotions with an open attitude (rather than rejecting them, quashing them, or taking them out on others); and
4. Acting in a way that aligns with your values.[39]

According to Dr. David, "agility begins with unhooking ourselves from unhelpful thoughts, feelings, and patterns, and aligning our everyday actions with our long-term values and aspirations."[40]

While it may be unrealistic to expect emotional agility to resolve mental health issues like depression and anxiety, this strategy could be useful for changing how we communicate about mental health in the workplace. In the case of legal professionals who struggle with mental health issues, embracing emotional agility may help them change longstanding patterns of keeping those issues private, and to choose to instead discuss their mental health more openly so that they can help initiate change in the law firm or, alternatively, take steps to improve their wellbeing. Changing a longstanding pattern of behaviour, however, is likely to be particularly challenging in a high stress workplace like a law firm.[41]

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[38] Emotional Agility article, *ibid.*

[39] This summary is taken from the *Emotional Agility* article, *ibid.* The same practices are discussed at length in the *Emotional Agility* book, *supra* note 36.

[40] *Emotional Agility* book, *ibid.* at 195.

[41] See the *Emotional Agility* book, *ibid.* at 192, where David explains:

> At work, especially when things get intense, we too often fall back on our old stories about who we believe ourselves to be. Those dusty old narratives can really hook us at crucial

Emotional agility can also be utilized by lawyers who wish to facilitate a workplace where there is room to express emotions and engage with mental health issues. For example, in his work as a consultant, Anthony Kearns discusses how lawyers who are uncomfortable with emotions can productively communicate with colleagues who are emotional by utilizing emotional agility.[42] Kearns suggests that the first step is to learn to observe, understand and accept the role that our own emotions play when we interact with our colleagues, and to use that information to choose how to respond, rather than get hooked by internal stories as a result of our emotions or make assumptions about our colleague.[43] With increased emotional agility, the goal is to approach our colleagues with greater empathy and to approach our own emotions with equanimity. Treating strong emotions in colleagues as "unprofessional" or "irrational" will prevent connection and undermine other steps taken to build trust, not to mention undermine efforts to cultivate a work environment where legal professionals may discuss mental health issues openly.

Utilizing Mental Health Committees and Mental Health Initiatives

Justice Strathy recommends the creation of mental health committees with "real responsibility and accountability", and giving them the authority needed "to change the

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> moments, such as when we get (or need to give) negative feedback, or when we feel pressured to take on more work or to work faster, or when we must deal with supervisors or coworkers with stronger personalities, or when we feel unappreciated, or when our work-life balance is out of whack, or – you get the idea. The list goes on.

[42] Anthony Kearns, "Why so emotional?" (17 Apr. 2018), online: Linked In <https://www.linkedin.com/pulse/why-so-emotional-anthony-kearns>.

[43] *Ibid.* Kearns also recommends experiments for lawyers to enhance emotional agility:

> **Find two other reasons:** The next time you are confronted with someone who is angry or frustrated and you find yourself describing them as unreasonable or unprofessional think of at least two other reasons why they might be behaving in that way and see if that changes the way you perceive them.
>
> **Go meta:** If you are working with someone who is regularly angry or frustrated you might try "going meta" (briefly adopting the perspective of an objective observer of the relationship) by saying something like "I notice that in the last few meetings this particular project has made you very angry, what is it about this project that causes you to feel this way and is there something we can do to alleviate this as I think it is in the way of us making progress."
>
> **Foster your "observing self":** mindfulness practice is one of the most effective ways to gain perspective on your own emotions and increase your ability to approach others with empathy. It is also an essential component of self-compassion which is the first step toward approaching your own emotions with equanimity.

workplace culture, fight stigma, and provide confidential peer support, as well as the resources to get the job done."[44] This recommendation is consistent with the Well-Being Toolkit developed for the ABA in 2018,[45] which endorses launching a committee to create and lead a law firm "wellbeing agenda". According to the ABA:

> The Committee should include a high-level leader who has the credibility and influence to make things happen. Your organization's Employee Assistance Program, health insurance carrier, and/or a local Lawyer Assistance Program may be interested in participating and contributing resources.[46]

While the amount of change desired and/or necessary will vary from firm to firm, having a mental health committee could be critical to actually changing firm culture - without an infrastructure to propel and implement wellbeing solutions, there is a real risk that nothing will meaningfully change, even if a firm initiates a dialogue about mental health.[47]

In light of the magnitude of mental health issues facing the legal profession, a firm mental health committee may want to meet monthly to explore potential mental health solutions and initiatives.[48] Committees could start by considering how firm wellbeing programs have been implemented successfully in the United States.[49] Data published by the ABA notes how workshops have been used to grow and transform firm culture to be more supportive of mental, emotional and spiritual wellbeing, creating a space where firm

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[44] Strathy, *supra* note 5 at 7-8.

[45] *Well-Being Toolkit*, *supra* note 28.

[46] *Ibid.* at 10.

[47] Daniel T. Lukasik, "Prioritizing Mental Health and Well-being in the Workplace is Evolving and Driving Change in the Legal Profession," *Penn Carey Law* (1 June 2022), online: University of Pennsylvania <https://www.law.upenn.edu/live/news/14831-prioritizing-mental-health-and-well-being-in-the> [Lukasik].

[48] Lukasik, *ibid.* suggests meeting monthly and plotting a direction for each calendar year, including what specific steps the firm committee plans to take.

[49] Anne M. Brafford, "What's Working Well in Law Firm Well-Being Programs" (May 2021), online: <https://lawyerwellbeing.net/wp-content/uploads/2021/05/Well-Being-Firm-Profiles_4-2021.pdf> ["What's Working Well in Law Firm Well-Being Programs"]. Also see the Institute for Well-Being in Law, *supra* note 1.

members can discuss topics that previously were considered off-limits.[50] Another strategy that has been successful is changing a firm's employee assistance program to one with more experience working with law firms and that offered a more tailored approach.[51] The ABA also describes how another firm hired a full-time employee to focus on firm wellbeing,[52] and implemented an unplug policy that gave lawyers at least one full week of truly unplugged time and discouraged weekend emails.[53] That firm also focused on providing additional career path guidance to its employees.[54] The ABA notes how other law firms have used wellbeing committees to introduce programming focusing on mental and emotional health, physical health, nutrition, exercise and physical wellbeing, work-life integration, and even financial wellbeing.[55]

While the initiatives described above may be more suitable for large firms (that can afford to invest more resources into mental health), wellbeing initiatives do not necessarily have to be expensive to be effective. The ABA describes how one law firm helped employees by providing a wellbeing tip sheet - essentially a laminated card - to all firm members which contained a list of meditation apps, wellness articles and contact information for staff in charge of professional development. The card also included a prompt to try out a "3 good things" activity - a daily practice of listing three things that the individual is grateful for.[56] That firm also reported allowing associates to docket up to 25 hours annually for mindfulness activities.[57]

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[50] "What's Working Well in Law Firm Well-Being Programs", *ibid.* at 2.

[51] *Ibid.*

[52] The phenomenon of hiring leaders to improve mental health and wellness in law firms is discussed in more detail in "Operationalizing Well-being: Law firm approaches to mental health and well-being," (March/April 2020) 6:3 *The Practice*, online: Center on the Legal Profession, Harvard Law School <https://thepractice.law.harvard.edu/article/operationalizing-well-being/>.

[53] "What's Working Well in Law Firm Well-Being Programs," *supra* note 49 at 3-4.

[54] *Ibid.* at 4.

[55] *Ibid.* at 7-8.

[56] *Ibid.* at 5.

[57] *Ibid.*

The ABA Well-Being Toolkit also suggests general tasks that could be assigned to mental health committees, including:

- defining the term "well-being" for the firm;
- conducting a needs assessment to guide organizational change;
- identifying mental health priorities in the workplace;
- creating and executing an action plan to act on those priorities;
- continually evaluating law firm well-being and the success of individual program elements; and
- creating policies.[58]

The kinds of policies that a mental health committee could be responsible for creating include:

- a wellbeing policy;
- the firm's policy on the right to disconnect from work, which is now required in Ontario for law firms that employ 25 or more employees;[59] and
- policies related to alcohol use.[60]

The ABA Well-Being Toolkit also suggests a variety of assessments that firms may want to undertake in order to identify the types of organizational changes the firm ought to strive for. For example, a mental health committee could:

- utilize stakeholder interviews or surveys to gauge organizational challenges to wellbeing; or
- conduct an audit of policies and practices that influence lawyers' wellbeing, focusing on topics as broad as "on-boarding, diversity, work-life conflict,

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[58] *Well-Being Toolkit*, *supra* note 28 at 10-11.

[59] *Working for Workers Act, 2021*, S.O. 2021, c. 35, which amended the *Employment Standards Act, 2000*, S.O. 2000, c. 41 to include Part VII.0.1 Written Policy on Disconnecting from Work.

[60] The Institute for Well-Being in Law, an American charitable organization, offers a template for an alcohol use policy which addresses numerous topics, including responsible drinking and expected behaviours. See the Alcohol Use Policy Template for Legal Employers, online: <https://lawyerwellbeing.net/wp-content/uploads/2021/04/Alcohol-Use-Policy_wIntroduction.pdf>.

24/7-availability expectations, billing practices, performance appraisals, compensation systems, and fairness."[61]

Another function that could be assigned to a firm mental health committee is creating protocols for reporting bad behaviour in the workplace that could negatively impact mental health, such as bullying, ostracism, nasty emails, yelling, temper tantrums, and gossiping.[62]

Perhaps the most practical way for law firm mental health committees to change the dialogue surrounding mental health in the workplace is to educate staff about mental health issues, including how such issues can manifest at work and steps that employees can take to help themselves and others.[63] While it may not be viable to provide mental health and addiction training to all law firm members, such training would be particularly advisable for members of the mental health committee. Similarly, it would be advisable for a firm's mental health committee to consult with individuals who specialize in mental health or behavioural science before engaging in any mental health initiatives. While lawyers are experienced problem solvers, we must remember that we are not experts when it comes to mental health, nor should we put ourselves in that role.[64] The ABA Well-Being Toolkit specifically cautions that organizational strategies intended to detect and respond to mental health and alcohol use disorders, such as public awareness campaigns, can backfire if they are not implemented carefully, with advice from experts in the field.[65] For example, "depressive symptoms can radically distort how people interpret information" included in a public awareness campaign. On a similar note, bossy

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[61] *Well-Being Toolkit*, *supra* note 28 at 10. The *Well-Being Toolkit* also includes additional information about the types of assessments that law firms may want to use to measure well-being and track progress on well-being goals at 24-28. Specific conditions noted in the Toolkit that law firms may wish to address include depression, anxiety, substance use disorders, and burnout. Other factors mentioned in the Toolkit that could also be measured include resilience, the meaningfulness of lawyers' work, optimism, leadership, and incivility.

[62] "8 Practical Ways," *supra* note 6.

[63] *Ibid.*

[64] See Yufik, *supra* note 22.

[65] *Well-being Toolkit*, *supra* note 28 at 19.

language used in a campaign may cause individuals being targeted to react negatively.[66] With this in mind, it would be helpful for a firm to provide its mental health committee with a budget sufficient to consult with experts when necessary.

One thing that members of any law firm mental health committee also ought to be mindful of before approaching colleagues about concerns related to mental health or substance use is the ethical duty that will arise if a colleague discloses information indicating that his or her ability to practice or offer professional services is being impacted by mental health issues. Rule 7.1-3 of the *Rules of Professional Conduct* provides:[67]

> Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer shall report to the Law Society,
>
> ...
>
> (e) conduct that raises a substantial question about the licensee's capacity to provide professional services; and
>
> (f) any situation where a licensee's clients are likely to be severely prejudiced.

The commentary accompanying rule 7.1-3 confirms that the rule is intended to address misconduct arising from stressors or physical, mental or emotional conditions, disorders or addictions, and that a lawyer is required to report a colleague, even if information about misconduct or potential misconduct is shared in the context of that colleague seeking assistance.[68] It appears that this rule uses a screening model, requiring lawyers to report the possibility of misconduct so that the Law Society can investigate and make a determination.[69] Surely this rule would bind members of a firm's mental health committee, as the commentary accompanying the relevant provision of our *Rules of Professional Conduct* states:[70]

> ... a lawyer counselling another lawyer has an ethical obligation to report to the Law Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct ... related to the lawyer's

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[66] *Ibid.*

[67] *Rules of Professional Conduct*, *supra* note 26.

[68] *Ibid.*, Rule 7.1-3 Commentary, para. 3.

[69] See Martin, *supra* note 30 at 665.

[70] *Rules of Professional Conduct*, *supra* note 26, Rule 7.1-3 Commentary, para. 3.

> practice or there is a substantial risk that the lawyer may in the future engage in such conduct ... The Law Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.[71]

In light of rule 7.1-3, a firm may want to ensure that its mental health committee has resources to refer employees to external coaches and counsellors (who are not lawyers),[72] to prevent a situation from arising where a member of the committee feels compelled to report a colleague to the Law Society. Members of a firm mental health committee may also want to be careful about the kind of discussions they have with colleagues about personal mental health and how much information colleagues are encouraged to share. While the reporting duty imposed by rule 7.1-3 has been described as "poorly understood",[73] there could be a chilling effect on mental health initiatives in a law firm if employees are being reported to the Law Society by the mental health committee.[74] Under such circumstances, reluctance to discuss mental health issues honestly could result.

While an exception to the reporting requirement for mental illness has been proposed for lawyers in close personal relationships, including a lawyer's spouse or

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[71] This commentary addressing a lawyer's ethical duty to report is particularly interesting in light of the conclusion reached by the Mental Health Task Force of the Law Society of British Columbia: "The majority of lawyers living with a mental health condition are not at risk of acting unethically or unprofessionally, and it is critically important that diagnosis is not incorrectly correlated with impairment." See the Law Society of British Columbia, Mental Health Task Force, *First Interim Report of the Mental Health Task Force* (Chair: Brook Greenberg) *Report* at 12, paras. 37-38, online: <www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/MentalHealthTaskForceInterimReport2018.pdf>.

[72] See "8 Practical Ways," *supra* note 6.

[73] See Martin, *supra* note 30 at 660. Jean-Michael Montbriand suggests that when in doubt, it is better for a lawyer to report than not to report. See Jean-Michael Montbriand, "L'obligation des members d'un ordre professional de dénoncer le comportement dérogatoire d'un autre membre" (2019) 458 Barreau du Québec Service de la formation continue 175 at 224, summarized in Martin's article at 670.

[74] See Aidan Macnab, "Legal profession must ensure inclusion for lawyers with mental health and addiction issues: lawyer" (24 Nov. 2020), online: Law Times <https://www.lawtimesnews.com/resources/practice-management/legal-profession-must-ensure-inclusion-for-lawyers-with-mental-health-and-addiction-issues-lawyer/335565>.

Also see Martin, *ibid.* at 685-686. Martin recommends "further transparency around how the law society processes and responds to [such] reports[,]" noting that "[i]f lawyers understand and believe that reported lawyers will be treated fairly and compassionately, and more specifically will not be discriminated against by the regulator or other lawyers – and that reporting will prevent more serious problems – they should be more likely to comply with their reporting obligations."

children who happen to be lawyers,[75] it appears that no such exception has been proposed for firm members who serve on a mental health committee.

Using a Growth Mindset to Change Firm Culture Around Mental Health

Another practical concept that law firms (and mental health committees) can utilize when taking steps to change pre-conceived notions and stereotypes around mental health is promoting a growth mindset. Stanford University psychologist Carol Dweck explores the power of mindset in her work, specifically the concepts of growth mindset and fixed mindset.[76] Someone with a growth mindset has a desire to learn and embraces challenges, meets obstacles with persistence, sees effort as a pathway to learning and accomplishment, seeks to learn from criticism, and learns from the success of others.[77] In comparison, someone with a fixed mindset has a "deterministic view of the world", and typically doesn't like challenges, gives up more easily when faced with obstacles, sees no point in making an effort, and is fearful of criticism.[78] A fixed mindset has also been described as "a hallmark of perfectionistic thinking".[79]

Lawyers are often associated with a fixed mindset, as counsel are "taught to revere and live by precedent".[80] Law firms may also reinforce fixed mindsets, even amongst lawyers who think that they have a growth mindset, by rewarding knowledge over curiosity, expertise over a desire to learn, and answers over questions.[81]

For those on a mental health committee to change law firm culture, it is essential for these individuals to have a growth mindset. Serving on a mental health committee

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[75] See Martin, *ibid* at 684.

[76] Carol S. Dweck, *Mindset: The New Psychology of Success* (New York: Ballantine Books, 2016). Dr. Dweck also has a TED Talk – see TED, "The Power of Believing You Can Improve" (Dec 2014), online: TED <https://www.ted.com/talks/carol_dweck_the_power_of_believing_that_you_can_improve>.

[77] See Heather Gray-Grant, "How Mindset Matters in Leadership" (23 Mar 2022), online: SLAW <http://www.slaw.ca/2022/03/23/how-mindset-matters-in-leadership/> [Gray-Grant].

[78] *Ibid.*

[79] Confino, *supra* note 13.

[80] Thomson Reuters, "Fearless Confidence and the Growth Mindset" (22 Aug. 2017), online: Above the Law <https://abovethelaw.com/2017/08/fearless-confidence-and-the-growth-mindset/>.

[81] See Gray-Grant, *supra* note 77.

ought to be seen as a leadership role, intended to take the firm forward, rather than hold it back.[82] As such, it is important to fill such a committee with individuals who recognize that mental health is a serious issue for the profession, who are curious to explore how law firms can effectively address mental health issues in the workplace, and are willing to work on these issues for an extended period of time, despite obstacles that may arise. After all, achieving meaningful change in this area could take years.

Heather Gray-Grant, a business strategist, marketing expert and executive coach who works with lawyers and small to medium-sized law firms, also has a few tips for how law firms can encourage the development of a growth mindset, including:

- discussing a growth mindset, versus a fixed mindset, at the firm;
- asking aloud at meetings whether the conversation is focussed on a fixed mindset or growth mindset;
- becoming aware of fixed mindset responses, such as proposing ideas because they have been successful for other law firms or rejecting ideas because they did not work on previous occasions; and
- during a meeting, actively assigning someone to take a growth mindset perspective.[83]

It is also important for lawyers who are working through mental health issues or a mental illness to approach these challenges with a growth mindset. Returning to my previous example of Lexi from *Modern Love*,[84] the amount of time that she spent working on finding the right medication after being diagnosed as bipolar aptly demonstrates the importance of a growth mindset when facing mental health problems. Lexi is based on

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[82] *Ibid.* Gray-Grant cautions:

> So, what do we do with our fixed mindset lawyers? They should not be in senior leadership in a law firm. That means not the Managing Partner, and nor more than one of them should be on the Executive Committee. The point of leadership is to take an organization forward, not to hold it back. Fixed mindsets don't believe real progress is possible, so they'll spend the bulk of their time in those positions arguing for inaction, and avoiding conflict.

[83] *Ibid.*

[84] See the discussion above at 7-8.

real life entertainment lawyer Terri Cheney, who has written a biography about her mental health struggles.[85] In the original Modern Love column published by the *New York Times*, Cheney explained that she searched for help for her bipolar disorder "through an endless parade of doctors, therapists, drugs and harrowing treatments like electroshock, to no avail".[86] She described her mental health journey as "five long years of ups and downs, of searching for just the right doctor and just the right dose." Cheney concluded:

> I've finally accepted that there is no cure for the chemical imbalance in my brain, any more than there is a cure for love. But there's a little yellow pill I'm very fond of, and a pale blue one, and some pretty pink capsules, and a handful of other colors that have turned my life around. Under their influence, I'm a different person ... I have moods, but they don't send me spinning into an alternate persona.

Cheney is not the only lawyer to need an extended period of time to address mental health issues. Daniel Lukasik, the current director of the Judicial Wellness Program for the New York State Office of Court Administration, has written about how his doctor recommended a three-month medical leave from work to treat his depression while he was working as a managing partner, noting that his depression also was not "cured" after his hiatus.[87]

For lawyers who have to confront mental illness or other mental health issues, a growth mindset could be the difference between seeking help and investing the time and energy needed to adapt and continue practicing, or leaving the profession. Promoting a growth mindset when it comes to mental illness, in addition to removing the stigma and stereotypes that are typically associated with mental health issues, plus demonstrating patience with lawyers as they work through such issues, is crucial if law firms genuinely want to change how the profession addresses mental health.

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[85] Terri Cheney, *Manic: A Memoir* (New York: HarperCollins, 2009).

[86] Terri Cheney, "Take Me as I Am, Whoever I Am," Modern Love, *New York Times* (13 Jan. 2008), online: < https://www.nytimes.com/2008/01/13/style/modern-love-take-me-as-i-am-whoever-i-am.html>.

[87] Lukasik, *supra* note 47.

Helping Lawyers Who Need Additional Support

As noted previously in this paper, a law firm may wish to send employees to external coaches and counsellors, particularly when there are concerns that mental health issues may be affecting an employee's capacity to work.[88] This approach is also desirable for employees whose mental health issues require assistance beyond the kind of help that can be offered through in-house workshops or self-help books. For lawyers like Terri Cheney, who have a diagnosed mental illness, or even lawyers who have more significant mental health issues, the kind of benefits that a law firm offers could significantly impact that lawyer's wellness journey.

Treatment of mental health issues can be expensive.[89] For example, accessing care through private practitioners such as psychologists and psychotherapists can cost anywhere from $150 to $250 per hour in Ontario.[90] Often, practitioners can avoid this expense by accessing treatment through the Member Assistance Program offered by the Law Society of Ontario.[91] According to Doron Gold, a staff clinician with the program, "[t]here is no limit to the number of sessions that a lawyer can book".[92] However, depending on the mental health issue that a lawyer is facing, he or she may want to work with an external caregiver, particularly if the mental health issue is a product of circumstances external to practice. For example, if a lawyer has been the victim of a sexual assault, or is seeking treatment for mental health issues related to childhood trauma, he or she may want to work with someone who specializes in that particular area,

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[88] See the discussion on page 18, citing "8 Practical Ways," *supra* note 6.

[89] Peter Goffin, "Timely, affordable mental health therapy out of reach for many" *Toronto Star* (29 Dec. 2016, updated 11 Jan. 2017), online: The Star < https://www.thestar.com/news/gta/2016/12/29/timely-affordable-mental-health-therapy-out-of-reach-for-many.html> [Goffin].

[90] See, for example, the Fees and Policies of the Toronto Psychology Centre, online: <https://torontopsychologycentre.com/therapy-faq/fees-and-policies/>. As noted in Goffin, *ibid.*, the Ontario Psychological Association recommended in 2016 that practitioners charge $225 per session in private practice.

[91] *Supra* note 1.

[92] Katherine Laidlaw, "What mental-health services can I access as an Ontario lawyer?" (6 Mar. 2018), online: Precedent < https://lawandstyle.ca/culture/how-to-help-what-mental-health-services-can-i-access-as-an-ontario-lawyer/>.

or obtain a particular kind of treatment, such as EMDR[93] or DBT,[94] just to name a few treatment options. With this in mind, another point for law firms to be cognizant of is how much therapy coverage (or coverage for other mental health treatment) legal professionals can access through firm benefits. In 2017, the Canadian Psychological Association recommended that employers offer $3,000 to $3,500 of therapy coverage, as lower amounts of coverage may not allow employees to access a meaningful amount of treatment.[95] In light of inflation over the last five years, law firms may want to ensure that employees can access even greater coverage today.

Lastly, law firms and mental health committees should also bear in mind that lawyers who require extensive treatment for mental health issues will also likely need to reduce their billable hours, or even take a leave of absence, while working on their health. If a lawyer is in talk therapy, for example, treatment may trigger emotions which make it difficult to resume working after the session is over. Often, patients will need time to heal which exceeds the time spent in actual treatment. Accordingly, it may be necessary to adjust billable hour targets (or other markers that legal professionals may be required to satisfy) while undergoing treatment, and even after treatment has ended, depending on how an employee transitions post-care. Needless to say, creating a firm environment where mental health issues can be dealt with effectively will require patience.

Conclusion

In light of increased awareness of the importance of mental health, including how mental health issues can impact lawyers due to the nature of practice, the time has come for law firms to prioritize mental health. As noted by Justice Strathy, "[i]ndividual measures to prioritize mental health are important, but without [a] top-down change in the lawyers'

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[93] EMDR refers to Eye Movement Densensitization and Reprocessing. To learn more, see, for example, Eye Movement Desensitization and Reprocessing (EMDR) Therapy, online: American Psychological Association <https://www.apa.org/ptsd-guideline/treatments/eye-movement-reprocessing>.

[94] DBT refers to Dialectical Behavioural Therapy. To learn more, see, for example, Dialectical Behavioural Therapy, online: CAMH <https://www.camh.ca/en/health-info/mental-illness-and-addiction-index/dialectical-behaviour-therapy>.

[95] See Goffin, *supra* note 89.

and law firms' work, they are not enough ... if top-down change doesn't work, more drastic measures will be required."[96]

One of the first steps that firms can take to prioritize mental health is facilitating a work environment where professionals can discuss mental health issues and concerns openly, without fear of stigma. Starting a conversation about mental health in the workplace may seem daunting, but with psychological tools like a growth mindset and emotional agility, this goal is attainable.

While a dialogue is a great place to start, it simply is not enough - a top-down approach to mental health will also require a commitment to follow-through to truly prioritize the wellness of legal professionals. No matter how large or how small a law firm is, additional steps can be taken to protect or nurture mental health, whether that takes the form of establishing a formal mental health committee, utilizing mental health initiatives, or creating a wellness program. Some of these measures may be especially important for firms focusing on estate law, where we need to guide our clients through a highly-emotional time of their lives while preserving our own wellbeing.

A lawyer may be skeptical of actively prioritizing mental health, particularly if there is no overt evidence of mental health issues impacting his or her law firm. However, simply because we are unaware of colleagues facing serious mental health issues does not mean that investing in mental health should be delayed. Given the stigma around mental illness and mental health issues, plus fears that speaking openly about personal issues could result in professional regulation, or simply make our colleagues uncomfortable, there has been great incentive to hide these issues in the workplace. We should not wait to invest in mental health until a colleague is suffering from burnout, for example, or is prescribed medical leave. As we emerge from the pandemic, during which mental health issues have been on the rise, now is the time to demonstrate that wellness matters. As lawyers, our most valuable resource is our people. To serve our clients and ensure that

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[96] Strathy, *supra* note 5 at 14-15.

our legal practice remains sustainable, caring for the professionals we employ, starting with their mental health, must be seen as a priority.

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Tab 2

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Disclosure in Estates and Trusts – Who must disclose what and when

Ian M. Hull and Stuart Clark

Ian M. Hull
Tel: (416) 369-7826
Fax: (416) 369-1517
Email: ihull@hullandhull.com

Stuart Clark
Tel: (416) 369-0325
Fax: (416) 369-1517
Email: sclark@hullandhull.com

Hull & Hull LLP
Barristers and Solicitors

TORONTO
141 Adelaide Street West, Suite 1700
Toronto, Ontario M5H 3L5
TEL: (416) 369-1140
FAX: (416) 369-1517

OAKVILLE
228 Lakeshore Road East
Oakville, Ontario L6J 5A2
TEL: (905) 844-2383
FAX: (905) 844-3699

www.hullandhull.com
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Disclosure in Estates and Trusts – Who must disclose what and when

Introduction

Disclosure in an estates and trust context, it means different things to different people at different times. The questions of who must disclose what to whom, at what time, and whether they are under an obligation to do so, often remains unclear for those involved in an estate or trust dispute. Questions like what may a drafting lawyer reveal, what information is a beneficiary of a trust entitled to receive from the trustee, and, conversely, what information must a trustee or estate trustee disclose to a beneficiary, are often unclear for many, and as a result can often lead to unnecessary conflict and expense.

The aim of this paper is to offer some clarification on the issue of disclosure in an estates and trust context, and is broken down into four basic subcategories: (i) What may the drafting lawyer disclose; (ii) As a beneficiary of a trust, what are you entitled to know from the trustee; (iii) As a trustee, is there a positive duty to inform beneficiaries of certain information; and (iv) As a beneficiary of a trust, are there circumstances under which you must disclose certain trust documents to third parties?

What may the drafting Lawyer disclose[1]

The Rules of Professional Conduct are clear as it regards the duty of confidentiality that is owed from a lawyer to their client. Rule 2.03(1) of the Rules of Professional Conduct provides:

> *"A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so."*[2]

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[1] For more information, see "Prior Wills and Testamentary Documents: Know When to Hold Them, Know When to Fold Them", Ian M. Hull, 16 E.T.R. (2d) 94

[2] Rules of Professional Conduct, Law Society of Upper Canada (Toronto: 2012), at Rule 2.03(1)

Under most circumstances this rule is fairly straightforward. A lawyer may not divulge any information received from a client in the course of their professional relationship to any other individual unless authorized to do so by the client. The idea, in principle, seems simple enough.

The duty of confidentiality that is owed from the drafting lawyer to the client can become more complicated however in an estates context as, by its design, the estate plan that is created for the client will not take effect until after the client has died. As a result, the client would no longer be around to consent to the drafting lawyer disclosing any information to a third party should there be any issues or questions relating to the estate plan.

The "Wills Exception" – Releasing the Will

Strictly speaking, if one was to follow the rules regarding confidentiality to the letter of the law, a drafting lawyer would be unable to release the testator's will following their death. The will, being a document drawn by the solicitor on the client's instruction, could easily be classified as a document that was "*acquired in the course of the professional relationship*". As a result, the drafting lawyer, if adhering to the rules regarding confidentiality, would be unable to divulge the contents of the will to a third party.

To follow the rules regarding confidentiality in such a way would seem to be of little sense. Generally speaking, it seems self-evident that when a testator drafts a will they intend for that document to become public upon their eventual death.

In order to overcome this potential problem, the common-law has developed what is known as the "wills exception" to the rules regarding confidentiality between a lawyer and their client. Generally speaking, the "wills exception" enables the drafting solicitor to divulge the existence of a will, and the contents thereof, to those individuals with an interest in the estate.

Under certain circumstances the courts have extended the wills exception beyond the mere disclosure of the existence of a will, allowing the drafting lawyer to discuss circumstances surrounding the drafting of the will. In *Re: Ott*[3] the court was faced with the question of whether the drafting lawyer could discuss the circumstances surrounding the drafting of a will, or whether to do so would be to violate the duty of confidentiality which the lawyer owed to the deceased. In

[3] [1972] 2 O.R. 5

ruling that the lawyer may discuss the circumstances surrounding the drafting of the will with the court, the court states:

> "*In any event, since it is of essence to the case to find out the intention of the testator… the whole issue turns on this question and it would seem to me that to invoke the privilege of the client, after the client is deceased, would make it impossible for the court to determine the intention of the testator… In the interest of justice; it is more important to find out the true intention of the testator.*"[4]

In *Hope v. Martin*[5], the Ontario Superior Court of Justice dealt with the question of whether the drafting lawyer could release the original will to a beneficiary of an estate who intended to apply to the court to be appointed as estate trustee after both named estate trustees had renounced their appointment. The beneficiary requested the release of the original will so that she could apply for probate and the drafting lawyer refused, citing that they could not release the will due to solicitor/client privilege.

In concluding that the drafting solicitor could release the will to the applicant, the court references *Stewart v. Walker*[6], a 1903 decision of the Court of Appeal, in which it was stated:

> "*One objection taken on behalf of the appellant was to the rejection of the evidence of Mr. Francis A. Hall, solicitor, with regard to certain communications said to have passed between him and the deceased during the existence between them of the relationship of solicitor and client, and which those opposed in interest to the Attorney-General claimed the right to exclude on the ground that they were privileged. The privilege is not the privilege of the solicitor, but of the client who may waive it or not as he pleases. In this case the client by whom the communications were made was dead, leaving no heirs or next of kin to stand in his place. No person survived him upon whom the benefit of the privilege devolved, unless it was the Attorney-General, who, in the event of intestacy, would be entitled to obtain letters of administration to the estate: R.S.O. 1897, ch. 70. The*

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[4] *Ibid* at para. 11
[5] 2011 ONSC 5447
[6] (1903), 6 O.L.R. 495 (C.A.)

> *plaintiff claims the benefit of the privilege as executor of the will, but the existence or non-existence of the will is the question at issue."*[7]
>
> "*The mere fact of the death did not destroy the privilege, but the right of the Attorney-General to waive the benefit was at least equal to that of the plaintiff.* ***The nature of the case precludes the question of privilege from arising. The reason on which the rule is founded is the safeguarding of the interests of the client, or those claiming under him when they are in conflict with the claims of third persons not claiming, or assuming to claim, under him. And that is not this case, where the question is as to what testamentary dispositions, if any, were made by the client.*** *As said by Sir George Turner, Vice-Chancellor, in Russell v. Jackson (1851), 9 Ha. 387, at p. 392: "The disclosure in such cases can affect no right or interest of the client. The apprehension of it can present no impediment to the full statement of his case to his solicitor ... and the disclosure when made can expose the Court to no greater difficulty than presents itself in all cases where the Courts have to ascertain the views and intentions of parties, or the objects and purposes for which dispositions have been made."*[8] (emphasis added)

In concluding that the drafting lawyer could release the original will to the applicant, the court cites the 1993 decision of the Supreme Court of Canada in *Goodman Estate v. Geffen*[9], in which the court states:

> *"In my view, the considerations which support the admissibility of communications between solicitor and client in the wills context apply with equal force to the present case. The general policy which supports privileging such communications is not violated.* ***The interests of the now deceased client are furthered in the sense that the purpose of***

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[7] *Ibid* at para. 9
[8] *Ibid* at para. 10
[9] [1991] 2 S.C.R. 253 (SCC)

> ***allowing the evidence to be admitted is precisely to ascertain what her true intentions were.***"[10] (emphasis added)

As cases such as *Re: Ott* and *Hope v. Martin* make clear, the "wills exception" enables a drafting lawyer to divulge certain information pertaining to the estate planning of the deceased that under normal circumstances would offend the duty of confidentiality which is owed to the client.

Who can Waive Privilege/Confidentiality

While the "wills exception" can offer a drafting lawyer some guidance and assistance in what they may disclose, it does not offer them the ability to divulge all information pertaining to the deceased's estate planning to any individual. In the course of an estate dispute many third parties may request a drafting lawyer to divulge certain information about the deceased's estate planning. When determining what information they may divulge to whom and when, the drafting lawyer must always have their mind turned to the duty of confidentiality which they owe to the deceased.

Under most circumstances, when a lawyer is faced with the dilemma of whether to divulge confidential information to a third party, the most straightforward solution is for the lawyer to seek their client's instructions and ascertain whether the client would like this information released to the third party. If the client consents to the release of the information, the lawyer may release it, and if the client refuses to give their consent, the lawyer must keep the information confidential. As already discussed, in an estates context this is often not possible, for the client is no longer around to give the lawyer their consent.

In *Hicks Estate v. Hicks*[11] ("***Hicks***"), the court held that an estate trustee may step into the place of the testator and waive privilege in the same fashion as if the testator was still alive and had waived privilege themselves. In *Hicks*, the estate trustee of an estate sought an order compelling the two former lawyers of the deceased to disclose to him all materials in their file regarding the production of the deceased's wills. The lawyers refused, citing solicitor/client privilege. In coming to its decision, the court clarified that solicitor/client privilege exists for the benefit of the client, not of the solicitor and that as a result, the estate trustee was deemed to

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[10] *Ibid* at para. 65
[11] 25 E.T.R. 271

have the ability to waive confidentiality in the same fashion as the deceased themselves. In coming to such a conclusion, the court states:

> "***The plaintiff can waive the privilege and call for disclosure of any material that the client, if living, would have been entitled to from the two solicitors.*** *The Rules of Practice enable the plaintiff to obtain disclosure of any other relevant material in the possession of the former solicitors of Mildred Hicks and to examine them prior to or at trial.*"[12] (emphasis added)

What cases such as *Hicks* make clear is that an estate trustee may step into the shoes of the deceased following their death, and waive privilege over a document, in the same fashion as if they had been the deceased themselves. As a result, should a drafting lawyer be faced with a situation in which an estate trustee seeks the release of a document or information, or seeks to waive privilege over the information or document, they may treat the request as if the request was coming from the deceased themselves.

While *Hicks* makes it clear that the estate trustee of a deceased's estate may waive confidentiality or privilege, the question remains of whether there are any other individuals who may waive confidentiality or privilege on behalf of the deceased. If a beneficiary of the deceased's will approaches the drafting solicitor with a question pertaining to the deceased's estate, may the drafting lawyer waive the duty of confidentiality which they owed to the deceased and discuss the matter with the beneficiary?

In *Hicks*, the court refers to the decision of *Langworthy v. McVicar*[13] ("***Langworthy***") when discussing who, in addition to the estate trustee, could waive privilege over a document, stating:

> "*... it would seem any one claiming to be a representative whether as heir or next of kin may waive it.*"[14]

Arguably, as a result of the language used by the court in *Langworthy*, the group of individuals who may have the drafting lawyer waive privilege or confidentiality could be quite diverse, including beneficiaries, next of kin, and potentially even creditors of the deceased. As a result, and in light of the fact that it is unlikely that the collective group will speak with one mind in an

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[12] *Ibid* at para. 15
[13] (1913) 25 O.W.R. 297
[14] *Ibid* at 298

estate dispute and collectively decide to waive privilege or confidentiality, a lawyer who is faced with the issue of releasing confidential information or documents should seek the consent of all interested parties with a financial interest in the estate before releasing such documents.

In view of the problems that may be associated with obtaining the consent to waive confidentiality or privilege, it has often been suggested that the most prudent route for a drafting lawyer to take when faced with the decision of whether to release confidential information to those individuals with a financial interest in the estate, is to seek an order of the court that would override any solicitor/client privilege as it regards the information that is being released.

Cases such as *Hicks* and *Langworthy* make clear that following the death of the deceased, certain individuals may be able to step into the shoes of the deceased and instruct the drafting lawyer regarding the release of confidential information much in the same capacity as the deceased themselves. Unfortunately, as a result of the often contentious nature of estates disputes, even though the drafting lawyer may be entitled to release the information to the beneficiaries, it may still appear wisest from the drafting lawyer's point of view to seek the guidance of the court on the issue of what, if any, documents they should release.[15]

Beneficiaries' Request for Information[16]

As a general rule, the beneficiaries of a trust may, on reasonable notice, require the trustees to produce for their inspection any trust document that the beneficiaries wish to see.[17] While little debate exists concerning a beneficiary's right to access trust documents or information upon request, there has been much debate concerning upon what legal basis the right of the beneficiary to access such information exists.

The classic viewpoint as to why a beneficiary of a trust is entitled to view trust documents characterizes the right as a "proprietary right" in the documents themselves. As phrased by Lord Wrenbury in *O'Rourke v. Darbishire*[18]:

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[15] Please see Appendix "A" for a precedent Order

[16] For more information see generally "Disclosure of Trust Documents Revisited", David A. Steele, (1996) 15 E.T.J. 218, & "The Beneficiaries Right to Know", David A. Steele, presented at the Fourth Annual Estates and Trusts Forum, November 2001.

[17] The Law of Trusts: A Contextual Approach, 2nd ed., Mark R. Gillen & Faye Woodman, eds., Emond Montgomery Publications Limited (Toronto: 2008), at 386

[18] [1920] A.C. 581 (H.L.)

> "*The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own.*"[19]

Simply put, the classic view as to why a beneficiary may be entitled to view trust documents is that the beneficiary has an ownership interest in the documents themselves. As the beneficiary is in part an owner of the documents, they are entitled to view the documents upon request.

The characterization of a beneficiary's right to access documents from the trust as a "proprietary right" has been highly criticized over the years. In *Schmidt v. Rosewood Trust (Isle of Man)*[20], Lord Walker, in discussing Lord Wrenbury's "proprietary right" description in *O'Rourke v. Darbishire*, states that the characterization of the right as a proprietary right gives rise to far more problems than it solves.[21] In discussing the issue, Lord Walker agrees with the modern characterization of the problem as phrased in *Principles of the Law of Trusts*[22], writing:

> "*The legal title and rights to possession are in the trustees: all the beneficiary has are equitable rights against the trustees… **The beneficiary's rights to inspect trust documents are founded therefore not upon any equitable proprietary right which he or she may have in respect of those documents but upon the trustee's fiduciary duty to keep the beneficiary informed and to render accounts.** It is the extent of that duty that is in issue. The equation of the right to inspect trust documents with the beneficiary's equitable proprietary rights gives rise to unnecessary and undesirable consequences. It results in the drawing of virtually incomprehensible distinctions between documents which are trust documents and those which are not; it casts doubts upon the rights of beneficiaries who cannot claim to have an equitable proprietary interest in the trust assets, such as the beneficiaries of discretionary trusts; and it*

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[19] *Ibid* at 626 & 627
[20] [2003] UKPC 26
[21] *Ibid* at para. 52
[22] H.A.J. Ford, *Principles of Law of Trusts*, 2nd ed, Law Book Co. (Sydney: 1990) at 425

> *may give trustees too great a degree of protection in the case of documents, artificially classified as not being trust documents, and beneficiaries too great a right to inspect the activities of trustees in the case of documents which are, equally artificially, classified as trust documents."*[23] (emphasis added)

Simply put, in the more modern interpretation the beneficiary's right to view trust documents is founded upon the fiduciary duty which the trustee owes to the beneficiary, and not upon any proprietary interest that the beneficiary may have in the trust document itself.

Whether you accept the classic definition of why a beneficiary is entitled to access trust documents as a proprietary right, or accept the more modern characterization of the right being founded on the fiduciary duty which is owed by the trustee to the beneficiary, it is clear that upon a beneficiary making a request to view the trust documents, the trustee is under an obligation to provide the beneficiary access to the documents.

Discretionary Beneficiaries

There has been some debate over whether a discretionary beneficiary has the same right to view and inspect trust documents as a beneficiary under normal circumstances. The issue was considered in *Spellson v. George*[24] in which Justice Powell states:

> "*The question then is, whether person whose status is only that of a potential object of the exercise of a discretionary power can properly be regarded as one of the cestuis que trust of the relevant trustee. I do not doubt that he can, and should, properly be so regarded, for although it is true to say that, unless, and until, the trustee exercises his discretion in his favour, he has no right to receive, and enjoy, any part of the capital or income of the trust fund, it does not follow that, until that time arises, he has not rights against the trustee. On the contrary,* ***it is clear that the object of a discretionary trust, even before the exercise of the trustee's discretion in his favour, does have rights against the trustee... those rights, so it seems to me, are not restricted to have***

[23] *Supra* note 20, at para. 52
[24] (1987) 11 NSWLR 300

> ***the trustee bona fide consider whether or not to exercise his (the trustee's) discretion in his (the object's) favour, but extend to the right to have the trust property properly managed and to have the trustee account for his management***..."[25] (emphasis added)

While a discretionary beneficiary may be entitled to receive information pertaining to the trust in the same way as a beneficiary under normal circumstances, there are exceptions to what the trustee must disclose to a discretionary beneficiary. While a discretionary beneficiary is entitled to view trust documents, they are not entitled to see any documents or information pertaining to why the trustee did (or did not) exercise their discretion in the trust.

In *Re Londonderry's Settlement*[26], the trustee resisted disclosing correspondence amongst trustees pertaining to the exercise of their discretionary powers citing that it would lead to family disharmony. In agreeing with the trustee, the court states:

> "*Nothing would be more likely to embitter family feelings and the relationship between the trustees and members of the family, were trustees obliged to state their reasons for the exercise of the powers entrusted to them. It might indeed well be difficult to persuade any persons to act as trustees were a duty to disclose their reasons, with all the embarrassment, arguments and quarrels that might ensue, added to their present not inconsiderable burdens.*"[27]

As cases such as *Spellson v. George* and *Re Londonderry's Settlement* make clear, discretionary beneficiaries may be afforded the same rights regarding access to trust information as all other beneficiaries. The right for a discretionary beneficiary (or indeed any beneficiary) is not absolute, as beneficiaries are not entitled to know the reasons behind why the trustees exercised the discretion afforded to them by the trust. As *Re Londonderry's Settlement* makes clear, even when the trustee's reasons for exercising their discretion have been reduced to writing, the beneficiaries are still not entitled to access such information.

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[25] *Ibid* at 316
[26] [1965] Ch. 918
[27] *Ibid* at para. 56

Trustees Obligations to Inform

Generally speaking, there is no positive obligation on the part of a trustee to give unsolicited information to beneficiaries.[28] There are however exceptions to this rule. A trustee of a trust in which there are minor beneficiaries has a positive obligation to inform the minor beneficiary of the existence of the trust once they come of age. As phrased by Justice Collins in *Hamar and another v. Pensions Ombudsman and another*[29] ("***Hamar***"):

> *"(W)hen infant beneficiaries' come of age, it is necessary for them to be told that they are beneficiaries and that there exists a trust. Of course, in general, they have the right to be shown the Trust Deeds and any other relevant documentation which explains or sets out the basis of the trust."*[30]

In discussing what information the trustee must inform the beneficiary of, Justice Collins went on to state:

> "*What is suggested…is that there was a duty on the trustees not only to inform of rights, but also to inform as to how those rights could be properly exercised or, more importantly perhaps, that those rights were not being properly exercised. It seems to me that that is to extend, beyond anything that has hitherto been suggested, to supposed duties of trustees. It is certainly the case that there is an obligation to give information to a beneficiary of the existence of the trust and, by showing him documents, to give information.* ***What is, in my judgment, not supported by the authorities is a duty to go further and to give explanations. No doubt the trustees frequently will, but they do not have to. Still less are they obliged, in my judgment, to give information as to how a particular beneficiary may obtain his portion in a particular fund or may exercise his statutory rights*** *particularly where, as here, they form the view that it was not in the interests of the remaining beneficiaries."*[31] (emphasis added)

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[28] *Supra* note 17
[29] [1996] OPLR 55
[30] *Ibid* at para. 44
[31] *Ibid* at para. 46

In *Tito v. Waddell (No. 2)*[32], the court further summarizes the law pertaining to what information the trustees must proffer to beneficiaries, stating:

> *"...trustee, and doubtless other persons in a fiduciary position, are under a duty to answer inquiries about the trust property... but that is a far remove from saying that trustees have a duty to proffer information and advice to their beneficiaries; and I think the courts should be very slow to advance along the road of imposing such a duty."*[33]

As authorities such as *Hamar* and *Tito v. Waddel (No. 2)* make clear, trustees are under a positive obligation to inform infant beneficiaries of the existence of a trust upon coming of age, however the positive obligation seems to end there. Once informed of the existence of the trust the trustee's positive duty seems to have concluded, and should the beneficiary wish any further information, the beneficiary may request access to such information from the trustee in the normal course.

Disclosure to Third Parties

A relatively recent development in the law surrounding disclosure in a trust context is what trust documents and information must a beneficiary disclose to third parties in litigation? As already demonstrated, a beneficiary of a trust is entitled to receive certain information from the trustee about the trust upon request. As the beneficiary's right to view trust documents is almost a certainty, could these documents be considered within a beneficiary's "possession control or power" when considering what documents they may have to disclose when involved in litigation?

In *Customs v. Parissis and Others*[34] ("***Parissis***"), the UK government sought the disclosure of certain trust documents and information from a beneficiary of a trust involved in a tax dispute. The beneficiary refused, stating that such documents were not under his "possession, custody, or power", and that as a result he did not have to disclose them.

In ruling that the taxpayer must in this case disclose to the government certain trust documents, the tribunal reasoned that these documents were within the taxpayer's practical power, for in the

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[32] [1977] Ch. 106
[33] *Ibid* at 242
[34] [2011] UKFTT 218 (TC)

view of the tribunal the taxpayer would have been given these documents by the trustee had he requested them. As a result, the tribunal took the position that these documents were within the "*de facto*" control of the taxpayer, and as a result he must disclose such documents in the proceeding.[35]

While *Parissis* deals with the requirements of disclosure to the government in a tax proceeding, an interesting analogy could be drawn between the tribunal's reasoning in requiring the disclosure of trust documents in *Parissis*, and the disclosure requirements for parties involved in litigation in Ontario. Rule 30.02(1) of the *Rules of Civil Procedure* provides:

> "*Every document relevant to any matter in issue in an action in the possession, control or power of a party to the action shall be disclosed…*"[36]

The wording of rule 30.02(1) that a party must disclose all relevant documents within their "possession, control or power" is analogous to the wording of the disclosure requirements in *Parissis*, where the court required the taxpayer to disclose all documents in their "possession, custody or power". In light of the court's reasoning in *Parissis*, a strong argument could potentially be put forward that a beneficiary of a trust involved in litigation in which trust documents may be relevant has a duty to disclose such documents to the other parties involved in the litigation, for in the eyes of the court such documents are within the "possession, control or power" of the beneficiary.

Conclusion

Disclosure in estates and trusts must be considered in the context of the request made or the obligation owed. Whether it be what documents and information a drafting lawyer may release to the estate trustee or beneficiaries of an estate following the death of the deceased, what information a beneficiary is entitled to receive from a trustee upon request, when a trustee is under a positive obligation to inform a beneficiary of certain trust information, or whether there is ever a situation under which a beneficiary may have to disclose certain trust information to a third party, the rules regarding what must be disclosed when in an estate or trust context are fact specific, and can change depending on the context of the situation.

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[35] See "Rules of Disclosure: De Facto Power over Documents Sought for Disclosure", Fiona Poole, STEP (June 2012)

[36] *The Rules of Civil Procedure*, R.R.O. 1990, R. 194, as amended, at Rule 30.02(1)

Appendix "A"

Court File No. 12-34/56

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE) _____, THE
) _____
JUSTICE _____)

DAY OF _____, 20___

IN THE ESTATE of Joan Smith, deceased

O R D E R

THIS MOTION, made pursuant to section 9 of the *Estates* Act by the Applicant, Jane Smith, for an Order requiring the Respondent, Joe Solicitor, to produce for inspection any testamentary paper signed by the deceased, Joan Smith, and any copies of any files, notes, drafts, electronic data and other documents pertaining to the making of such testamentary paper, which are in the possession, power or control of the Defendant, Joe Solicitor, and for a Declaration that the Defendant, Joe Solicitor, is relieved of any Duty of Confidentiality that may attach to said documents and information, was heard this day at Pleasantville.

ON READING the Affidavits of Jane Smith and Joe Solicitor filed, and upon hearing the submissions of counsel for the Defendant, Joe Solicitor, not objecting to this Order,

1. THIS COURT ORDERS that Joe Solicitor shall forthwith produce for inspection any testamentary paper signed by the deceased, Joan Smith, and any copies of any files, notes, drafts, electronic data and other documents pertaining to the making of such testamentary paper, which are in the possession, power or control of the Defendant, Joe Solicitor.

2. THIS COURT ORDERS AND DECLARES that Joe Solicitor may give evidence pertaining to the matters relating to the proceedings and the production and disclosure as set out in paragraph 1 hereto, *viva voce* or on consent of Jane Smith by written interrogatories.

3. THIS COURT ORDERS AND DECLARES the production and disclosure by Joe Solicitor of the documents set out in paragraph 1 and disclosure of the information set out in paragraph 2, is a proper exception to the solicitor and client rule respecting privilege and is made in the interests of justice.

4. THIS COURT ORDERS AND DECLARES that Joe Solicitor is relieved of any duty of confidentiality that may attach to the disclosure of said documents and information.

N THE ESTATE OF JOAN SMITH, deceased

Court File No: 12-34/56

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Pleasantville

O R D E R

Lawyer, Barrister & Solicitor LLP
Barristers and Solicitors
123 Wonder Street West, Suite 1500
Pleasantville, Ontario

Mr. Lawyer LSUC#: 12345B
Tel: (416) 555-0325
Fax: (416) 555-1517

Lawyers for the Applicant

Tab 3

Tab a

Elderly Clients and Unconscious Assumptions

Elderly Clients and Unconscious Assumptions

By David M Smith | April 11, 2024 | 4 minutes of reading | Leave a Comment

Today's blog is authored by Chigozie Enwereuzo, LPP student-at-law with Hull & Hull LLP

Lawyers owe their elderly clients the same general duties and obligations owed to any other client. The act of providing older adults with legal advice or representation is an undertaking to be taken seriously and not lightly assumed or perfunctorily discharged.

Sadly, however, complaints from this category of clients about being subjected to assumptions, stereotyping and ageism by their own lawyers have been on the rise over the years. Their complaints include being presumptuously treated as persons with mental impairment or borderline capacity, as well as being made to grapple with their counsel's assumptions that their problems always centre on issues of death and disability.

Ageism and stereotyping are harmful to elderly clients as they all do not fit the detrimental characterization of the frail and vulnerable senior citizen. These seemingly unconscious assumptions and beliefs are especially prevalent amongst practitioners of wills, estates, and trust law.

Consider, for instance, the assumption that elderly people are exclusively prone to suffering from dementia. According to the Landmark Study (the **"Study"**) of the

Alzheimer Society of Canada, advancing age is the strongest known risk factor for dementia, but **dementia is not a normal part of aging**.

Dementia is an umbrella term that describes a set of symptoms caused by what is most often a progressive loss of brain function and structure over time. Symptoms can include (but are not limited to) impaired judgment, changes in mood or behaviour, memory loss, disorientation, language difficulties, decreased ability to perform daily activities, and problems with abstract thinking. Some forms of dementia can affect other areas of functioning, including vision and movement. The Study found that young adults also suffer from the disease ("young onset dementia") with the exact same features that encompass decline in one or more areas of cognition and interference with the individual's independence in everyday functioning.

The Study debunked the widely held assumptions about dementia, noting that older adults who develop dementia can live life with dementia from three to more than twenty years after their diagnosis. Thus, most elderly clients, including those over eighty years of age, will be capable and never suffer any cognitive impairment. Their capacity would include the ability to process, retain and understand the information relevant to a decision and to appreciate the reasonably foreseeable consequences of a decision or lack of one (*Starson v. Swayze, [2003] 1 S.C.R.722.*).

In many situations, the initial contact that an elderly client makes with a practitioner is done while being accompanied by a family member or a caregiver. Such a companion may have merely transported the elder to the lawyer's office, but elders have noted a preference by lawyers to engage with the usually younger companion on a matter that is wholly about the elder. This preference is arguably driven by some unconscious assumption on the part of the practitioner that the younger companion is better able to communicate the older adult's need for legal representation.

Not only is this assumption wrong, but it could also hurt the practitioner's client management efforts and negate any attempt to develop a trusting relationship with the elder. Practitioners should not be complicit in denying their elderly clients the right to advocate for themselves or make decisions about their own affairs, where their capacity to do so is not in question.

Some of the caselaw that could be cited as instances where counsel acted based on negative assumptions made about their elderly clients include *Strong v. McCarron, 2003*

NBQB 206; *Juzumas v. Baron, 2012, ONSC 7220 (CanLII)*; and *Baron v. Mamak, 2018 ONSC 2169 (CanLII)*.

Aging is a highly individual experience, and it is wrong to generalize about the abilities of a person based on his or her chronological age, any more than it is wrong to make assumptions about someone based on unfounded conjectures. Elderly clients should be treated as individuals, assessed on their own merits instead of presumed group characteristics and offered the same opportunities as everyone else in lawyer/client interactions.

Thanks for reading!

Chigozie Enwereuzo, student-at-law

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Tab b

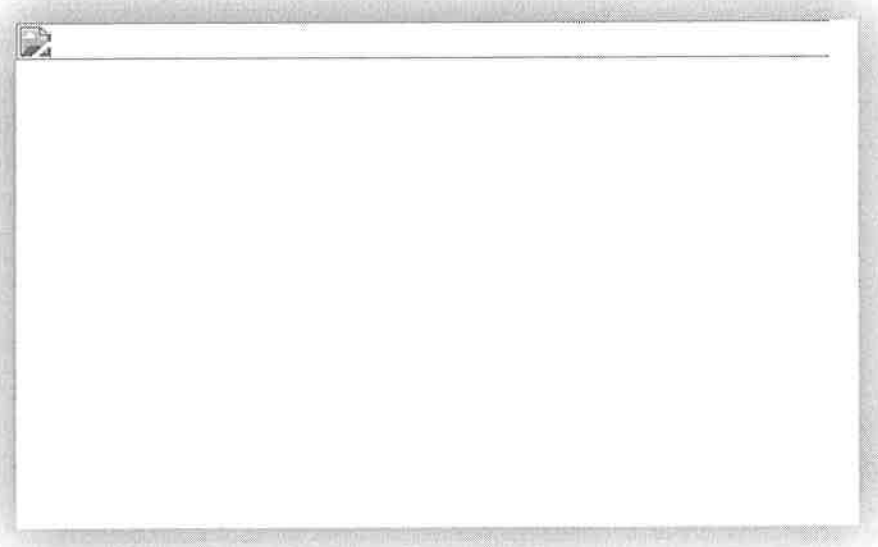
Hull & Hull LLP

Growing Concerns for our Aging Population

Growing Concerns for our Aging Population

By Suzana Popovic-Montag | October 21, 2020 | 2 minutes of reading | Leave a Comment

Canada's population is rapidly aging. With baby boomers constituting just over one quarter of our population, the percentage of elders in our society is rising at an alarming rate. In 2014, the percentage of seniors north of 65 was 15.6 percent of the population. By 2030 – in the next decade – seniors will make up 23 percent of the Canadian population. With this change in demographics, elder abuse (and financial exploitation particular) has become somewhat of an epidemic.



Financial exploitation commonly occurs when an attorney for property abuses his/her power afforded by the Power of Attorney ("POA") document. Executing a POA is a vital component of every estate plan. When properly drafted and with the appropriate understanding of rights, duties and obligations, a POA has the effect of protecting individuals and their heirs against future incapacity. When drafted improperly and without a clear recognition of duties and responsibilities, the consequences can be grave.

Toronto resident, Christine Fisher ("**Fisher**"), is all too familiar with the devastating impact that POA abuse can have on an individual's financial situation. In 2016, Fisher was 94 and living independently in her own apartment despite suffering from the beginning stages of Dementia. Fisher ultimately executed a POA appointing an old colleague, Theresa Gardiner (**"Gardiner"**), as her attorney for property. In her role as attorney, Gardiner immediately moved Fisher from her apartment to a seniors' residence – a decision that was not viewed favourably by Fisher's family and long-time friend, Nancy Lewis (**"Lewis"**). In the coming months, Lewis discovered that Gardiner had been abusing the power granted to her under the POA by misappropriating Fisher's funds. By breaching her fiduciary duty, Gardiner exacerbated Fisher's financial situation and improved her own. In an attempt to justify her misconduct, Gardiner told CBC News that Fisher had gifted her the money. In July of 2019, Gardiner was charged with several counts of theft. Most of these charges were withdrawn by the Crown in November of 2019.

Unfortunately, the story of Christine Fisher is not an anomaly. It is a reflection of society's tendency to overlook and ignore vulnerable elders. Given the substantial risks associated with appointing an inappropriate attorney, lawyers should remain vigilant to possibilities of incapacity, fraud and undue influence prior to creating a POA for a client. Recognizing the warning signs is the first step to protecting this vulnerable population.

Thanks for reading!

Suzana Popovic-Montag & Tori Joseph

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Tab c

Navigating Family Turbulence: Mediation's Role in Power of Attorney Disputes

By Shawnee Matinnia | August 28, 2023 | 3 minutes of reading | Leave a Comment

When it comes to Power of Attorney ("POA") disputes, tensions among family members often run high. Resolving such conflicts amicably is often a priority, and in Ontario, mediation is a constructive option for finding common ground. In this blog post, I delve into the advantages and potential drawbacks of mediating in POA disputes, exploring situations where mediation is recommended and cases when it may not be the ideal approach.

Pros of Mediation in POA Disputes:

Preservation of Relationships: POA disputes within families are often emotionally charged. Mediation provides a platform for open communication, enabling parties to express their concerns, understand each other's viewpoints, and work towards resolution while minimizing damage to relationships.

Flexibility and Customized Solutions: Mediation allows parties to craft creative and tailored solutions that address the unique complexities of each case. This flexibility often leads to more comprehensive and mutually acceptable agreements.

Confidentiality: Unlike court proceedings, mediation is private. This confidentiality safeguards sensitive family matters from becoming public, protecting both the family's reputation and personal information.

Cost and Time Efficiency: Mediation is generally quicker and more cost-effective than going to court. It helps parties avoid the lengthy litigation process, enabling them to reach a resolution in a more efficient manner.

Control Over Outcomes: In mediation, parties retain control over the final agreement. This empowerment can lead to a more satisfactory outcome compared to the unpredictable outcomes of litigation.

Cons of Mediation in POA Disputes:

No Guaranteed Resolution: Mediation hinges on the willingness of all parties to engage in a constructive dialogue. If a party is not open to finding common ground, mediation might not lead to a resolution.

Lack of Legal Authority: The mediator's role is to facilitate communication, not provide legal rulings. If parties need a binding legal decision, litigation or arbitration might be more suitable.

Unequal Power Dynamics: In situations where there is a significant power imbalance between parties, mediation might not ensure a fair and equitable resolution.

Mediate When:

Relationship Preservation is Key: Mediation is ideal when maintaining family relationships is a priority, as it focuses on collaboration rather than confrontation.

Creative Solutions are Needed: When a POA dispute involves complex and individual circumstances, mediation offers flexibility by allowing more innovative solutions that suit all parties.

Emotions are Running High: Mediation provides a controlled environment for emotional discussions, potentially leading to better understanding and resolution.

Do Not Mediate When:

Abuse or Safety Concerns Exist: If there is a history of abuse or safety concerns, pursuing legal action might be more appropriate.

Binding Legal Rulings are Needed: In cases where parties require a legally binding decision, turning to a court or arbitration process could be more effective.

All Parties are Unwilling to Cooperate: If the parties are unwilling to engage in meaningful dialogue, mediation might not lead to a successful outcome.

Overall, mediation offers a constructive pathway to resolving Power of Attorney disputes among family members in Ontario. Its benefits include relationship preservation, flexibility, confidentiality, cost-efficiency, and parties' control over outcomes; however, mediation might not always be suitable. By carefully evaluating specific family dynamics in a POA dispute on a case-by-case basis, you can make a more informed decision about whether mediation is right for your client.

Thanks for reading!

Shawnee Matinnia

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Tab d

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On a Lawyer's Duty to Their Client

On a Lawyer's Duty to Their Client

By Aaron Chan | July 17, 2023 | 4 minutes of reading | Leave a Comment

The case of *Capone v. Fotak,* 2021 ONSC 7992, aff'd in 2022 ONCA 430, while taking place in the context of a family law dispute, is a helpful analogue in understanding how materials are to be properly served in the civil litigation process pursuant to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (the "***Hague Service Convention***").

But *Fotak* isn't simply a discussion about the dense, esoteric legal framework surrounding abroad service of judicial and extrajudicial documents. No, a separate debate over an age-old question took place out of court.

Shortly before posting what should have been a dry commentary about the *Hague Service Convention* and establishing jurisdiction, I came across an online article penned by Mr. Gary Joseph ("The need for counsel to take on unpopular cases"), one of the counsel for the Respondent, as a rejoinder to a case commentary by Ms. Nathalie Boutet ("Case a wakeup call in dealing with difficult clients"). Both pieces are extremely insightful, and I highly encourage our readers to take the time to read them.

Far be it from me to wade into deep waters occupied by counsel far more experienced and senior than I, it would be remiss of me not to address the discrete issues discussed in those pieces.

In short, Ms. Boutet convincingly emphasises the utility of ADR in resolving high-conflict family law cases, both during and before the commencement of litigation, in which a

client's judgment may be "impaired" (defined as, "Being impaired happens after the overconsumption of drugs or alcohol, but also when being consumed by strong negative emotions. The dictionary definition of impaired is being in an imperfect or weakened state or condition") by strong negative emotions. Mr. Joseph presents an equally powerful argument that counsel at large litigate cases, despite their unpopularity, where legal issues are raised that may potentially challenge our country's laws.

Having been criminal defence counsel, I'm sympathetic to Mr. Joseph's role in the case. I'm sensitive to the societal, professional and institutional pressures counsel face when representing difficult clients and litigating unpopular cases. In the criminal defence sphere, I should add, such an unenviable position is often compounded by a mercurial and thankless profession that finds itself plagued by declining numbers and underrepresentation of women in criminal defence practice, and significant funding cuts to legal aid programs each successive year.

What reason could possibly exist, then, for lawyers to take on these cases in the face of significant obstacles?

Mr. Joseph echoes the criminal defence bar's *raison d'être*:

But I'm also of the mind that our clients are entitled to resolute advocacy on their behalf. That means, as Justice Moldaver underscored in *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at para. 73, to "raise fearlessly every issue, advance every argument and ask every question, however distasteful".

Ours is an adversarial system, constituted with strict rules governing legal procedure, admissibility of evidence, professional conduct, examination and cross-examination. To be able to work within (and around) those confines, we have to be forceful advocates on behalf of our clients and to represent their interests to the best of our ability. We should not feel discouraged from confronting a case in a manner after careful consultation with our client no matter how unfavourable the facts are nor how low the chances of success may seem.

Thanks for reading.

Aaron Chan

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> *Of course, we are bound by our duties under the **Rules of Professional Conduct**, and we are morally obligated to do all we can to resolve family law disputes outside of courts. I say also though that we are bound to be critical thinkers, brave counsel and advocates for justice. Think about the social and legal changes that have arisen from counsel willing to take on unpopular clients or highly contentious legal issues (gay marriage, abortion are but two that quickly come to mind) to court.*

I have no lingering doubt that encouraging ADR is, of course, always at the forefront of our minds as lawyers. Our clients would be poorly served if we were to engage in costly and frivolous litigation at every turn in pursuit of some ephemeral goal when reasonable settlement and compromise would better protect their legal interests. If there is a more efficient and cost-effective path forward to resolving a case, I would wholeheartedly embrace and recommend it to my clients.

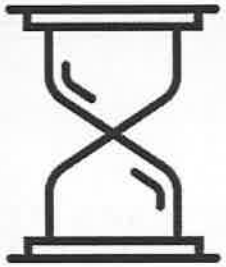
Tab 4

Tab a

Mental Capacity

Situation Specific

Time Specific



Task Specific

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Preumption of Mental Capacity

- There is a statutory presumption of mental capacity (*Substitute Decisions Act, 1992*, SO 1992, c 30, s 2):

  1) A person who is eighteen years of age or more is presumed to be capable of entering into a contract.

  2) A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care.

  3) A person is entitled to rely upon the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving or refusing consent, as the case may be.

Mental Capacity – Guidance from Ontario Legislation

- The *Substitute Decisions Act, 1992* also outlines capacity standards in respect of property (s 6) and personal care (s 45) – a person is considered incapable of personal care or of managing property if:
  1) He or she cannot understand information relevant to the type of decision to be made; or
  2) He or she is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.
- Other legislation addressing mental capacity: *Mental Health Act*, RSO 1990, c M.7, *Health Care Consent Act*, SO 1996, c 2, Sched A, and *Family Law Act*, RSO 1990, c F.3

Testamentary Capacity

- Criteria set out in *Banks v Goodfellow* (1870), LR 5 QB 549 (CA) – the testator must:
  a) Understand the nature of the act of making a will and its consequences;
  b) Understand the extent of his or her assets;
  c) Comprehend and appreciate the claims of those who might expect to benefit from the will, both of those to be included and excluded;
  d) Understand the impact of the distribution of the assets of the estate; and
  e) Be free of any disorder of the mind or delucions that might incfluence the disposition of his or her assets.

Banks v Goodfellow Revisited

- Proposed updates to the *Banks v Goodfellow* criteria – the testator must be:
  a) Capable of understanding the act of making a will and its effects;
  b) Capable of understanding the nature and extent of their property relevant to the disposition;
  c) Capable of evaluating the claims of those who might be expected to benefit from their estate, and able to demonstrate an appreciation of the nature of any significant conflict and/or complexity in the context of the testator's life situation;
  d) Capable of communicating a clear, consistent rationale for the distribution of their property, especially if there has been a significant departure from previously expressed wishes or prior wills; and
  e) Free of a mental disorder, including delusions, that influences the distribution of the estate.

Evidence of Testamentary Capacity Considered on a Will Challenge

- Medical evidence
  - Contemporaneous medical records
  - Evidence of attending physicians and other healthcare professionals
  - Contemporaneous and/or retrospective capacity assessments
- Solicitor's evidence
  - Meeting notes and other file contents
  - Evidence on examination for discovery as a non-party witness and/or at trial
- Evidence of lay witnesses

LSO Rules of Professional Conduct

Client with Diminished Capacity

- **3.2-9** When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

- [1] ...A client's ability to make decisions, however, depends on such factors as their age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time.
- [1.1] When a client is or comes to be under a disability that impairs their ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

LSO Rules of Professional Conduct (commentary continued)

- [3] A lawyer with a client under a disability should appreciate that **if** the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

- [5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances. (See Commentary under rule 3.3-1 (Confidentiality) for a discussion of the relevant factors). If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

Best Practices

- Keep an eye out for red flags

- Probe for undue influence

- Confirm client instructions in private

- Document observations in respect of a client's mental capacity

- Consider using a checklist

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Proposed Checklist Questions

- ❑ Is the client reliant on assistance provided by another person/people?
- ❑ Why is the client providing these instructions? If there does not at first appear to be a clear and consistent rationale, try to understand why the client is choosing this course of action;
- ❑ Is the client in a relationship of dependency, domination, or special confidence or trust?
- ❑ Ask whether the client is a victim of any form of elder abuse or neglect in other respects;
- ❑ Obtain relevant third-party information, if the client consents, and consider obtaining a medical assessment;
- ❑ It is best to interview the client alone using open-ended questions

Tab b

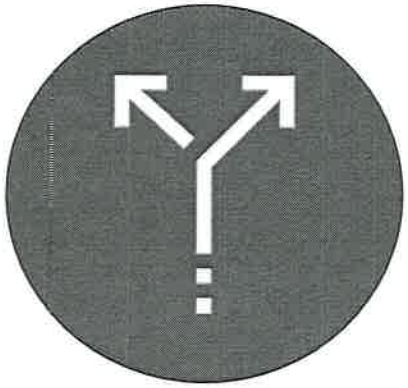
Comparing Capacity Standards and Contingency Planning for Lawyers

With Ian Hull

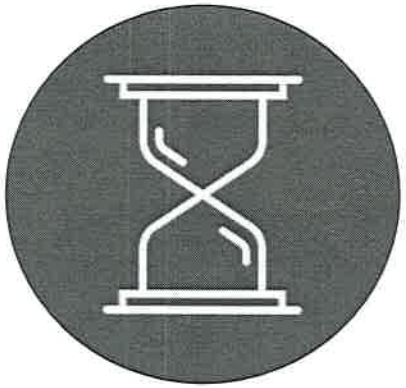
eStateAcademy

Basics of Mental Capacity

Situation Specific



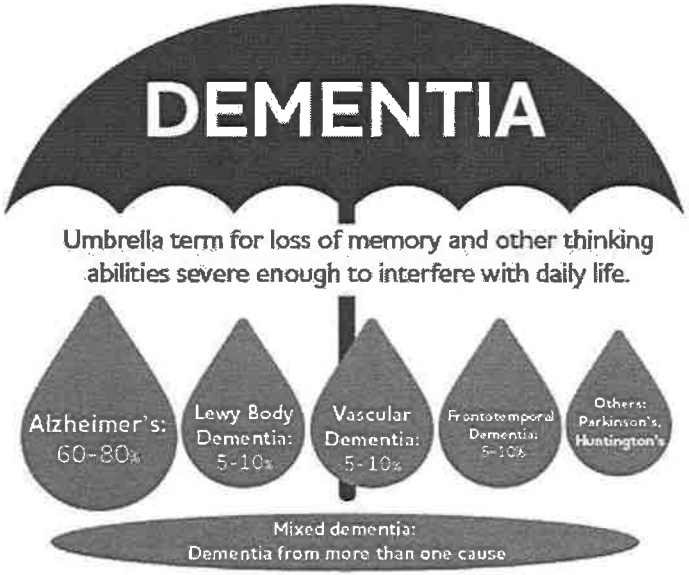
Time Specific



Task Specific

Conditions Affecting Capacity

- Presumption of mental capacity under the *Substitute Decisions Act, 1992*
- Delirium is typically a temporary symptom of another ailment. It is only momentary.
- Dementia is a chronic problem, and progressively worsens over time. It comes in many forms.
- A diagnosis with dementia or another condition associated with capacity issues does not *necessarily* mean that a person is incapable.



The Subsitute Decisions Act

Incapacity to manage property

- **6** A person is incapable of managing property if the person is not able to understand information relevant to making a decision in the management of their property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. 1992, c. 30, s. 6.

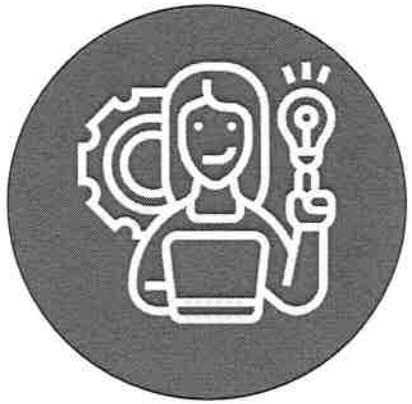
Incapacity for personal care

- **45** A person is incapable of personal care if the person is not able to understand information relevant to making a decision concerning their health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. 1992, c. 30, s. 45; 1996, c. 2, s. 29.

Testamentary Capacity

Criteria set out in *Banks v Goodfellow* (1870), LR 5 QB 549 (CA) – the testator must:

a. Understand the nature of the act of making a will and its consequences;
b. Understand the extent of his or her assets;
c. Comprehend and appreciate the claims of those who might expect to benefit from the will, both of those to be included and excluded;
d. Understand the impact of the distribution of the assets of the estate; and
e. Be free of any disorder of the mind or delusions that might influence the disposition of his or her assets.



Other Common Capacity Standards

- Capacity to retain and instruct counsel
- Capacity to contract
- Capacity to make Powers of Attorney
- Capacity to gift
- Capacity to marry/separate/divorce/reconcile

Contingency Planning for Lawyers

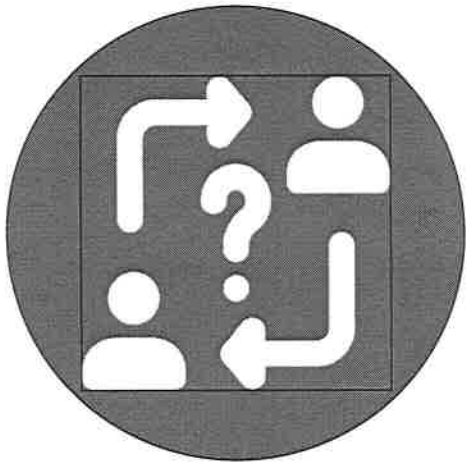
- Lawyers who practice without a contingency plan may be putting their clients at risk
- A lawyer's sudden incapacity, disability or death – or even just a prolonged absence may substantially prejudice clients' interests
- What would happen to your:
  - Original Wills/Powers of of Attorney?
  - Drafting Notes?
  - Trusteeships?

Sole Practitioners

1. Choose a Replacement Lawyer, and Discuss your Plans. Prepare a Written Agreement
2. Make Arrangements with your Bank
3. Grant a Power of Attorney for Law Practice
4. Appoint Replacement Lawyer as Estate Trustee for your Law Practice
5. Prepare your Practice and Finances

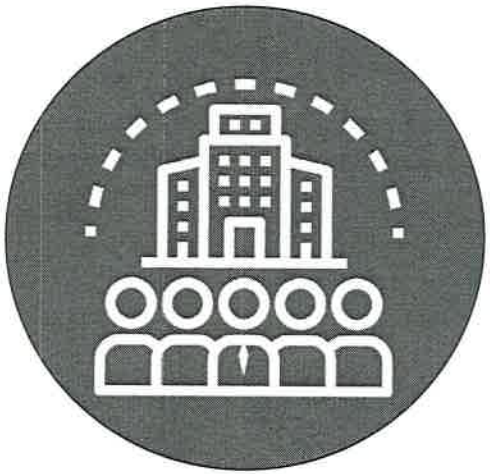
Members of a Partnership

For Contingency Planning, Partnerships are more flexible. Still, you should consider:



- What does it mean to be 'incapacitated' or 'disabled'?
- Does your Partnership Agreement provide for what happens to an incapacitated partner?
- How will the partner's clients and files be delegated within the firm?
- Should partners be required to hold disability/life insurance during their practice?

Professional Corporations



- If you practice through a Professional Corporation, your contingency planning may look different
- The OBCA and Law Society Act require that the corporation be owned by lawyers only
- Wills should be updated with a provision with an Ontario lawyer as Trustee for their professional corporation
- The LSO has provided a detailed guide, entitled 'Preparing for Death and Disability of a Law Partner or Shareholder'

Tab 5

Tab a

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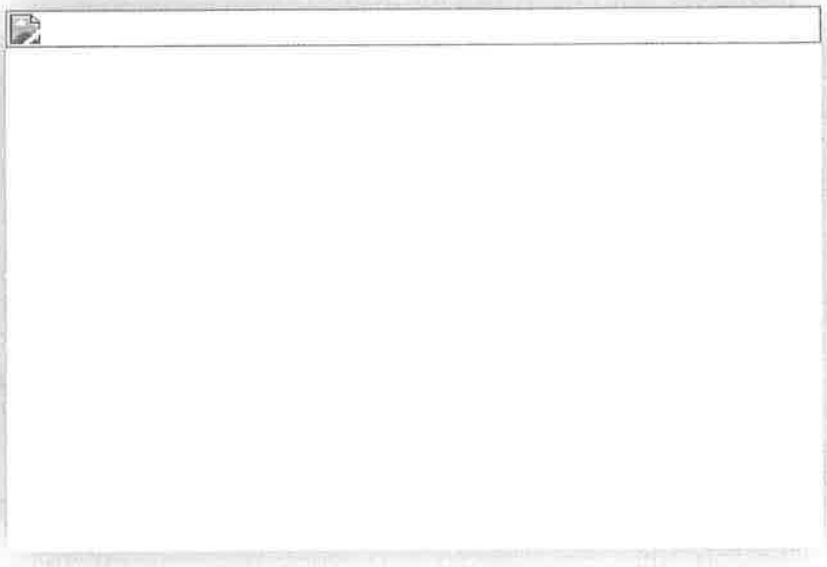
What People Need to Know About Probate in Ontario

By Suzana Popovic-Montag | May 19, 2021 | 3 minutes of reading | Leave a Comment

The settling of an estate often involves probate, where the court grants someone authority to act as an estate trustee for the deceased. This procedure, set out in the *Estates Act*, also confirms that the deceased's will is their last Will and Testament.

Estate trustees can file an application for an estate certificate (previously called "letters probate" or "letters of administration") at the Superior Court of Justice, in the county or district office when the testator or intestate lived at the time of death. If that probate application is successful, the court issues a Certificate of Appointment of Estate Trustee, evidencing that the person named in the Certificate has the legal authority to deal with the estate and its assets.

To help people avoid common errors when completing this application, the Attorney General provides this guideline.



As our associate Sydney Osmar has noted, people can now file probate applications, supporting documents and responding documents by email to the Superior Court. Sydney's blog post provides helpful information about sending these documents electronically, with the email address for each court location listed here.

- the deceased died without a will;
- the will does not name an estate trustee;
- a financial institution requires proof of a person's legal authority to receive the financial assets of the deceased; or
- the estate's assets include land or buildings that do not pass to another person by right of survivorship.

One of the times probate will not be necessary is if the entire estate is held jointly, and all assets are passing to the surviving joint owner by right of survivorship. A scenario might include a husband and wife with a joint bank account and a jointly-owned home. If the husband died and left the entire estate to his wife, probate can be avoided since banks and financial institutions have no risk exposure.

The Estate Administration Tax, better known as probate fees, is charged on the value of the estate if a Certificate of Appointment is applied for and issued. Estate trustees must be able to substantiate the fair market value of the assets at the time of death through documentation, such as financial statements or valuations from appraisers.

Assets to include in determining the value of an estate include real estate in Ontario, bank accounts (including foreign banks), investments, vehicles and insurance (if proceeds are left to the estate).

Once the value of the entire estate is determined, you can then calculate the tax. If the estate is worth $50,000 or less, you do not have to pay any probate fees, although you still must file an Estate Information Return within 180 calendar days after the estate Certificate has been issued.

For estates valued over $50,000, the tax will be calculated as $15 for every $1,000 (or part thereof) of the value of the estate on top of the $50,000 exemption. For example, for an estate valued at $240,000, you would only pay tax on $190,000, resulting in $2,850 being owed to the Minister of Finance.

Use this tax calculator to determine the amount owing.

Hull & Hull LLP

Please feel free to call me if I can assist you – and have a great day,

Suzana Popovic-Montag

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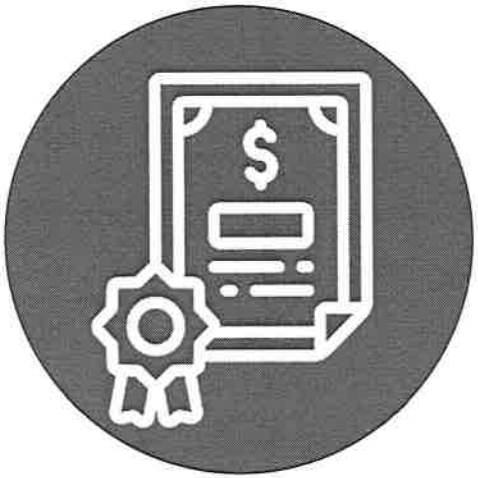


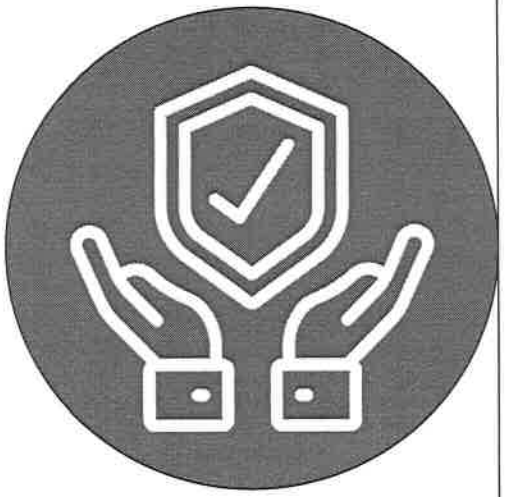
Administration Bonds

With Jordy Atin and Ian Hull

Agenda

1. The purpose of Administration Bonds
2. When are they required?
3. When can they be dispensed with?
4. How to get them
5. How to release them

Purpose



- Protect beneficiaries and creditors for loss due to actions of the estate trustee
- Limited Protection?
  - Last resort for recovery
  - Section 35 of the Estates Act provides that the bond is "...conditioned for the due collecting, getting in, administering and accounting for the property of the deceased, and the bond shall be in the form prescribed by the rules of court, and in cases not provided for by the rules, the bond shall be in such form as the judge by special order may direct."

When

A: An Intestacy

Unless:

1. Applicant is the surviving spouse (married only) and
    a. the net value of the estate is less than the preferential share ($350K - the deceased died on or after March 1, 2021); and
    b. an affidavit setting forth the debts of the estate is filed.

OR

1. "Small Estate" Application AND
    a. there are no minor heirs; and
    b. there are no incapable heirs.

OR

1. The Applicant is a Trust Company

When

B. Non-Named Executor

The applicant is not the named executor in the Will UNLESS:

"Small Estate" Application

AND

a. The applicant is a resident of the Commonwealth,
b. There is no minor beneficiaries, and
c. There are no incapable beneficiaries.

When

C. Non-Resident Executor

IF Executor is a resident outside of Canada OR in a Country that is not a member of the Commonwealt

Countries by region

Africa

- Botswana
- Cameroon
- Gambia, The
- Ghana
- Kenya
- Kingdom of Eswatini
- Lesotho
- Malawi
- Mauritius
- Mozambique
- Namibia
- Nigeria
- Rwanda
- Seychelles
- Sierra Leone
- South Africa
- Uganda
- United Republic of Tanzania
- Zambia

Asia

- Bangladesh
- Brunei Darussalam
- India
- Malaysia
- Maldives
- Pakistan
- Singapore
- Sri Lanka

Caribbean and Americas

- Antigua and Barbuda
- Bahamas, The
- Barbados
- Belize
- Canada
- Dominica
- Grenada
- Guyana
- Jamaica
- Saint Lucia
- St Kitts and Nevis
- St Vincent and The Grenadines
- Trinidad and Tobago

Europe

- Cyprus
- Malta
- United Kingdom

Pacific

- Australia
- Fiji
- Kiribati
- Nauru
- New Zealand
- Papua New Guinea
- Samoa
- Solomon Islands
- Tonga
- Tuvalu
- Vanuatu

Members of the Commonwealth: https://thecommonwealth.org/member-countries

Other Situations

D. Estate Trustee during Litigation

In the case of estate trustee during litigation (unless bond dispensed with by the judge in the order for directions appointing the estate trustee during litigation)

E. Application for Succeeding Estate Trustee (74J) in certain circumstances:

- Succeeding estate trustee with a Will, where **alternate** named is not a Canadian resident or resident of the Commonwealth.
- Succeeding estate trustee with a Will, where last named executor has died.
- Succeeding estate trustee without a Will -where applicant is an individual (not a trust company)

F. Nomination by Foreign Estate Trustee

In the case of a foreign estate trustee nominating a person within Ontario as estate trustee

Other Situations

G. Resealing with no Will

Resealing of appointment of estate trustee without a Will

H. Ancillary Appointment with a Will

Ancillary Appointment of Estate Trustee with a Will

I. On Motion

Rule 74.11(2) Any person, including a creditor, who has a contingent or vested interest in an estate may at any time, on notice to the estate trustee or applicant for appointment, move for an order to have a bond filed or the amount of an existing bond increased or reduced. O. Reg. 484/94, s. 12.

Statutory Provision

Section 35 of the *Estates Act*

[The Bond shall] enure for the benefit of the Accountant of the Superior Court of Justice, with a surety or sureties as may be required by the judge, conditioned for the due collecting, getting in, administering and accounting for the property of the deceased, and the bond shall be in the form prescribed by the rules of court, and in cases not provided for by the rules, the bond shall be in such form as the judge by special order may direct.

Amount of Bond

Amount of security

The bond shall be in a penalty of **double** the amount under which the property of the deceased has been sworn, and the judge may direct that more than one bond be given so as to limit the liability of any surety to such amount as the judge considers proper. (R.S.O. 1990, c. E.21, s. 37 (1))

Power to reduce amount

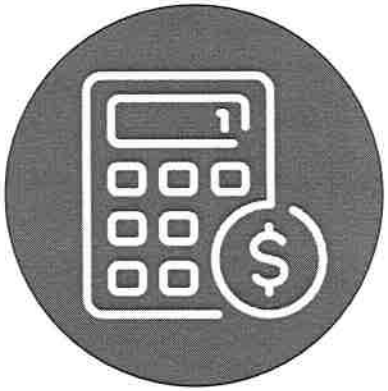
The judge may at any time under special circumstances reduce the amount of or dispense with the bond. (R.S.O. 1990, c. E.21, s. 37 (2))

Amount of Bond

Rule 74.11- How to calculate the value of the bond in special circumstances

Where bond needed for Succeeding Estate Trustee

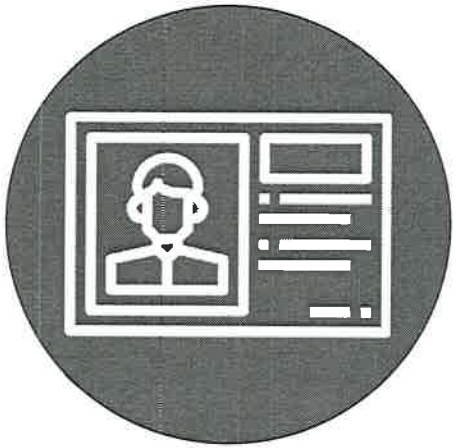
Rule 74.11 (1) (e) the security required for a succeeding estate trustee shall be based on the value of the assets of the estate remaining to be administered at the time the application for a certificate of appointment as succeeding estate trustee is made; and



Where bond needed for Resealing/Ancillary Appointment

Rule 74.11 (1) (f) the security required for confirmation by resealing of the appointment of an estate trustee, or for an ancillary appointment of an estate trustee, shall be based on the value of the assets of the estate over which the estate trustee seeks jurisdiction in Ontario. O. Reg. 484/94, s. 12; O. Reg. 24/00, s. 13; O. Reg. 575/07, s. 1.

Surety vs Bond



The bond must be:

1. From an insurer licensed under the *Insurance Act* to write surety and fidelity insurance.

OR

1. by two personal sureties (each must post a bond to cover the total estate value) or one personal surety where the estate value is $100,000 or less.

   Personal Surety must be-Ontario resident who is not:
   (i) a minor,
   (ii) a registrar, or
   (iii) a solicitor

Surety vs Bond

Rule 74.11 (1) Unless the court orders otherwise,

(a) the bond required by section 35 of the *Estates Act* shall be the bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance in Ontario (Form 74L) or of one or more personal sureties (Form 74M);

(b) a registrar of the court or a lawyer shall not be a personal surety;

(c) a personal surety must be a resident of Ontario who is not a minor;

(d) one personal surety is sufficient where the value of the assets of the estate does not exceed $100,000;

Surety vs Bond

Obtaining an administrative Bond can be time consuming and expensive

- Lawyer assistance often needed to obtain an administration bond
- Invasive personal and financial questions
- Cost of Bond depends on estate's value (often a percentage of the bond amount plus annual fee).

Form of Bond

FORM 74L
Courts of Justice Act
ONTARIO
SUPERIOR COURT OF JUSTICE

BOND — INSURANCE OR GUARANTEE COMPANY

BOND NO. _____ AMOUNT: $ _____

In the estate of *(insert name)*, deceased.

The principal in this bond is *(insert name)*.

The surety in this bond is *(insert name)*, an insurer licensed under the *Insurance Act* to write surety and fidelity insurance in Ontario.

The obligee in this bond is the Accountant of the Superior Court of Justice acting for the benefit of creditors and persons entitled to share in the estate of the deceased.

The principal and the surety bind themselves, their heirs, executors, successors and assigns jointly and severally to the Accountant of the Superior Court of Justice in the amount of _____ dollars ($_____).

The principal as an estate trustee is required to prepare a complete and true inventory of all the property of the deceased, collect the assets of the estate, pay the debts of the estate, distribute the property of the deceased according to law, and render a complete and true accounting of these activities when lawfully required.

The primary obligation under this bond belongs to the principal. The principal is liable under this bond for any amount found by the court to be owing to any creditors of the estate and persons entitled to share in the estate to whom proper payment has not been made.

The surety, provided it has been given reasonable notice of any proceeding in which judgment may be given against the principal for failure to perform the obligations of this bond shall, on order of the court, and on default of the principal to pay any final judgment made against the principal in the proceeding, pay to the obligee the amount of any deficiency in the payment by the principal, but the surety shall not be liable to pay more than the amount of the bond.

The amount of this bond shall be reduced by and to the extent of any payment made under the bond pursuant to an order of the court.

The surety is entitled to an assignment of the rights of any person who receives payment or benefit from the proceeds of this bond, to the extent of such payment or benefit received.

_____
Date

SIGNED, SEALED AND DELIVERED
in the presence of:

(insert signature)
Principal

(insert name and signature)
Witness

(insert signature)
Surety

FORM 74M
Courts of Justice Act
ONTARIO
SUPERIOR COURT OF JUSTICE

BOND — PERSONAL SURETIES

BOND NO. _____ AMOUNT: $ _____

In the estate of *(insert name)*, deceased.

The principal in this bond is *(insert name)*.

The sureties in this bond are *(insert names)*.

The obligee in this bond is the Accountant of the Superior Court of Justice acting for the benefit of creditors and persons entitled to share in the estate of the deceased.

The principal and the sureties bind themselves, their heirs, executors, successors and assigns jointly and severally to the Accountant of the Superior Court of Justice in the amount of _____ Dollars ($_____).

The principal as an estate trustee is required to prepare a complete and true inventory of all the property of the deceased, collect the assets of the estate, pay the debts of the estate, distribute the property of the deceased according to law, and render a complete and true accounting of these activities when lawfully required.

The primary obligation under this bond belongs to the principal. The principal is liable under this bond for any amount found by the court to be owing to any creditors of the estate and persons entitled to share in the estate to whom proper payment has not been made.

The sureties, provided they have been given reasonable notice of any proceeding in which judgment may be given against the principal for failure to perform the obligations of this bond shall, on order of the court, and on default of the principal to pay any final judgment made against the principal in the proceeding, pay to the obligee the amount of any deficiency in the payment by the principal, but the sureties shall not be liable to pay more than the amount of the bond.

The amount of this bond shall be reduced by and to the extent of any payment made under the bond pursuant to an order of the court.

The sureties are entitled to an assignment of the rights of any person who receives payment or benefit from the proceeds of this bond, to the extent of such payment or benefit received.

Date: _____

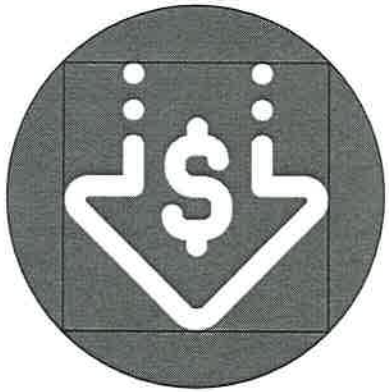
SIGNED, SEALED AND DELIVERED
in the presence of:

_____
(insert signature)
Principal

(insert name and signature)
Witness

(insert signature)
Surety

Dispensing with the Bond



The applicant can request the reduction or waiver of the bond:

1. Applicant's Affidavit (Contents of Affidavit from *Re Henderson)*

i. The identity of all beneficiaries of the estate;

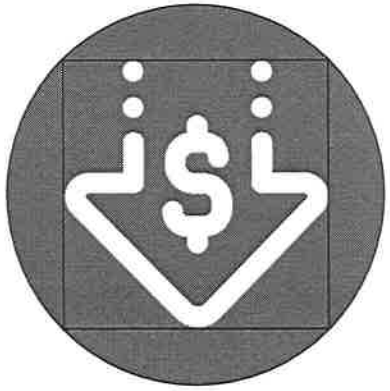
ii. The identity of any beneficiary of the estate who is a minor or incapable person;

iii. The value of the interest of any minor or incapable beneficiary in the estate;

iv. Executed consents from all beneficiaries who are sui juris to the appointment of the applicant as estate trustee and to an order dispensing with an administration bond should be attached as exhibits to the affidavit...;

v. The last occupation of the deceased;

Dispensing with the Bond

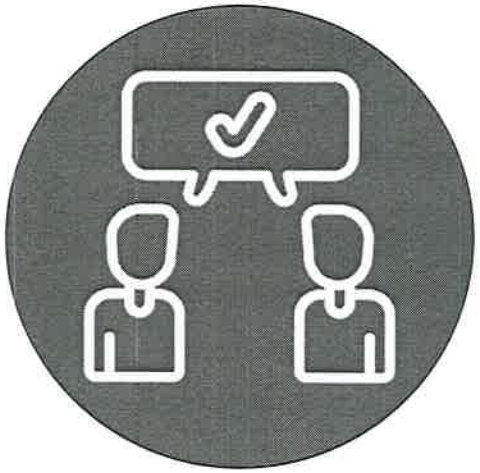


vi. Evidence as to whether all the debts of the deceased have been paid, including any obligations under support agreement orders;

vii. Evidence as to whether the deceased operated a business at the time of death and, if the deceased did, whether any debts of that business have been or may be claimed against the estate, and a description of each debt and its amount;

viii. If all the debts of the estate have not been paid, evidence of the value of the assets of the estate, the particulars of each debt – amount and name of creditor – and an explanation of what arrangements have been made with those creditors to pay their debts and what security the applicant proposes to put in place in order to protect those creditors.

Dispensing with the Bond



2. **Consents of beneficiaries**
3. **Order to Dispense with the Bond**
    - Draft order filed with the court should read: "THIS COURT ORDERS that the posting of an administration bond by the Estate Trustee is dispensed with." (*Re Henderson Estate*)

Limiting Bond to Estate Value

- If the Court won't dispense with the bond, the Court still has the discretion to reduce the amount of the bond (Section 37(2))
- Practice has developed such that the size of the bond is often reduced to the sworn value of the estate.

Collecting on a Bond

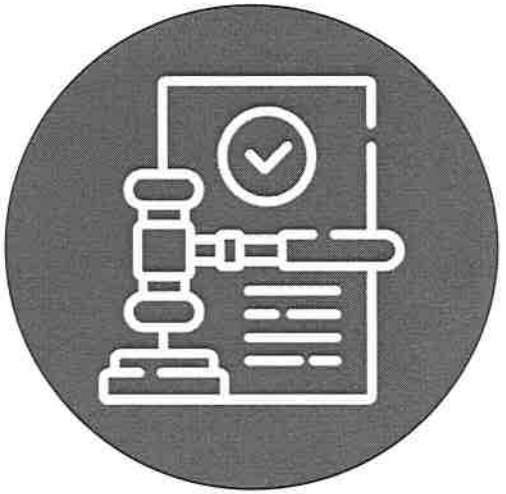
Power of courts as to assignment of bonds

38 The judge on application made in a summary way and on being satisfied that the condition of the bond has been broken may order the registrar to assign the bond to some person to be named in the order, and such person is thereupon entitled to sue on the bond in the person's own name as if it had been originally given to the person, and shall recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the bond. R.S.O. 1990, c. E.21, s. 38.

Substitution and Release of Bond

To Release a Bond:

1. Motion must be made (not before 11 months from posting)
2. Affidavit from the estate trustee
3. Fee Payable
4. Court's approval is required

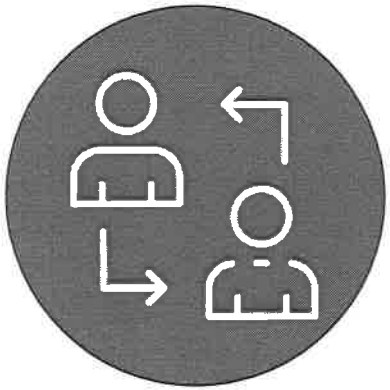


Substitution and Release of Bond

To Release a Bond:

- Affidavit from the estate trustee acknowledging that the debts of the estate have been paid, how the residue of the estate was distributed, confirmation that the beneficiaries have released the estate and whether any beneficiaries of the estate included minors or individuals under disability.
- Court may release a bond where final accounts passed and all assets distributed (Section 43).
- Notice of motion must be served on Children's lawyer where minor beneficiary and on PGT where mentally incapable beneficiary.

Substitution of Bond



Substitution of security

41 (1) Where a surety for an administrator or guardian desires to be discharged from their obligation or where an administrator or guardian desires to substitute other security for that furnished by the surety, the judge may allow other security to be furnished in lieu of that of such surety or of the security so furnished on such terms as the judge considers proper, and the judge may direct that, on the substituted security being furnished, and, if the judge so directs, the accounts of the administrator or guardian being passed, the surety or sureties be discharged. R.S.O. 1990, c. E.21, s. 41 (1).

How application made

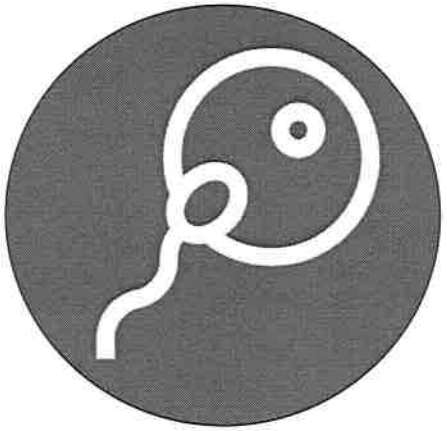
(2) The application may be made without notice or on such notice as the judge may direct. R.S.O. 1990, c. E.21, s. 41 (2).

Where A Bond Must Be Addressed

Table 7. ***Circumstances where a bond must be addressed***

Is there a Will?	Applicant resident in Canada or in a Common-wealth country	Applicant named as estate trustee in Will	Applicant is deceased's married spouse	Net estate valued at over $350k (for death on or after march 1, 2021) or valued at over $200k (for death before March 1, 2021)	Beneficiary is minor or incapable adult	**Form 74A Application (Certificate of Appointment of Estate Trustee)**	**Form 74.1A Application (Small Estate Certificate)**
No			No		Yes	Bond required (or order dispensing with a bond)	Bond required (or order dispensing with a bond)
No			No		No	Bond required (or order dispensing with a bond)	No bond
No			Yes	Yes	Yes	Bond required (or order dispensing with a bond)	Bond required (or order dispensing with a bond)
No			Yes	Yes	No	Bond required (or order dispensing with a bond)	No bond
No			Yes	No	Yes	No bond if spouse filed affidavit setting forth debts of estate	No bond if spouse filed affidavit setting forth debts of estate
No			Yes	No	No	No bond if spouse filed affidavit setting forth debts of estate	No bond if spouse filed affidavit setting forth debts of estate
Yes		No			Yes	Bond required (or order dispensing with bond)	No bond
Yes		No			No	Bond required (or order dispensing with a bond)	No bond
Yes	Yes	Yes			Yes	No bond	No bond
Yes	Yes	Yes			No	No bond	No bond
Yes	No				Yes	Bond required (or order dispensing with bond)	Bond required (or order dispensing with bond)
Yes	No				No	Bond required (or order dispensing with bond)	Bond required (or order dispensing with bond)

Tab c



Planning for Unusual Assets

With Jordy Atin and Ian Hull

eStateAcademy

Agenda

1. Fundamental Questions
2. Reproductive Material
3. Posthumously Conceived Children
4. Firearms
5. Cultural Property
6. Ticket Licences
7. Private Corporation Shares
8. Pets

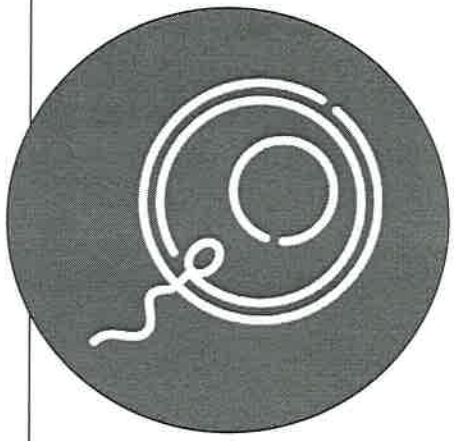
Fundamental Questions

1. **Can the asset be passed on after death?**
    a. Ex. Social Media
2. **What additional legislation applies to the transfer?**
    a. Ex. Firearms
3. **Are there any non legislative conditions that apply?**
    a. Ex. Shareholder Agreements
4. **Required Permissions from any third parties?**
    a. Ex. Ticket licenses

Reproductive Material Removed/Use After Death

Cannot **remove or use** reproductive material unless donor gave prior written consent.

- *Assisted Human Reproduction Act, s. 8*
- *Consent for Use of Human Reproductive Material and In Vitro Embryos Regulations*
- *L.T. v. D.T. Estate*, 2020 BCCA 328



Consent to Use or Remove

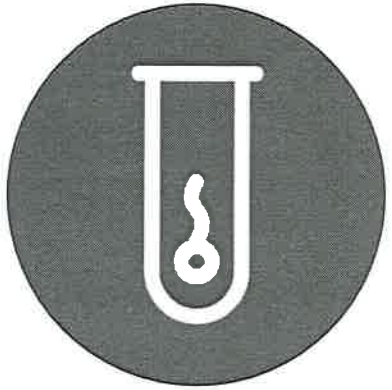
Document signed by the donor stating that, before consenting to the removal, the donor was informed in writing regarding the information in the Regulations

1. Confirming the use for one or more of the following purposes, namely
    1. the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,
    2. improving assisted reproduction procedures, or
    3. providing instruction in assisted reproduction procedures;
2. Withdrawal of consent must be in writing and person using the material is notified in writing of the withdrawal before use; and
3. ~~Dealing with excess embryos created by the reproductive material~~

Is Reproductive Material Property?

CK.L.W. v. Genesis Fertility Centre, 2016 BCSC 1621

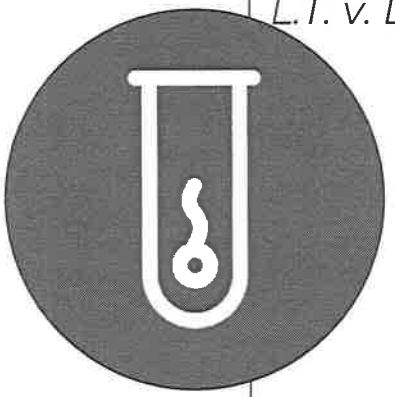
- Facts:
  - Wife claimed reproductive material of deceased husband was her sole legal property
  - Husband died without consenting in writing for his wife to use the stored material
  - Fertility clinic refused to release the material to wife and continued to hold it
- Court found reproductive material is property and since the wife was sole beneficiary on intestacy, the reproductive material was ordered to be released to her
- Confirmed that while reproductive material cannot be sold, it can be passed to someone through your estate and provisions of ownership transfer can be made in your will



Is Reproductive Material Property?

BUT:

L.T. v. D.T. Estate, 2020 BCCA 328



> "I do not propose to comment directly on the judge's reasoning about the status of reproductive material as property. Whether that conclusion withstands scrutiny should be decided after considered argument in a properly adversarial hearing. Given that the judge did not have the benefit of full argument, even though I am sure counsel did their best to provide the court with helpful and relevant authority, I am not persuaded that the case can be treated as authoritative."

S.H. v. D.H., 2019 ONCA 454

- Regardless of whether it is property, informed and withdrawable consent is required

Posthumously Conceived Children and Estates

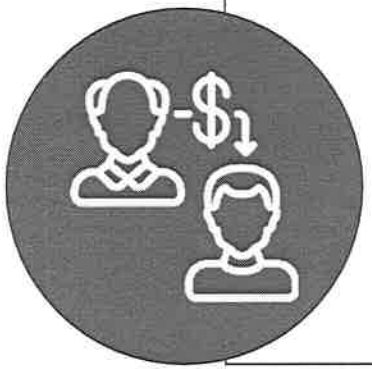
Spouse can use stored reproductive material of deceased under the following conditions:

- Deceased must have intended to be the parent of the child conceived
- Must give written notice of intention to conceive within 6 months of death to the Estate Registrar for Ontario
- Child must be born before 3-year death anniversary unless court orders otherwise

Effect of Posthumously Conceived Children

Child conceived and born after death may be entitled to inherit and receive support from the estate of the deceased:

- Requires Court Declaration
- Can also affect the estates of other family members and class closing issues
- Consider specifying in Will whether classes include posthumously conceived children or not
    - If included, consider date at which they should be deemed alive



Drafting for Including/Excluding Posthumously Conceived Children

(i) Any reference to a child (a "Child") of a person (a "Parent") shall include a Child who was conceived and born after the death of his or her Parent in accordance with the definition of "Child" in the Family Law Act, such Child being deemed to be born alive at the death of the Parent.

Any reference in this Will to a "child", "children" or "issue" of a particular person (a "Parent") shall not include a person conceived and born after the death of the Parent but shall include a person conceived before the death of the Parent but born after the death of the Parent.

Cord Blood

The cord blood in private banks are owned by the donor

- Some registries allow an additional owner to be listed

Provisions can be made in Will for the transfer of cord blood

- Arrangements for continued storage payments after death
- Granting permission to someone else to access the material when needed

Firearms

- Different classifications of firearms (non-restricted, restricted, and prohibited)
- The Federal *Firearms Act* requires anyone in possession of a firearm to hold a license
- **Criminal Code, section 91(1)**: ...every person commits an offence who possesses a prohibited firearm, a restricted firearm or a non-restricted firearm without being the holder of

    a) a licence under which the person may possess it; and
    b) in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.

Firearms

- **EXEMPTION**: executor does not need a license for purpose of administering the estate
    - Authority to possess firearm without license for a reasonable amount of time (**Criminal Code, section 91(4)(b)**)
- If deceased did not have a Registration Certificate
    - Executor MUST register and obtain certificate to be in compliance with law
- If executor is prohibited from possession of firearms due to court order
    - Can still act as executor but must facilitate the transfer to someone who can lawfully acquire them

Firearms

- Executor should understand Federal and Provincial regulations that apply
    - *Firearms Act and Regulations*
    - *Criminal Code*
    - *Estates Administration Act*
- Important for distribution – beneficiaries must possess a license
    - Otherwise subject to the Criminal Code for unlawful possession, storage or transportation

Cultural Property

- Cultural property is broadly defined as objects of archeological, historical, artistic, and scientific significance
    - Classified as being of "outstanding significance" and "national importance"
    - **Examples**: fossils, meteorites, Aboriginal artifacts, military apparel, paintings, sculptures, documents, scientific instruments, musical instruments, etc.
- *Cultural Property Export and Import Act*
    - Cannot export items on the Canadian Cultural Property Export Control List
    - Criminal offence to export objects that are on the Control List without an export permit (penalties include fines, imprisonment or both)
    - Must apply to get an export permit from the Department of Canadian Heritage

Cultural Property

- Were the artifacts in possession of the deceased legally?
- *Income Tax Act*
  - Provides favourable tax treatment for dispositions of certified cultural objects to designated donees (ex. charities, museums, art galleries, etc.)
- Must obtain certificate establishing that the property meets the criteria of "outstanding significance" by the Review Board
  - Criteria of "national importance" no longer needed on or after March 19, 2019

Ticket Licences

- Season tickets are not necessarily transferable
    - Depends on contract signed (may be conditional)
    - Ex: Maple Leafs season tickets can be gifted in Will but only to a blood relative – spouse not included
- Seat license – underlying interest in an asset
    - Make sure the person you bequeath to can afford to buy season ticket
- Otherwise sell the tickets upon death and distribute proceeds among beneficiaries

Private Corporation Shares - Shareholder Agreements

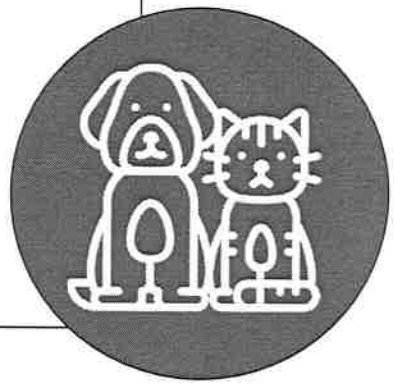
- Transfer subject to conditions in shareholder agreement??
- *Frye v. Frye Estate, 2008 ONCA 606*
    - SA prevented transfer of shares without consent of the Board.
    - Testator bequeathed his shares to a person without consent.
    - Court found that while it was a breach of the SA, the Testator's shares still vested in his executors.
    - While the legal title to the shares could not be transferred to the beneficiary without consent, the Executors were holding those shares as bare trustee for the beneficiary.

Private Corporation - Gift of Corporate Assets

- Testators can bequeath assets owned by a corporation that they are the sole shareholder of even though they don't actually own those assets.
    - *Trezzi v. Trezzi, 2019 ONCA 978*
- Still recommended to specifically indicate that intention in the Will itself.

Pets

- Pets are considered property and therefore cannot inherit other property
- Cannot leave a cash bequest or set up a trust for a pet as the beneficiary
- Cash legacy to "pet guardian"
    - Condition precedent that they must accept the pet along with the cash
    - BUT instructions for pet care cannot be enforced
- Trust
    - Must have beneficiary who can enforce the trust – a pet cannot
    - Condition: beneficiaries receive funds if they take care of the pet



Pets

- Pet stewardship program
  - Agreement with an organization to bequeath your pet to them
  - Include enrollment fee and any other expenses
- Can find a permanent home for your pet and provide ongoing medical care throughout your pet's lifetime

Tab d

Planning for Unusual Assets (Part 2)

With Jordy Atin and Ian Hull

Agenda

1. Firearms
2. Cultural Property
3. Ticket Licences
4. Private Corporation Shares
5. Pets

Firearms

- Different classifications of firearms (non-restricted, restricted, and prohibited)
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    - Condition precedent that they must accept the pet along with the cash
    - BUT instructions for pet care cannot be enforced
- Trust
    - Must have beneficiary who can enforce the trust – a pet cannot
    - Condition: beneficiaries receive funds if they take care of the pet

Pets

If at my death, I am residing with one or more cats/dogs/pets, I hereby direct my Trustees to transfer the Pet Amount(s) to the Pet Recipient(s) in accordance with the provisions below.

1. "the Pet Recipient" means the person or persons whom my Trustees, in their absolute discretion, selects to, and who consents to, adopt one or more of my pets which are residing with me at the time of my death.

2. "the Pet Amount" means in respect of each pet, a sum equal to the age of the pet (in years) subtracted from the number 15 and then multiplied by the sum of $3,000. For example, if my pet is 12 years and 7 months old at the time of my death, the Pet Amount shall be calculated as 15-12=3 x $3,000= $9,000.

3. The Pet Recipient shall provide my Trustees with a written undertaking acknowledging that the pet(s) should not be given to a shelter and that the said Pet Amount(s) will be utilized, as necessary, for the support and care of the pet(s); however the delivery of the said Pet Amount(s) to the Pet Recipient shall be a complete discharge to my Trustees who shall not have any responsibility to see to the application thereof.

4. The Pet Amount(s) shall be in addition to any executor's compensation or any legacy provided for herein.

Pets

- Pet stewardship program
  - Agreement with an organization to bequeath your pet to them
  - Include enrollment fee and any other expenses
- Can find a permanent home for your pet and provide ongoing medical care throughout your pet's lifetime

Tab e

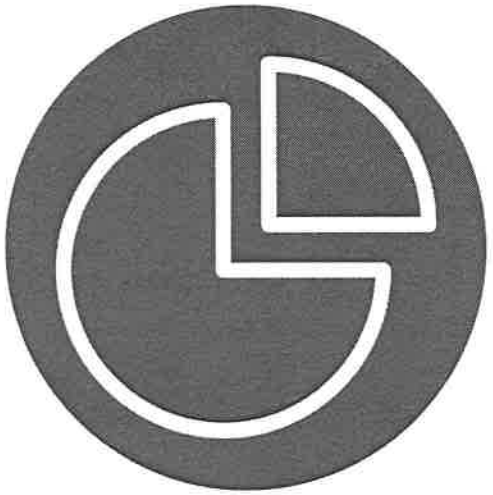
Planning for Personal Effects

With Jordy Atin and Ian Hull

Agenda

1. Why have a separate provision for Personal Effects?
2. Options for distributing Personal Effects
3. Drafting Personal Effects clauses

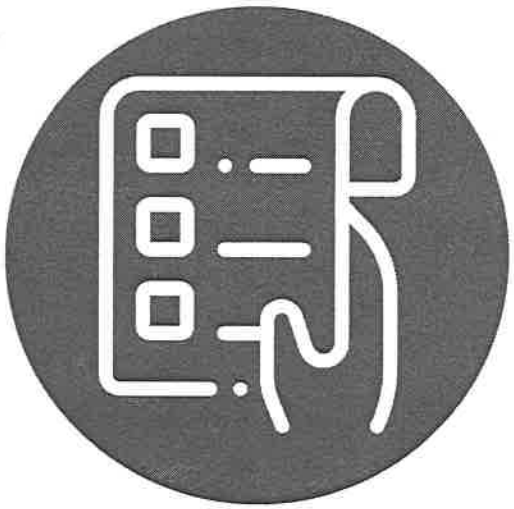
Specific Provision for Personal Effects



1. Leaving Personal Effects to fall into residue
2. Carving out Personal Effects from the residue

General Options for Personal Effects

1. Specific gifts
    a. In Will itself
    b. By Legal Memorandum
2. By agreement
3. Discretionary distribution
4. Precatory Memorandum
5. Selection process



Specific Gifts

1. "Personal Effects" definition
2. Specific items description
3. Cost of delivery
4. Precatory wishes for subsequent gifts of item
5. Probate tax is not avoided by not mentioning specific items

Will vs. Legal Memorandum

- Gifts can be listed
  - in the Will itself or
  - in a separate document ("Legal Memorandum)
- Legal Memorandum is used when there are numerous items to be gifted
- To be legally binding the Memorandum must:
  - Be in existence at the time the will is signed
  - Be referred to in the Will specifically
- Cannot be changed without re-executing the Will.

Distribution Among a Group of People

1. By agreement of the Beneficiaries
   a. Used if the group of people can be identified and sui juris
2. By discretion of the Executor or Personal Effects Trustee
3. By other method such as lottery or highest bidder.

Discretionary Division

- **Discretion**
  - Among a specific group of beneficiaries
  - Among anyone
- **Precatory Guidance**
  - Take into account wishes of beneficiaries
  - Try and treat them relatively equally
  - Consider any non-binding memorandum (including future list)
- What if the beneficiaries are also the executors?

Lottery and Selection

Consider if failure to otherwise agree or if beneficiaries = executors

- Selection of items in order
- Order - fixed or rotating
- Who gets first pick
- Do they have to equalize the value of the items - if so valuations
- Predeceased beneficiaries

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Tab f

Estate Administration: First Steps

With Jordy Atin and Ian Hull

eStateAcademy

Agenda

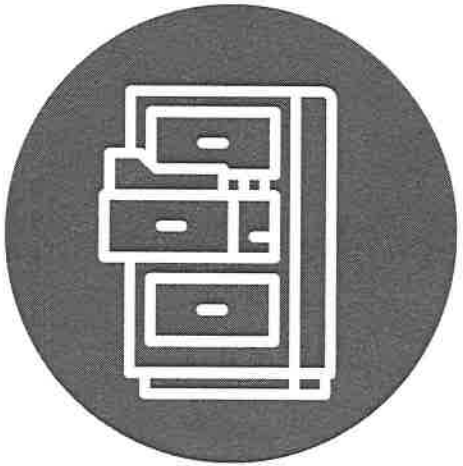
1. First Contact
2. Retainers
3. Initial Steps

Releasing the Original Will

- To Whom?
  - Multiple Executors
  - Alternate Executors
- On What Authority?
  - Death Certificates
  - ID

Finding the Original Will

1. Importance of Original Will
2. Suggestions to Clients of Typical Places
3. Advertising for Original Will
4. Lost Will Applications



Identifying Conflicts

- Identify Clients
- Identify Capacities
- Spouse/Beneficiary/Creditor/Estate Trustee/Guardian/Trustee
- Acceptance of Appointment
  - (executor de son tort)
- Renunciations

Retainer Issues

1. Client's Capacity as Estate Trustee
2. Fees
3. Joint Retainer
4. Scope of Work (e.g. tax returns)
5. Executor Compensation vs Legal Fees

Review Will

- Validity
- Appointments (Conditions, Residency)
- Dispositive Provisions
- Beneficiaries (including minors or incapable)
- Family tree (crucial if intestacy)

Immediate Steps

1. Funeral and burial arrangements.
2. Make provisions for the immediate needs of any dependants.
3. Dispose of perishable assets.
4. Minors guardianship
5. Arrange for the care of any pets.

Asset Issues

6. Determine the nature and value of the deceased's assets and debts
    - Ownership - Identify joint assets
    - Special exemptions like Land Titles Qualified
    - Determine whether probate is necessary and benefits of probate even when not necessary
    - Secure and protect all other assets including business interests and rental properties.

Asset Issues

6. Review insurance coverage and obtain increased or additional coverage of the assets where necessary.

7. Review risky assets, equities etc.

Pitfalls

- Disputes among estate trustees
- Rushing to probate
- Not identifying spousal/dependant claims
- Not securing assets
- Missing filing dates
- Compensation for lawyer/ET

Tab 6

Tab a

A refresher on solicitor's negligence claims

By Sydney Osmar | November 9, 2021 | 2 minutes of reading | Leave a Comment

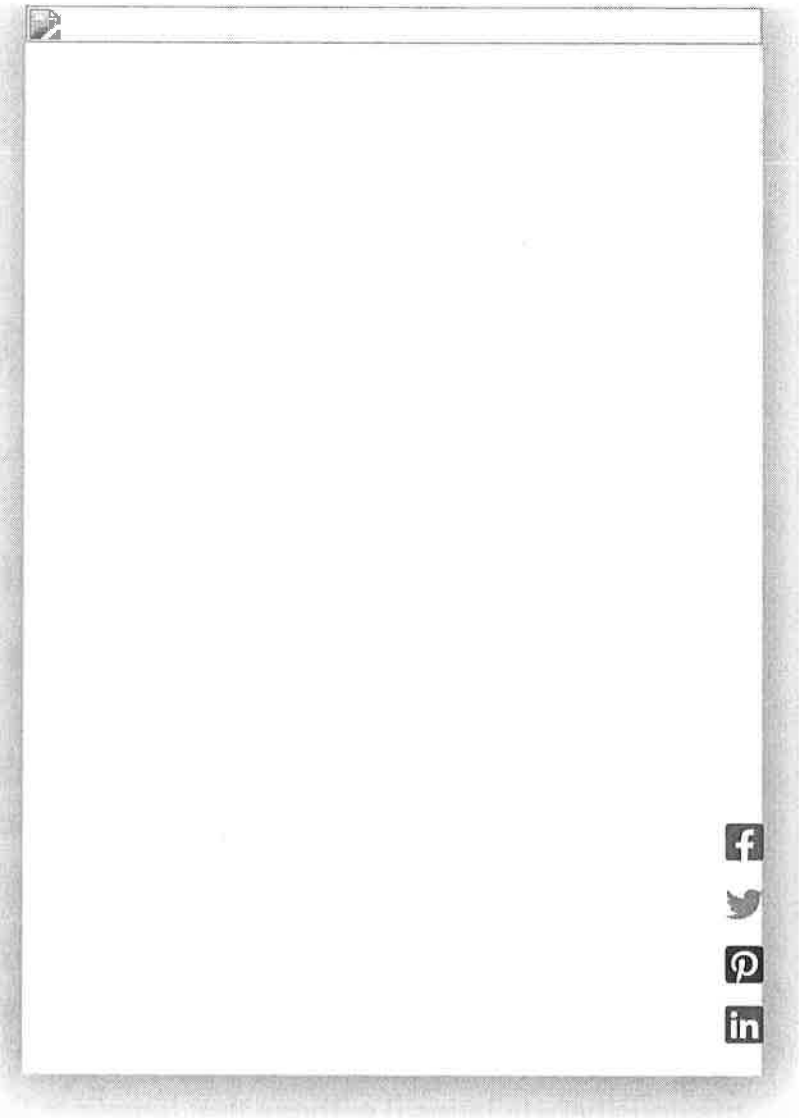
Recently, I had the opportunity to attend the OBA's CPD program on Solicitor's Negligence Claims: Strategies for Effective Advocacy, which provided a helpful refresher for estate practitioners specifically.

At the outset of the program, attendees were reminded that in an estate planning context, there are two types of beneficiaries – disappointed beneficiaries (i.e. those the testator had intended to benefit, and who did not, but for the solicitor's negligence) and previous beneficiaries (i.e. those that benefit in the testator's previous Will(s), but not the Last Will).

The jurisprudence has differentiated between these two types of beneficiaries, finding that a solicitor owes a duty of care to the former, but not the latter. The "disappointed beneficiary" remedy was essentially created to address a gap in the law, where the Courts identified a group of claimants who would not otherwise have access to recourse if the Will should fail, or if the solicitor failed to include them in the Will at all. On the contrary, a previous beneficiary has the ability to access relief through a Will Challenge. In this way, a disappointed beneficiary's interests are seen to be aligned with the Testator's, where the previous beneficiaries' interests are not.

The program also reminds solicitors that in solicitor's negligence claims, the standard of care is that of the reasonably competent solicitor, a standard that does not require

perfection. The main obligation of the solicitor, in the estate planning context, is to prepare a valid Will that gives effect to the Testator's wishes.



In the context of negligence claims – even if a duty of care is found to be owed by the solicitor, and that the solicitor breached the standard of care, it must be clear that the damages suffered are linked to the negligence of the solicitor.

The program provided a helpful summary of common omissions that can give rise to claims:

- Timing (i.e. failing to execute the Will in a timely manner);
- Accuracy (i.e. technical errors, incorrect dispositions, failure to include a residue clause);
- Communication;
- Privacy;
- Failing to document instructions;
- Failing to advise of risks regarding pre-death dispositions; and
- Failing to probe for capacity and undue influence concerns.

In conclusion, the program (though not representing LawPRO), provided helpful reminders that solicitors are to report alleged, actual, or possible errors that could potentially give rise to claims to LawPRO, and, to report any potential claims sooner rather than later to avoid coverage concerns.

To learn more about solicitor's negligence claims, check out our past blogs:

When might a solicitor be negligent in preparing a Will?

Solicitor's negligence claims: are non-clients owed a duty of care?

Thanks for reading!

Sydney Osmar

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Tab b

Covid-19 Articles & Resources

The disruptions resulting from the Covid 19 virus are causing uncertainty for many lawyers as they attempt to run their practices remotely while continuing to provide professional services to their clients. LAWPRO is working to make lawyers aware of the latest developments, changes in the law and court procedure and resources to make remote practice easier. All can be found on this page.

LAWPRO notices to the profession

LAWPRO Statement on Covid-19 (March 26)

Using technology for lawyer/client communications

Understanding e-signatures

Security Tips for Lawyers Hosting a Zoom Meeting

Work from home technology tips

Technology products for lawyers and law firms

Ten tips for effective video conferencing

Video Conferencing Checklist

Fraud and Cybersecurity

Beware of cyber security risks during Covid-19 and working from home

More examples of cyber criminals taking advantage of Covid-19 disruption

Wellness

Managing your mental health through COVID

Civil Litigation

How to deal with limitations periods that were suspended during the pandemic

Tips for calculating limitations deadlines accounting for the COVID-19 emergency suspension period

Ontario limitation periods resumed September 14, 2020

Federal limitations periods extended

Superior Court of Justice June 25th Notice to the Profession, Litigants, Accused, Media and Members of the Public

Ontario Suspension of Limitation Periods and Procedural Deadlines Extended to September 11, 2020

Consolidated Notice to the Profession Regarding the Operations of the Superior Court of Justice, Effective May 19, 2020

Suspension of limitations periods lifted for Construction Act matters

Civil matters the Superior Court of Justice will hear as of April 6, 2020

Managing litigation matters during Covid-19

Real Estate

Planning Act Emergency Period Suspension Calculator

Navigating The Planning Act amid Covid-19 Emergency Orders

Impact of COVID-19 – TitlePLUS is here to help

Remote communication and fraud risks in real estate

Wills and estates

The dangers of renting out your signature as a virtual witness on a will or POA

How to lessen your risk of a malpractice claim when virtually witnessing wills and powers of attorney

Tab c

Hull & Hull LLP

PracticePRO Guide to Resources

PracticePRO Guide to Resources

By Hull & Hull LLP | October 27, 2015 | 1 minute of reading | Leave a Comment

LawPRO's practicePRO initiative provides risk management, claims prevention and law practice management information to Ontario lawyers. PracticePRO's resources, precedents and checklists will help you take proactive steps to avoid a legal malpractice claim, and show you how to grow a successful and thriving law practice.

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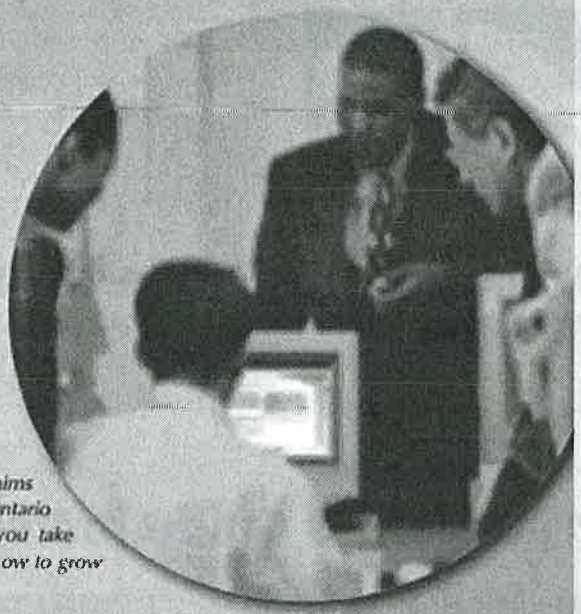
Guide to resources



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- Fraud warnings and alerts
- Names of confirmed fraudsters
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practicepro.ca website

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- Practice aids, precedents and checklists
- Past issues of *LawPRO Magazine*
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- Most popular downloads (see back page for list)

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LAWPRO

Tab d

Hull & Hull LLP

Professional Liability Insurance During Mediation

Professional Liability Insurance During Mediation

By James Jacuta | August 25, 2022 | 1 minute of reading | Leave a Comment

Are services provided by a lawyer during a mediation insured by professional liability insurance? Yes, coverage is provided under the Primary Policy by the Lawpro, Lawyers' Professional Indemnity Company, if those services fall within the definition of "Professional Services".

A lawyer would also be insured for mediation services, which the lawyer provides for, or through, a corporate entity. However, the corporate entity itself, would not be insured. The lawyer would not be insured in the capacity of director or officer of the corporate entity. Therefore, separate corporate liability insurance and directors and officers liability insurance should be considered.

Recent increased reliance on web-based meeting platforms allows for remote work, and now for mediations to take place in the digital workplace. It is worth noting that the Lawpro Primary Policy has an exclusion for cybercrime, as follows:

"This policy does not apply: (j) to any claim in any way relating to or arising out of a cybercrime(s). Cybercrimes means an incursion, intrusion, penetration, impairment, use or attack of a computer system(s) by electronic means by a third party other than the insured or the insured's law firm."

For more information please see the wording in the policy at the Lawpro website.

Thank you for reading.

James Jacuta

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June 7, 2017

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Tab e

The Hull & Hull weekly webinar: a summary

The Hull & Hull weekly webinar: a summary

By Sydney Osmar | June 1, 2020 | 6 minutes of reading | Leave a Comment

As many of our blog readers will know, Ian Hull, Jordan Atin and Suzana Popovic-Montag have been working hard during the pandemic to host weekly webinars in efforts to increase resource sharing and practice management tips.

I have had the opportunity to help out with this endeavour, and have attended each webinar to date. Many helpful practice tips and resources have been shared, so I thought it may be useful to provide an overview summarizing some of the main takeaways that have been touched upon to date:

Virtual and Counterpart Execution of Wills/POAs

- After swift responses from the Attorney General of Ontario, Wills and POAs can now be witnessed virtually, and, executed in counterpart for the duration of the pandemic. Of course, the Emergency Order does not set out explicitly how to do so. Therefore, Ian and Jordan have attempted to outline best practices on how to accomplish the virtual and counterpart execution of Wills and POAs. Jordan has prepared a detailed blog setting out the process he uses, providing links to helpful checklists which can be found here.
- Some further tips discussed include circulating locked versions of the documents to be executed with a unique identifier so that the solicitor can ensure everyone is working off the same document.

- While the Emergency Order has opened up the possibility for counterpart and remote execution of Wills and POAs, clients should be encouraged to re-sign their Wills and POAs when in-person meetings can resume.

Holograph Wills and the use of an Amanuensis

- Some early discussions in the webinar series, before counterpart and remote execution was a possibility, focused on the possible use of holograph wills, or the use of an amanuensis (signing a testator's Will, on their behalf, at their direction).
- Jordan has summarized these discussions in two blogs. To learn more about the use of holograph wills, see here. To learn more about the use of an amanuensis, see here.

Avoiding Claims

- An important topic that has been touched on throughout the webinar series is avoiding LawPRO claims in a COVID-19 world. While much thought has been given to the actual execution and witnessing of Wills and POAs during the pandemic, practitioners should not let their regular practice management fall to the back burner. Regardless of COVID-19, LawPRO claims continue to result from errors such as: inadequate investigation, miscommunication, errors of law and poor time management.
- Now with the increasing necessity to take Will planning instructions by phone or video conference, heightened steps need to be taken to ensure that both client and solicitor understand the client's instructions and intent, as well as testing for things like capacity and undue influence. WEL Partners have prepared a checklist for indicators of undue influence during virtual meetings which can be found here.

Tools and Technology for Practice Management

- LawPRO has prepared a resource page which includes links to various tools, articles, checklists and other resources which can be accessed by practitioners.
- E-State Planner – one of the many ways in which E-State Planner can be used to avoid claims, regardless of COVID-19, is by providing the client with visuals. Using visual aids while taking instructions ensures that there is an understanding between client and solicitor, right from the spelling of names to the actual impact their instructions have on the distribution of the estate.

- Virtual Web Conferencing Systems – while there are many options to choose from, it is clear that the web conferencing has become a significant part of the daily practice of law, one which is likely to stay. Whether using Zoom, Webex, Microsoft Teams, Google Hangouts or any of the many other systems available, lawyers should take the opportunity now, to familiarize themselves with web conferencing. In particular, screen sharing, which has become integral to virtual meetings, mediations, hearings, examinations and so forth, is a particular skill that should be honed.
- Protecting privacy – as we have learned, it is extremely important to take all necessary precautions to protect privacy when utilizing web conferencing systems. Examples of such steps are: using passwords, using the "waiting room" or "lobby" feature so that the host can limit access to the meeting to authorized individuals, or, requiring registration.
- Recordings – another unique feature of web conferencing systems is that the recording of meetings is becoming increasingly more common. While this can be helpful for ensuring that there is a complete record of instructions and advice given, it also means that lawyers will likely be held to a higher standard (as the recording will allow for greater scrutiny).
- Inter-office communication resources – with lawyers and staff working from home, there is greater need for fostering instant communication and resource sharing inter-office. Services such as Slack can be used for both inter-office communication and file management. Slack also allows for you to add in tools and apps to assist in practice management, such as Notability, the use of check lists, work flows, and even web conferencing platforms.
- File management in a "remote world" – with the office working from home, there is a greater need for remote office software. Programs such as Clio and Monday.com are examples of such software.

Moving Matters Forward

- With courts limited to hearing only urgent matters, lawyers have had to get creative in how we can continue to move matters forward and continue to meet and exceed client expectations. As discussed in the webinar series, this has included (for cases that are appropriate) conducting examinations and mediations virtually. To

learn more about the Estate Arbitration Litigation Management initiative spearheaded by Suzana, see here.

CPD Credits

Finally, as we have had a regular and significant turn out to the weekly webinar series, I would like to remind all participants that they qualify for CPD credits for having attended the webinars. In case you missed which credits you are eligible for, please see below:

- Webinar 1 – March 27, 2020: 15 mins substantive, 15 mins professionalism
- Webinar 2- April 3, 2020: 45 mins substantive, 15 mins professionalism
- Webinar 3 – April 11, 2020: 30 mins substantive, 30 mins professionalism
- Webinar 4 – April 17, 2020: 45 mins substantive, 15 mins professionalism
- Webinar 5 – April 23, 2020: 45 mins substantive, 15 mins professionalism
- Webinar 6 – April 24, 2020: 15 mins substantive, 15 mins professionalism
- Webinar 7 – May 1, 2020: 45 mins substantive, 15 mins professionalism
- Webinar 8 – May 8, 2020: 45 mins substantive, 15 mins professionalism
- Webinar 9 – May 15, 2020: 45 mins substantive, 15 mins professionalism
- Webinar 10 – May 22, 2020: 45 mins substantive, 15 mins professionalism
- Webinar 11 – May 29, 2020: 45 mins substantive, 15 mins professionalism

Thanks for reading!

Sydney Osmar

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Tab f

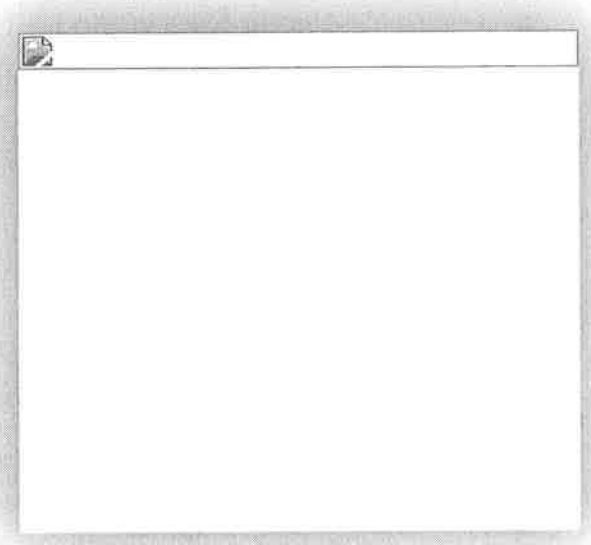
Hull & Hull LLP

Virtual Witnessing of Wills and Powers of Attorney With Less Risk

Virtual Witnessing of Wills and Powers of Attorney With Less Risk

By Natalia R. Angelini | April 15, 2020 | 4 minutes of reading | Leave a Comment

Although the temporary ***emergency Order*** has only been in place for a few days, there is no question that lawyers have already begun to virtually witness the execution of wills and powers of attorney. A complimentary CPD program on the issue was put on by the Law Society of Ontario (LSO) last week, chaired by Ian Hull. A link to it is ***here***. LawPRO has also provided a helpful commentary on the subject matter from the perspective of risk-avoidance ***here***, and below I draw upon the points made that may help lawyers lessen their risk of a malpractice claim.



As much as lawyers may be focused on adhering to the requirements under the emergency Order, LawPRO reminds us that the most common cause of malpractice claims in the estates area is inadequate investigation – a failure to inquire about assets, prior wills and details about past and present marital and familial relationships. The second most common error is a communication failure – not ensuring consistency between the draft will and the instruction notes, and not ensuring that the

solicitor and client each understand the other. So it is important to keep risk management tips ***here*** top of mind, particularly given that it may be more difficult to effectively communicate or ensure that clients understand documentation when conducting virtual client meetings.

As related specifically to virtual witnessing of wills and powers of attorney, LawPRO has various suggested steps to lessen the risk of a claim, which I comment on below.

- *Comfort* – Some clients may not be as ease with video technology and/or discussing personal matters through this medium. Take the time to establish that all participants are comfortable.
- *Identification* – As a result of Covid-19, the LSO is not requiring face-to-face meetings to identify or verify a client's identity. ***Here*** you can find the LSO's guidance on the issue, and LawPRO's video conference checklist (accessible through the LawPRO link above) will help lawyers consider the steps needed before, during and after a video conference meeting.
- *Capacity and undue influence* – These known risks may be more difficult to assess through virtual communication, making it all the more important that certain precautions be taken, such as: (i) asking open questions, and follow up questions, (ii) asking questions to establish that the client is acting independently (e.g. explore relationships and reasoning in detail when marked changes are being made), (iii) when acting for one client, make sure the client is alone in the room (consider asking for a video pan of the room if you can't clearly see it), and (iv) take notes reflecting consideration of capacity and undue influence, especially if there are any concerns. ***Here*** you can find a checklist WEL Partners has created for indicators of undue influence during video meetings, and the LSO has released a special comment on the issue ***here***.
- *No counterparts* – You will need multiple virtual meetings so each witness can sign the original will or power of attorney. Video conference wills will also likely require a different affidavit of execution, and ***here*** you can find our recent blog that provides sample affidavits of execution.

- *Document your work* – Particular scrutiny may be given to documents executed during this health crisis. Taking detailed notes or recording the meeting (with client consent) will document what occurred, and reporting to the client thereafter will serve to confirm your instructions.
- *After the emergency* – Although not required, once it is safe to do so consider recommending that your clients re-execute their testamentary documents in the physical presence of witnesses.

To help mitigate the risk of a claim, Hull eState Planner has created checklists for executing wills and powers of attorney by video. The will execution by video checklist can be found here and the powers of attorney execution by video checklist can be found here.

The Covid-19 situation is creating rapid change, and at Hull & Hull LLP we are monitoring things on a daily basis. I encourage you to continue to access our website for further updates. Our resource page can be found ***here***.

Thanks for reading and have a great day,

Natalia Angelini

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Tab 7

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EVIDENTIARY ISSUES IN ESTATE LITIGATION MATTERS

Ian M. Hull and Suzana Popovic-Montag

Ian M. Hull
Tel: (416) 369-7826
Fax: (416) 369-1517
Email: ihull@hullandhull.com

Suzana Popovic-Montag
Tel: (416) 369-1416
Fax: (416) 369-1517
Email: spopovic@hullandhull.com

Hull & Hull LLP
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TORONTO
141 Adelaide Street West, Suite 1700
Toronto, Ontario M5H 3L5
TEL: (416) 369-1140
FAX: (416) 369-1517

OAKVILLE
228 Lakeshore Road East
Oakville, Ontario L6J 5A2
TEL: (905) 844-2383
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INDEX

INTRODUCTION

Matters relating to estate litigation and, in particular, will challenge proceedings bring with them unique evidentiary challenges. First, the main, and often the most important, witness is not alive. Second, there is a unique perspective that is given to estate litigation matters by the courts with regard to evidence at trial in light of the general presumption that, to the extent possible, the testator's wishes need to prevail. This, in part, comes from the premise that there is a presumption of capacity[1] and an overriding respect for testamentary freedom, including preservation of the intention of the testator's wishes.

ONUS

An important starting point when making determinations of evidentiary issues in estate litigation and, in particular, in will challenge proceedings, is the question of onus.

The legal onus or burden of proof in a case involving testamentary capacity is clearly on the party alleging the will is valid. This point was made by the Privy Council in *Barry v. Butlin*[2] and repeated by the Supreme Court of Canada in *Leger v. Poirier*[3] and *Vout v. Hay.*[4]

An often-cited description and statement of the onus in testamentary capacity matters was that of Justice Cullity found at paragraph 39 of *Scott v. Cousins* as follows:

1. The person propounding the will has the legal burden of proof with respect to due execution, knowledge and approval and testamentary capacity.

2. A person opposing probate has the legal burden of proving undue influence.

---

[1] *Substitute Decisions Act, 1992*, SO 1992, c. 30, s. 2; *Leger v. Poirier,* [1944] SCR 152 at para 28, [1944] 3 DLR 1 (SCC) ["*Leger*"]; *Vout v. Hay*, [1995] 2 SCR 876 at para 26, ETR (2d) 209 (SCC) ["*Vout*"].
[2] (1838) 2 Moore's PCC 480 at 482.
[3] *Leger*, *supra* note 1 at para 28.
[4] *Vout, supra* note 1 at para 26; see also John E. S. Poyser, *Capacity and Undue Influence* (Toronto: Carswell, 2014) at c 1, s 2(a).

3. The standard of proof in each of the above issues is the civil standard of proof on a balance of probabilities.

4. In attempting to discharge the burden of proof of knowledge and approval and testamentary capacity, the propounder of the will is aided by a rebuttable presumption.

   Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.

5. This presumption "simply casts an evidential burden on those attacking the will."

6. The evidential burden can be satisfied by introducing evidence of suspicious circumstances - namely, "evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder".

7. The existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the will than the civil standard of proof on a balance of probabilities. However, the extent of the proof required is proportionate to the gravity of the suspicion.

8. A well-grounded suspicion of undue influence will not, *per se*, discharge the burden of proving undue influence on those challenging the will:

   > It has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval in testamentary capacity. The burden of

> proof with respect to fraud and undue influence remains with those attacking the will.[5]

EVIDENCE – GENERALLY

His Honour, Justice Perell, created a comprehensive evidence "cheat sheet", which is of tremendous assistance in considering all of the evidentiary issues in a trial and, in particular, those developed through estate litigation trial matters.[6]

(a) Corroboration

Along with the hearsay rules, which are dealt with later in this paper, the question of the need for corroboration in respect of claims against an estate is a fundamental starting point in any estate litigation evidentiary analysis. In light of the absence of the often-central source of evidence (the deceased) in an estate litigation matter, section 13 of the *Evidence Act* restricts the free flow of evidence as follows:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.[7]

The Ontario Court of Appeal in *Burns Estate v. Mellon* noted that the requirement under section 13 of the *Evidence Act* exists to address the obvious disadvantage faced by the dead: He or she cannot tell his or her side of the story or respond to the livings' version of events.[8] In *Orfus Estate*, the Court of Appeal considered the issue of whether or not the motion Judge erred by ruling inadmissible the objector's evidence about her relationship with her mother.[9] The court held that the objector's evidence was properly excluded in that while the challenger swore in her affidavit as to the nature of the relationship between herself and her mother, there was no meaningful attempted corroboration by the deceased's granddaughter as the granddaughter

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[5] 37 ETR 113, [2001] OJ No 19 at para 39 (ONSC).
[6] The Honourable Justice Paul Perell, "An Evidence Cheat Sheet" (2007) 33 Advocates' Q 490.
[7] RSO 1990, c. E.23, s. 13.
[8] [2000] OJ No 2130, 48 OR (3d) 641 (ONCA).
[9] 2013 ONCA 225 at paras 71-77.

could not corroborate the challenger's testimony during the critical time period. "As to the nature of the corroboration required, it need not be corroboration of the surviving party's evidence in every particular, since that would be requiring him or her to establish his whole case by independent evidence".[10]

The Ontario *Evidence Act* does not require that every fact to establish a cause of action be corroborated by evidence. It only requires evidence of the interested party itself be corroborated by some other material evidence.[11] The courts have not precisely or studiously defined in exhaustive terms what constitutes corroboration within the Act.[12] The Alberta Court of Appeal in *Murphy Estate v. McLean Estate*[13] noted that the standard of proof for evaluating evidence of "living against the dead":

> ought to be one of suspicion, even where that evidence is corroborated within the meaning of the statute and effect ought not to be given to it unless the effect of the entire evidence, including that which is relied upon as corroboration, is to remove all reasonable doubt from the judicial mind.[14]

In *Murphy Estate*, the Court of Appeal went on to say that it did not take this standard of proof to import a criminal standard of proof for the presence of corroborating evidence. Furthermore, the Alberta Court of Appeal held that the conditions outlined above are based on the requirement that the evidence must appreciably help the judicial mind believe some material fact (such as the existence of an agreement to indemnify), and it must be convincing on the civil standard of proof. Thus, the "corroborative" evidence must be evaluated with this in mind.[15]

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[10] Frederick Clyde Auld & Carl H. Morawetz, *MacRae on Evidence*, 2nd ed (Toronto: Carswell, 1952) at 391.

[11] Provisions requiring corroboration for actions involving an estate exist also in Alberta, Newfoundland, Nova Scotia, Prince Edward Island, and the Yukon Territories: *Alberta Evidence Act*, RSA, c A-18, s 11; the Newfoundland *Evidence Act,* RSNL 1990, c E-16, s 16; the Northwest Territories *Evidence Act*, RSNWT 1988, c E-8, s 17; the Nova Scotia *Evidence Act*, RSNS 1989, c 154, s 45; the Prince Edward Island *Evidence Act*, RSPEI 1988, c E-11, s 11; the Yukon Territories *Evidence Act*, RSY 2002, c 78, s 15.

[12] *MacRae on Evidence, supra* note 10 at 392.

[13] [1992] AJ No 859, 131 AR 250 (ABCA); see also Brian A. Schnurr, "Estate Litigation – Requirement of Corroboration" (1979-81) 5 E & TQ 42.

[14] *Murphy Estate, ibid* at paras 31-34; *Bayley v. Trusts and Guarantee Co. Ltd.*, [1931] 1 DLR 500, 66 OLR 254 (ONCA).

[15] *Murphy Estate*, *ibid* at para 33.

(b) Lay/Witness Evidence

The history and theory behind the rule of excluding lay witness evidence is based on the historic concept that neither experts nor ordinary witnesses may give their opinions upon matters of legal or moral obligation, or general human nature, or the manner in which other persons would probably act or be influenced.[16]

In matters relating to will challenges and the question of mental capacity, the courts have historically accepted evidence to show the insanity of a person.[17] Certainly, on the question of testamentary capacity of a testator, evidence of conversations between the testator and a solicitor who drew the will have been admitted, as well as the memorandum of instructions made by the solicitor at the time.[18] Furthermore, in the past, witnesses have been allowed to testify that they knew the testator, and had dealings and contact with him or her and that so far as anyone could see he or she was, when he or she made their will, in the possession of his or her usual intellectual vigor and understanding. Opinion evidence, in these circumstances, may be used generally whether of lay or expert witnesses.[19]

In fact, the observations of a lay witness as to testamentary capacity can carry as much authority as those of a doctor.[20] Moreover, historically, in *Spence v. Price*, the words of Laidlaw, J.A. were clear in that:

> A judgment may be formed by a person of sound mind and reason, exercising powers of observation and deduction, without the use of any scientific learning whatever. It is a practical question which may be answered by a layman of good sense with as much authority as by a doctor.[21]

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[16] *MacRae on Evidence, supra* note 10 at 147-148.
[17] *Ibid* at 73.
[18] *Ibid* at 73.
[19] *Ibid* at 73-74.
[20] *Schwartz v. Schwartz*, [1970] OJ No 1438, 10 DLR (3d) 15 (ONCA).
[21] [1945] OJ No 343, [1946] 2 DLR 592 (ONCA) at para 6; see also Ian M. Hull, "The Production of Medical Records in Estate Litigation" 18 ETR 2d 187.

In civil cases, a lay witness may express an opinion on the issue of a person's testamentary capacity.[22] In this regard, the Court of Appeal decision in *Robins v. National Trust Co.*[23] provided a helpful and comprehensive analysis of the question of the "helpfulness" of lay witness evidence on the question of testamentary capacity. At paragraph 39 of that decision, the court stated in part:

> There is another type where one specifically is qualified to give an opinion, but who has come into direct relationship with certain of the persons or things involved in the case, may be called to give evidence not only as to those persons or things but to draw conclusions based upon his scientific knowledge or special qualifications and to give the Court the benefit of the conclusions so formed. Cases of this type may present difficulty as to just when to draw the line between what is admissible and what the "Act" excludes. Then there is the type which is in question here, which, while sometimes termed "opinion evidence", is not that a person's "entitled, according to the law or practice, to give opinion evidence" as such, within the meaning of Section 10. Suppose, for example, a man who has associated for years with another is asked whether in all that time he ever saw anything to indicate that the other was insane or incapable of making his will. Would his evidence not be admissible *quantum valeat*? ... I think the plaintiff has failed to establish that there was any infringement by the learned trial judge of the provisions of Section 10.[24]

The modern statement of lay opinion evidence was set out in *R v. Graat,*[25] where Dickson, J. put the admissibility of such evidence on a sound and straightforward basis: "The witnesses had an opportunity for personal observation. They were in a position to give the court real help."[26]

The courts now have a greater freedom to receive lay witnesses' opinions if:

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[22] Alan Bryant, Sidney Lederman & Michelle Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed, (Toronto: LexisNexis, 2014) at para 12.31.
[23] [1925] 57 OLR 46, [1925] OJ No 10 (ONCA) affirmed [1927] AC 515, [1927] 1 WWR 692 (PC) [*Robins* cited to OJ No].
[24] *Ibid* at para 39; see also Schnurr, *supra* note 13.
[25] [1982] 2 SCR 819, [1982] SCJ No 102 (SCC) [*Graat* cited to SCR].
[26] *Ibid* at 836; see also Bryant, *supra* note 22 at para 12.10.

1. The witness has personal knowledge of observed facts;

2. The witness is in a better position than the trier of fact to draw the inference;

3. The witness has the necessary experiential capacity to draw the inference, that is, form the opinion; and

4. The opinion is in a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts he or she is testifying about.

In view of the "helpfulness" principle set out by the Supreme Court of Canada in *R v. Graat*, the categories of topics about which a lay witness can testify are not limited.[27]

A subcategory of opinion evidence of lay witnesses relates to the opinion evidence of the treating doctor. One includes under this heading doctors, nurses, visiting nurses, visiting home-makers and other persons who attended to the physical needs of the deceased and who were not related to the deceased, all of whom should be objective witnesses.[28] It is, of course, settled law that the physician him or herself may wear "two hats" and testify both as a treating physician and as an expert.[29] In their article, Honickman and Abogado note that, in the majority of cases, however, treating physicians will not be qualified as experts and will testify solely as fact witnesses.[30] Again, as the author's note, when this occurs, the court must determine whether the treating physician may offer opinions that were formed at the time of treatment, such as diagnoses and prognoses, or whether the physician's evidence must be confined to bare-bone, non-contentious facts, such as observations and test results.[31]

In *Burgess v. Wu*, Justice Ferguson distinguished between "treatment opinions" and litigation opinions.[32] His Honour went on to note that treatment opinions include the diagnosis, treatment

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[27] Bryant, *ibid* at paras 12.11 – 12.15.
[28] Rodney Hull "Preparation, Presentation and Introduction of Evidence in Contested Estate Matters" (1991), 11 E &TJ 178 at 179.
[29] See Asher Honickman & M. Greg Abogado, "In the Opinion of the Treating Doctor: Adducing Opinion Evidence from Fact Witness Physicians" (2013) 32(2) Adv J 14 at 14;, see also *Degennaro v. Oakville Trafalgar Memorial Hospital*, [2011] OJ No 1836 at paras 21-24 (ONCA).
[30] Honickman, *ibid* at 14.
[31] *Ibid* at 14.
[32] [2003] OJ No 4826 at paras 80-81, 235 DLR (4th) 341 (ONSC).

plan and prognosis made at the time of treatment. These are facts that form part of the evidentiary record and can therefore be put into evidence by a treating physician as a fact witness. This approach was adopted in *Farooq v. Miceli,* where Justice Lauwers (as he then was) affirmed that "treating physicians have always been allowed to give evidence and have been allowed to give opinion evidence about their working diagnosis and working prognosis."[33]

(c) Admissibility of Business Records

The fundamental principle of admissibility is that all facts which are logically probative are admissible in evidence unless excluded by some specific rule of exclusion.[34] Admissibility is thus a matter of logical relevancy cut down by exclusionary rules.[35] A business record is a record made in the ordinary course of business at the time of the occurrence of the fact by a person obliged to record the information and, therefore, is admissible generally.[36] However, as noted in *The Law of Evidence in Canada,* a notable feature of provincial enactments with regard to business records is that they contemplate the admissibility of a record based upon hearsay. In fact, it is expressly provided that lack of personal knowledge by the maker of the record will not affect the admissibility of the document, although it may go to the question of weight.[37] The notably broad spectrum of section 35 of the Ontario *Evidence Act* is, in part, as a consequence of the broad definition of "business", which includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise. Furthermore, section 35(4) provides that:

> (4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.[38]

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[33] 2012 ONSC 558 at para 25.
[34] *MacRae on Evidence, supra* note 10 at 16.
[35] *Ibid* at 6; see also *Re Robertson,* [1936] 1 DLR 53 (PE Prob Ct) where letters written to a testatrix by her friends and relatives were held to be admissible as evidence in respect of questions concerning her mental capacity even though there was no evidence of her conduct in relation to the letters.
[36] *Ares v. Venner*, [1970] SCR 608, 14 DLR (3d) 4 (SCC); *Evidence Act*, RSO 1990, c E 23, *supra* note 7 at s 35; *Evidence Act*, RSC 1985, c C-5, s 30.
[37] Bryant, *supra* note 22 at para 6.218.
[38] RSO 1990, c E 23, *supra* note 7 at s 35(4).

Special attention must be given to the question of notice and production as set out in sections 35(2) and (3):

> (2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
>
> (3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days' notice of the party's intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.[39]

While many records will be made in the usual and ordinary course of business, it is not always the usual and ordinary course of business to make the record. However, even when it is admissible, adequate notice must be given to the other parties that the business record will be tendered, and the other parties are entitled to require production of it. Finally, regardless of whether the subjective opinions of doctors and nurses contained in hospital records constitute "an act, transaction occurrence or event" within the meaning of the legislation, these records were held to be admissible at common law in *Ares v. Venner*.[40]

(d) Admissibility of Expert Opinion Evidence Generally

Generally speaking, a witness who is qualified by education or experience to provide the trier of fact with an opinion in a field that is outside the trier of fact's knowledge and experience may provide that opinion to assist the trier of fact to come to his or her own conclusion. A witness with the expertise to provide an opinion is commonly called an expert witness, and expert witnesses of every sort are often called to give evidence at trials.[41]

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[39] *Ibid* at s 35(2) and 3.
[40] *Ares, supra* note 36; Bryant, *supra* note 22 at paras 6.211 – 6.212, 6.228 – 6.230.
[41] Paul Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 2d ed, (Toronto: LexisNexis, 2014) at 9.85; see also *R. v. Mohan*, [1994] SCJ No 36, [1994] 2 SCR 9 (SCC); *R v. Abbey*, [1982] SCJ

The leading case, *R v. Mohan* sets out the clear parameters of expert opinion evidence beginning at paragraph 17:

> Admission of expert evidence depends on the application of the following criteria:
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> (a) relevance;
>
> (b) necessity in assisting the trier of fact;
>
> (c) the absence of any exclusionary rule; and
>
> (d) a properly qualified expert.[42]

In *R v. Mohan* the Supreme Court of Canada clearly stated that relevance is a threshold requirement for the admission of expert evidence as with all other evidence.[43] Furthermore, relevance is a matter to be decided by a judge as a question of law. The Supreme Court of Canada noted that other considerations are brought to bear when determining the logical relevance of the evidence. For example, evidence that is otherwise logically relevant may be excluded on the basis of a consideration as to "whether its value is worth what it costs".[44] In making this comment, the Supreme Court of Canada noted that the word "costs" in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. The Supreme Court of Canada noted:

> Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect of the trier of fact, particularly a jury, is out of proportion to its ability.[45]

No 59, [1982] 2 SCR 24 (SCC) [*Abbey* cited to SCR]; see also *MacRae on Evidence, supra* note 10 at 150-155.

[42] *R v. Mohan, ibid* at para 17; see also Bryant, *supra* note 22 at paras 12.39 and generally in respect of the discussion regarding the opinion of experts at 12.33 - 12.122.

[43] *R v. Mohan, ibid* at para 8.

[44] *Ibid* at para 22.

[45] *Ibid* at para 22.

In *R v. Mohan,* the Supreme Court of Canada also carefully considered the question of "necessity in assisting the trier of fact" and stated:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. 'An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary.'[46]

In *R v. Abbey,* at the Ontario Court of Appeal level, the four criteria noted above, controlling the admissibility of expert evidence identified in *R v. Mohan*, have achieved an almost canonical status in the law of evidence.[47] There, the court referred to the first phase of admissibility considerations, whereby four preconditions to admissibility must be established as follows:

> - the proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;
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> - the witness must be qualified to give the opinion;
>
> - the proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule; and
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> - the proposed opinion must be logically relevant to a material issue.[48]

In *R. v. Abbey,* the Ontario Court of Appeal carefully noted, "As when measuring the benefits flowing from the admission of expert evidence, the trial judge as "gatekeeper" must

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[46] *Ibid* at paras 21, 25.
[47] *R v. Abbey,* 2009 ONCA 624 at para 75.
[48] *Ibid* at para 80.

go beyond truisms about the risks inherent in expert evidence and come to grips with those risks as they apply to the particular circumstances of the individual case."[49]

(e) The Use and Admissibility of Retrospective Opinions on Testamentary Capacity

The party propounding the will, of course, has the onus of proving testamentary capacity and a common form of evidence placed before the court in respect of such cases is the use of medical opinions prepared by physicians who never met the testator, but are providing an opinion at the request of a party to the litigation, based upon material and information provided to them.[50]

In his article "Psychiatric Opinion Without Examination", Professor Ralph Slovenko undertakes an exhaustive review of the ethics and law of psychiatry and the law on psychiatric opinion without examination. This review is from an American perspective. It canvasses the historical movement toward the use of these types of opinions and highlights many of the same ethical and legal considerations that Canadian professionals in the same circumstances have considered. [51]

Recently, the Canadian courts have also considered the admissibility of retrospective opinions on testamentary capacity.

In *Woodward v. Roberts Estate*, the British Columbia Supreme Court considered whether or not the retrospective opinion of the expert should be admitted in a will challenge proceeding.[52] In this case, the objector in the will challenge proceedings took the position that the expert retrospective opinion should not be admitted into evidence. The court held that the expert report was admissible as it assisted the court in appreciating the technical facts found in the clinical records of the attending physicians.[53] In coming to this conclusion, the court first addressed the question of the four components of the admissibility of expert evidence found in *R v. Mohan* and

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[49] *Ibid* at para 92.
[50] Schnurr, *supra* note 13; see also Ian M. Hull, "The Use and Admissibility of Retrospective Psychiatric Opinions on Testamentary Capacity and Undue Influence" 30 ETR (2d) 52; see also Kenneth Shulman, Carole A. Cohen & Ian M. Hull, "Psychiatric Issues in Retrospective Challenges of Testamentary Capacity" (2005) 20(1) International Journal of Geriatric Psychiatry 63.
[51] Ralph Slovenko, "Psychiatric Opinion Without Examination" (2000) 28 The Journal of Psychiatry & Law 103; see also Shulman, Cohen & Hull, *ibid*.
[52] 2007 BCSC 1192.
[53] *Ibid* at paras 91-101.

found, on a preliminary basis, as in *Mohan*, that the opinion of the properly qualified expert was necessary in the sense that it provided information which was likely to be outside the experience and the knowledge of a judge.[54] In coming to this conclusion, the court looked at the business records produced - namely, the medical records of the attending physicians and medical caregivers - and concluded that the expert opinion evidence in this case was admissible as the expert in question had done a thorough review of all of the medical records of the deceased. The court noted that the question for the court involved consideration of all *(emphasis added)* the admissible evidence, not just the expert's opinion. The expert's opinion was simply some of the relevant evidence in addition to the clinical records.[55]

Furthermore, in *Johnson v. Huchkewich,* Justice Corbett of the Ontario Superior Court considered the question of the admissibility and usefulness of a retrospective opinion in a will challenge proceeding.[56] Justice Corbett determined the question of testamentary capacity in a will challenge proceeding in part on the basis of clinical notes and records provided by the attending physician. In this case, there was no expert report; however, the court noted the fact that it would have been helpful and of assistance to the court if there was indeed an expert report interpreting the findings of the attending physician and the clinical notes and records taken at the time of the care provided to the deceased. The court went on to note that:

> The clinical notes and records do support a conclusion that Ms. Kasiniak had begun to decline mentally and physically by the mid 1990's. This can be no surprise: Ms. Kasiniak was then in her early 80's. But the clinical notes and records do not establish that Ms. Kasiniak was "going down rapidly". Rather, this is a medical opinion the applicant asks the court to accept on the basis of the clinical notes and records, and in the absence of any qualified medical expert to support that opinion. I will not do that. The fact that Ms. Kasiniak had some deficits by 1998 is not a basis for inferring incapacity. The fact that some of these deficits were mental is no basis to draw such an inference. The fact that she did well, or poorly, on general diagnostic tests is no basis for such an inference. The diagnosis of Dr. Varga, that Ms. Kasiniak was experiencing the onset of dementia

[54] *Ibid* at para 94.
[55] *Ibid* at para 101.
[56] 2010 ONSC 6002.

> and/or Alzheimer's by December 1999, is not a basis for drawing such an inference. The task of interpreting these findings is properly for a medical expert or one of Ms. Kasiniak's clinicians to do. Such an opinion could have assisted the court in understanding the functional impact of these descriptions and diagnoses. In the absence of an expert opinion, I rely upon Dr. Kasiniak's observations and conclusions, and the dearth of evidence establishing any practical functional impairment of Ms. Kasiniak's abilities that would bear on her testamentary capacity in April 1998.[57]

Indeed, an expert witness providing a retrospective opinion on testamentary capacity allows the court to be assisted with an interpretation of the medical records and, more importantly, that assistance can come from a comprehensive review of all of the relevant medical records of the deceased, not just the clinical notes and records of one or a few attending physicians or medical caregivers.

(f) Hearsay – Generally

The statement of the rule is as follows:

> Evidence is not admissible through the mouth of one witness to show what a third person said for the purpose of proving the truth of what that third person said, (1) because to admit such evidence would be to accept the statement of a person not on oath, and (2) because that person cannot be cross examined on his statement.[58]

Another working definition of the rule can be stated as follows:

> Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.[59]

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[57] *Ibid* at para 44.
[58] *MacRae on Evidence, supra* note 10 at 168.
[59] Bryant, *supra* note 22 at para 6.2.

Further, the usual hearsay circumstance covered by the rule is where the witness testifies as to what *someone else,* who is not before the court, said.[60]

In addition, hearsay statements are typically objected to at trial. Mistakes or oversight of counsel with respect to objecting to the admission of evidence does not relieve the judge from the duty to ensure that only admissible evidence is put before, or considered by, the trier of fact, whether that be the judge or a jury.[61]

(g) Past Recollection Recorded/Present Recollection Revived

Two elements of the hearsay rule that can surface in estate litigation are the concepts of past recollection recorded and present recollection revised.

The issue of past recollection recorded arises in circumstances where the witness has no recollection of an event or fact but has reliably recorded the event or fact contemporaneously with the occurrence. If the record is acknowledged to have been accurate, the record is admissible for the truth of its contents. The record is then marked as an exhibit and the past recollection record is revived.[62]

Where a witness, when the facts were fresh in his mind, has made or verified a written record of them, and now is able to swear to the accuracy of that record, he may use it as part of his testimony, although he has not now any independent recollection of such facts.[63] Accordingly, for past recollection recorded, there is no requirement for the witness to have present memory of the event. In cases of past recollection recorded, where a witness has no present memory, she or he may testify at trial from:

(1) A writing made by the witness at or near the time of the occurrence of the event or matter recorded; or

(2) A writing made by a person other than the witness, recording events or matters observed or heard by the witness, which the witness verified as an accurate account when the facts were fresh in his memory of the witness. For example, a

[60] See *R v. Khelawon*, 2006 SCC 57.
[61] Bryant, *supra* note 22 at para 2.92.
[62] *R v. Fliss*, 2002 SCC 16.
[63] *MacRae on Evidence, supra* note 10 at 347; see also Bryant, *supra* note 22 at para 16.98.

> clerk who entered a transaction into a book as they occurred, which were then copied onto a ledger by the clerk's employer and checked by the clerk, was allowed to refer to the ledger to refresh his memory so as to be able to testify about the transactions.[64]

The absence of independent recollection and the role of past recollection recorded is described in *The Law of Evidence in Canada* as requiring the following:

1. The statement must have been recorded in some reliable way.

2. When made, the events must have been sufficiently fresh and vivid to be probably accurate.

3. The witness must affirm that the statement was true and accurate when he or she made it.

4. The original statement itself must be used, if it is available.[65]

Furthermore, the personal knowledge of the declarant is, of course, not a requirement, as a consequence of provincial enactments of the *Evidence Act*, namely, section 35 of the Ontario *Evidence Act* for example. These provincial statutes contemplate the admissibility of the record based upon hearsay. It is expressly provided that lack of personal knowledge by the maker of the record will not affect the admissibility of the document, although it may go to the question of weight. Therefore, the record, based upon information given to the maker, is nevertheless admissible.[66]

The concept of present recollection revived is described in *MacRae on Evidence* as relating to circumstances where a witness may have forgotten the fact entirely but, upon looking at a written document, may be able to recall that fact and so testify regarding it from actual present recollection.[67] For the purpose of "refreshing the memory of the witness", any writing whatsoever may, on principle, be used - whether written by the witness himself or not. The

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[64] *Ibid* at para 16.99; see also John Henry Wigmore *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3d ed, (Whitefish, MT: Literary Licensing, 2012) at para 759.
[65] Bryant, *ibid* at para 16.104.
[66] *Ibid* at para 6.224.
[67] *MacRae on Evidence, supra* note 10 at 349-351.

editors of *The Law of Evidence in Canada* note that caution needs to be brought to this type of analysis.[68] Notwithstanding the broad language of the provincial *Evidence Act* statutes, which allow for broad admissibility of information recorded by an individual based on information given to that maker, it does certainly go to the question of weight.

However, the New York Court of Appeal's decision in *Johnson v. Lutz*[69] has been referred to by a number of Canadian courts and bears consideration. In the *Johnson* case, which was an action arising out of a motorcycle accident, entries contained in a police officer's report where held to be inadmissible on the ground that they were not based upon the officer's personal knowledge but upon information given to him by a bystander.[70] In fact, the Court held that the police report did not fall within the New York equivalent of the provincial business records provisions, notwithstanding the fact that an explicit provision in the New York statute was broadly described, as it is in the provincial statutes in Canada. The relevant statute stated:

> All other circumstances of the making of ... [the] record, including lack of personal knowledge by the entrant or maker ... shall not affect its admissibility.[71]

The Court held that the police report of the accident was not a record made in the regular course of business in the sense that the legislature intended. This important distinction described by the New York Court of Appeal is a significant observation when dealing with evidence in estate litigation proceedings.

(h) The Rule in *Browne v. Dunn*

Justice Perell in his article, "An Evidence Cheat Sheet"[72], describes the rule in *Browne v. Dunn*[73] as a circumstance in which a witness's credibility is going to be impeached and, as a result, he or she should be given the opportunity during cross-examination to provide an explanation. Further, evidence elicited to contradict the evidence of a witness who was not given the

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[68] Bryant, *supra* note 22 at para 6.224.
[69] 253 NY 124, 170 NE 517 (NYCA 1930).
[70] Bryant, *supra* note 22 at para 6.218.
[71] *Ibid* at para 6.218.
[72] Perell, *supra* note 6.
[73] *Browne v. Dunn*, (1893), 6 R 67 (HL)

opportunity to defend his or her account of the evidence is admissible but is given less weight, or its introduction is grounds for recalling the witness.[74]

The leading Ontario case of *R v. Dexter*[75] provides a careful review of the rule in *Browne v. Dunn*. The rule in *Browne v. Dunn* is not nearly a procedural rule; it is a rule of trial fairness. The rule was summarized by the Ontario Court of Appeal in *R v. Henderson* as follows:

> This well-known rule stands for the proposition that if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given the chance to address the contradictory evidence in cross-examination while he or she is in the witness-box.[76]

In *R v. Dexter* the procedure is described as follows:

> The cross-examiner gives notice by first putting questions to the witness in cross-examination that are sufficient to alert the witness that the cross-examiner intends to impeach his or her evidence, and second, by giving the witness an opportunity to explain why the contradictory evidence, or the inferences to be drawn from it, should not be accepted. [77]

CONCLUSION

While this paper does not intend to comprehensively and conclusively review all of the potential evidentiary issues that can arise in estate litigation matters, it does serve to review some of the typical evidentiary issues and scenarios that may arise.

[74] *Ibid*; See also D.S. Ferguson, *Ontario Courtroom Procedure* (Toronto: LexisNexis, 2008) at 856-861.
[75] 2013 ONCA 744.
[76] [1999] OJ No 1216, 44 OR (3d) 628 (ONCA) at para 18.
[77] *Dexter, supra* note 75 at para 17; see also Bryant, *supra* note 22 at para 16.197.

Tab 8

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PASSINGS OF ACCOUNTS
- Contentious Proceedings and Case Law Update

Ian M. Hull
Tel: (416) 369-7826
Fax: (416) 369-1517
Email: ihull@hullandhull.com

Hull & Hull LLP
Barristers and Solicitors

TORONTO
141 Adelaide Street West, Suite 1700
Toronto, Ontario M5H 3L5
TEL: (416) 369-1140
FAX: (416) 369-1517

OAKVILLE
228 Lakeshore Road East
Oakville, Ontario L6J 5A2
TEL: (416) 369-1140
FAX: (416) 369-1517

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INDEX

INTRODUCTION

The purpose of this paper is to provide an overview of estate trustees' obligations, including their duty to keep and pass accounts, and to provide an update on case law in this area.

ASSETS OF THE ESTATE

In a sense, all personal property of the deceased which is of a saleable nature and may be converted into money is an asset of the estate. This, of course, can include the deceased's right of action or possession.

Pursuant to the *Estates Administration Act,*[1] real and personal property devolves to the deceased's personal representative.

Except in circumstances where there is wilful default, fraud or gross carelessness, ordinarily, trustees are not liable beyond what they actually receive in the context of an estate administration. Some unique assets to consider in the context of preparing estate accounts are as follows:

- a mortgage;
- a lease;
- profits made from continuing the testator's business;
- the benefit of a licence;
- an option;
- digital assets;
- a right of action; and
- any rights to support payments or property under the provisions of a domestic contract, such as a marriage contract.

[1] RSO 1990, c E 22 [*Estates Administration Act*], s 2.

VALUATION, CONTROL AND CUSTODY AND INVENTORY OF THE ASSETS

Taking possession of the assets of the Estate is the Executor's immediate obligation, and if not properly undertaken, can be the subject of an accounting by the beneficiaries. In the course of determining the nature and extent of the assets of the estate, the Executor's obligation is to undertake an inventory of the assets and to do so without delay. The delay is, of course, considered on a case by case basis, and is typically no longer than the Executor's year at a maximum.

It is the obligation of an Executor to bring in all of the assets of the estate, whether specifically bequeathed or otherwise, and the expenses associated with collecting those assets are typically payable out of the general estate unless the will provides otherwise.[2]

The liability of an Executor or Administrator for loss of assets of the estate in his or her hands has been developed through the Courts and subsequently adopted by section 7 of the *Courts of Justice Act*.[3] The Executor's liabilities are typically considered in the context of whether or not the fiduciary has acted for the benefit of the estate, used proper diligence, and acted with ordinary care and circumspection in the discharge of his or her trust. If this is the case, then he or she will not be held answerable for the losses.[4]

DUTY TO MAINTAIN ACCOUNTS

An executor has a duty to keep accurate records of his or her administration of the estate.[5] A primary remedy available in equity against an executor is the obligation to account. In the context of fiduciary obligations, the accounting remedy is imposed for the purpose of requiring the fiduciary to disgorge any benefit obtained through breach of the duty of loyalty.

Some of the duties and obligations of a fiduciary in relation to accounting to beneficiaries are as follows:

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[2] C. Thériault, *Widdifield on Executors and Trustees*, 6th ed, looseleaf (Toronto: Carswell, 2002) at 2-13 [*Widdifield*].
[3] RSO 1990, c C 43 [*Courts of Justice Act*], s. 7.
[4] *Widdifield*, *supra* note 2 at 2-13.
[5] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 74.17(1) [*Rules of Civil Procedure*].

1. To keep proper accounts of the trust estate which should be clear and accurate and rendered at appropriate intervals to the beneficiaries;

2. The accounts must be kept distinct from other accounts;

3. Receipts or cancelled cheques and vouchers must be preserved to support entries on both the credit and debit side of the accounts; and

4. To produce to any beneficiary the accounts when reasonably requested.

In the case of income or revenue beneficiaries, accounts must be rendered at reasonable intervals without being requested by the beneficiaries entitled to such income or revenue. In the case of residuary beneficiaries, accounts should be presented when the interest falls into possession.

These beneficiaries are entitled to inspect and investigate the accounts, vouchers and other documents of the trust estate, including the will or trust deed. They are also entitled to such full and accurate information regarding the state of the trust property and the administration generally as is or ought to be within the knowledge of the Trustee.

Thus the accounts must be kept in such a manner that they will clearly show how all the monies or assets received have been disbursed or otherwise disposed of, and the ultimate distribution among the beneficiaries of the available estate.

It goes without saying, of course, that beneficiaries who are given general or specific bequests or devises and who have received these bequests in full are not entitled to any further accounting.

If, for any reason, the executor cannot keep the accounts himself or herself, he or she is under a duty to employ a competent person to do so, and these costs will generally be chargeable out of his or her compensation, as it is his or her duty to keep the accounts.

Further duties and obligations imposed upon trustees include:

1. To make all beneficiaries fully acquainted with their rights;

2. To disclose any and all breaches of trust;

3. To allow all beneficiaries sufficient time to investigate the accounts;

4. To ensure that all beneficiaries have competent and independent advice in their investigation of the accounts; and

5. To notify all beneficiaries interested of any Court audit.

In general terms, the accounts should provide all essential information to all persons interested or entitled to an accounting in the estate or trust in a manner that is capable of being understood by a person of average intelligence, literate in English, and familiar with basic financial terms, who has read the trust document with care and attention. Accordingly, a fiduciary preparing her accounts should be careful to avoid technical terms such as "debit" and "credit," which are generally not known to persons who are not familiar with bookkeeping and accounting practices.

STATEMENT OF ORIGINAL ASSETS

In addition to the above, it is the Executor's obligation to provide a statement of original inventory or assets of the estate, and this is particularly set out in Rule 74.18 of the *Rules of Civil Procedure*.

FORM OF ACCOUNTS

The *Rules of Civil Procedure* outline the specific requirements for an application to pass accounts; however, there are a few general principles that should be considered.

Firstly, cash accounting rules apply and the accounts themselves do not reflect a "balance sheet" approach. The accounts for passing have been described as being similar to a bank book, which allows each and every entry throughout any specific point in time.

The *Rules of Civil Procedure* provide that accounts only need to be divided between capital and revenue in circumstances where there is some division of interest in the assets, such as where there are capital and income beneficiaries of an estate, for example.

As noted above, it is essential that a comprehensive list of the original assets are provided at the outset and that every original asset has an entry.

Furthermore, it is the duty of the executor to keep all records, receipts, cancelled cheques, and other vouchers that provide the back-up and supporting documentation with regard to each of the entries.

It can be said therefore that any accounting by an executor has both a broad and a narrow aspect. In the broad sense, it is an obligation whereby the executor furnishes information to interested parties on an ongoing basis concerning the administration of the assets. In the narrow sense, the executor's accounting relates to the accounts prepared at the close of his or her administration (or some appropriate intermediate stage) so as to reflect the transactions that have occurred, with a view to discharging the executor from liability for his or her stewardship.

The purpose of the type of accounting contemplated by the *Rules of Civil Procedure* is to record all transactions with a view to extinguishing the executor's fiduciary obligation to further account in the administration of the assets.

Once the accounts have been passed, the executor is relieved of any further accounting for the period except for items arising as a result of fraud or mistake.

A passing of accounts by an executor should typically include the following:

- a front page, indicating the period of the accounting and the date on which the accounts were prepared;

- an index disclosing the page numbers of the summary, the assets under the executor's management at the beginning and end of the accounting period, income, capital and investment transactions and a statement of the compensation claimed by the executor (each category set out in the summary should refer to the schedule in the accounts supporting that category and which will provide the details on which the summary is based);

- the inventory of the assets as at the beginning of the accounting period. These items should be detailed and should not simply refer to a total amount or refer to an inventory filed, either on another passing or in another location. While the assets in the inventory are recorded and maintained in the accounts at book value, i.e. the amount at which the executor obtained the assets, it is suggested that because these values are commonly misunderstood by persons considering the accounts as being a representation of actual values, in addition to the book value, the current market values should also be indicated in the inventory;

- a schedule of the assets under the executor's management as at the date of the preparation of the accounts and the comments relating to the insertion of current market values pertaining to this schedule;

- a schedule of the investment account transactions, setting out the sale or other disposition of securities during the accounting period. These transactions are shown as a separate item in a combined schedule indicating the transaction, date, and explanation. It may be helpful to identify gains and losses from the sale or purchases of securities as a separate schedule; and

- a statement of compensation.

Some considerations specific to unique assets that should be addressed as part of the accounting process are briefly reviewed below.

SPECIFIC AND UNIQUE ASSETS

Goodwill

The proceeds of the sale of goodwill in the practice or business of the deceased can be an important asset in respect of any estate administration and needs to be properly accounted for when there is still value in the goodwill at the date of death. In the case of a commercial partnership, it is now generally held that, subject to a provision in the partnership agreement to the contrary, the portion of the goodwill is naturally the deceased's asset.[6]

Chose in Action

It is a general assumption that the right of action which survived death will automatically pass to the personal representative. Instances where a chose in action is an asset of the estate include:

- actions against directors of the company;
- claims for a settlement agreement or contract of employment; and
- personal injury claims.

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[6] *Widdifield*, *supra* note 2 at 2-26 at paras 2.5.1.

Special attention must be given to section 38 of the *Trustee Act,*[7] which states specifically that there is a limitation period of 2 years for the commencement of actions for tort and damages generally.

Foreign Assets

It was generally held that an Executor was not obligated to include in the inventory of the estate assets that are in a foreign jurisdiction. However, where an individual is named Executor of the whole estate, wherever situate, he or she cannot completely ignore foreign assets.[8]

Land

Whether chattels attached to a building or land are fixtures is a question of fact depending principally on two considerations: Whether they can be easily removed without injury to them or to the building or land; and whether the object of the annexation was for the permanent and substantial improvement of the dwelling or merely for the temporary purpose and the more complete enjoyment and use of it as a chattel.[9]

Digital Assets

Digital assets have become increasingly prevalent in recent years. Such assets include any "record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means."[10] While the executor may face practical challenges in accessing a Deceased's digital assets, he or she should nevertheless make inquiries regarding such assets and, to the extent possible, be prepared to address the management of these assets within court-format accounts.

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[7] RSO 1990, c T 23 [*Trustee Act*], s. 38.
[8] *Widdifield supra* note 2 at 2-64.1 at para 2.5.9.
[9] *Widdifield supra* note 2 at 2-68 at para 2.5.12.
[10] *Uniform Access to Digital Assets by Fiduciaries Act (2016)*, Uniform Law Conference of Canada, available at: http://www.ulcc.ca.

OTHER CONSIDERATIONS

As a result of *Re: Silver Estate,*[11] there is no requirement that an Executor act under exclusively a probated will and, therefore, may be compelled to pass his accounts for both unprobated and probated assets.

Executors may be guilty of negligence or careless administration where they sell or dispose of the assets at less than their value.[12]

EXECUTOR'S COMPENSATION

Executors are entitled to compensation for their efforts; however, the quantum of such compensation can often become a contentious issue where the beneficiaries perceive the amount claimed by the executor or trustee to be excessive.

If the Will granting the executor his or her authority does not expressly outline the extent of the compensation claimable or the means by which any compensation should be calculated, the executor will be required to turn to statute and case law for guidance and in support of his or her claim for compensation.

Section 61(1) of the *Trustee Act* states that a "personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice".[13]

However, unlike guardian and attorney for property compensation, which has a calculation expressly provided for in section 40 of the *Substitute Decisions Act* and section 1 of Regulation 26/95 (as amended), there is no statute in Ontario that specifically outlines how executor compensation must be calculated.

As a result, a percentage tariff calculation has been developed through case law, which now serves as the baseline for the calculation of executors' compensation. The tariff sets claimable executor's compensation at 2.5% of the value of each of the capital receipts, income receipts, capital disbursements and income disbursements, and also permits an overall care and management fee of

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[11] [1999] OJ No 5026 (SCJ).
[12] *Widdifield, supra* note 2 at 2-14.2.
[13] *Trustee Act, supra* note 7, s. 61(1).

2/5 of 1% of average annual value of the assets. The award of an additional fee is the exception, rather than the rule.[14]

However, as the tariff percentages do not consider the actual time and efforts exerted by the executor, sole use of the tariff percentage calculation can result in inadequate compensation in the case of a complex estate or disproportionate compensation in the case of a simple estate.

Therefore, in determining whether the tariff calculation is in fact "fair and reasonable", the courts will generally have regard to the five factors set out in *Re Toronto General Trust v. Central Ontario Railway Co.*[15], which provides a factual analysis of the actual work completed by the executor or trustee. These factors include:

1. the size of the trust,
2. the care and responsibility involved,
3. the time occupied in performing the duties,
4. the skill and ability shown by the executor or trustee, and
5. the degree of success resulting from the administration.

Potential challenges to proposed executor or trustee compensation are much less likely to arise if the amount of compensation is thoughtfully considered. Executors should consider both the percentage tariff and the above noted five factors before proposing his or her compensation to the beneficiaries in order to ensure the amount claimed is truly fair and reasonable.

ACCOUNTING REMEDIES

As stated earlier, the accounting remedy is imposed for the purpose of requiring the fiduciary to disgorge any benefit obtained through breach of the duty of loyalty. Some accounting remedies are briefly reviewed below.

Rescission

The equitable remedy of rescission involves the setting aside of a transaction and the granting of such incidental relief as will restore the parties to their previous position.

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[14] *Re Archibald Estate*, [2007] OJ No 2390 at paras 20-24.
[15] [1905] OJ No 536, 6 OWR 350, at para 20.

This equitable remedy or damages in lieu, is available on a passing of the accounts of an Executor.[16] The position is the same on the passing of the accounts of an Attorney.[17]

There is, of course, a limit as to the availability of rescissionary relief. For instance, relief will not be allowed if the impugned transaction has been affirmed, if there has been laches or undue delay in seeking relief, or if third party rights have intervened.

Tracing

There are circumstances where a fiduciary's misconduct may result in the necessity to go beyond specific recovery of the unjust enrichment. For example, if the property in question cannot be recovered in its original form.

In order to successfully obtain a tracing order, one must first prove legal ownership of the property. Problems of identifying the property may arise, and the process of tracing the property itself can be cumbersome.

An illustration of a problem that can arise with respect to identifying a property is where two chattels are merged into one and each one's identity is lost in the other. For example, where a car is purchased under a conditional sales agreement and value is thereafter added to the car by way of new tires or equipment.

The answer to the question of whether the property can be identified is not an easy one and, of course, may depend on the terms of the contract itself. Furthermore, the general law of accession applies, and the Court will look at whether or not the item in question has become sufficiently annexed to the vehicle to constitute an accession.

The definition of accession has been set out in the decision of *Dawson v. Floyd Dunford Ltd.*[18], as follows:

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[16] *Estates Act,* RSO 1990, c E 21, s. 49(3).
[17] *Substitute Decisions Act*, SO 1992 c 30, s. 42(6).
[18] [1961] OWN 225 (Co Ct.) at 227.

> Accession, strictly speaking, is where a thing which belongs to one person becomes the property of someone else by reason of its becoming added to or incorporated with a thing belonging to the latter.[19]

Another consideration of the law of tracing relates to circumstances where the property of someone is transformed by the labour of another into a new form of property. The key question here, of course, is whether or not the title to the transformed property belongs to the owner of the original property, or has passed to the person who had performed the labour and thus transformed it.

As to the tracing of money, in general, money can be traced so long as it can be identified and has not been mingled with other money. However, if money becomes indistinguishably mixed with that of another, the right to trace those funds may be lost.

In *Clarke v. Shee and Johnson*[20], the Court expressed the rule as follows:

> Where money or notes are paid bona fide, and upon a valuable consideration, they never shall be brought back to the true owner; but where they come mala fide into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover. It is of public benefit and example that he should: but otherwise, if they cannot be followed and identified, because there it might be inconvenient and open a door to fraud.

In *McTaggart v. Boffo*[21], the Court described the doctrine of tracing money in this fashion:

> Tracing is only possible so long as the fund can be followed in a true sense, i.e., so long as, whether mixed or unmixed, it can be located and identified. It presupposes the continued existence of the money either as a separate fund or as a part of a mixed fund or as latent in property acquired by the means of such a fund. Simply put, two things will absolutely prevent the tracing of trust monies:

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[19] W.J. Byrne, *A Dictionary of English Law* (London: Sweet & Maxwell, 1923) at 8.
[20] (1774) 1 Cowp 197 at 200, 98 ER 1041.
[21] (1975), 10 OR (2d) 733 (HCJ), 64 DLR (3d) 441 at 458.

(a) if, on the fact of any individual case, such continued existence of the identifiable trust fund is not established, equity is helpless to trace it;

(b) the chain for tracing is also broken where the trust fund either in its initial form or a converted form has found its way into the hands of a third person purchaser for value without notice.

Onus and Evidentiary Considerations

In matters involving a fiduciary, the question of gifts received by the fiduciary is often raised. An *inter vivos* gift is a gratuitous transfer of property from its owner to another person with the intention that the transfer have a present effect and the title of the property passes to the donee. There are two major components to this process (a) the transfer is gratuitous, and (b) there is an intention to pass title to the donee.

The onus is on the donee to prove that there is an intention on the part of the donor to transfer the beneficial ownership as well as the legal title.

The onus of proof is on the defendant to prove a valid gift *inter vivos.*

The presumption arising upon a voluntary transfer of property is that of a resulting trust to the donor, and the burden is on those asserting a beneficial transfer to establish that fact.

The presumption of a resulting trust can only be met by providing the same convincing and unimpeachable evidence that is required for an *inter vivos* gift.

Where undue influence is alleged, consideration must be given to whether there was potential for domination given the nature of the relationship between the parties. The test embraces those relationships which equity has already recognized as giving rise to the presumption, such as a solicitor and client relationship, parent and child, guardian and ward, as well as other relationships of dependency which defy easy categorization.[22]

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[22] *Geffen v Goodman Estate*, [1991] 2 SCR 353. [*Goodman*].

If the evidence is clear that the donor was in a relationship of dependency to the donee at the time that she granted the donee a Power of Attorney, then, there is not a relationship of equals. While there may or may not be sufficient evidence to make a finding on the mental capacity of the donor at any point in time, clearly if she was in a weakened condition, both mentally and physically, throughout the period of time the gifting is alleged to have occurred, then any gifts by the donor are subject to review.

As to the issue of the presumption of undue influence, an *inter vivos* disposition of property may give rise to the presumption in cases of gifts to persons standing in a fiduciary relationship or some other relationship, whereby the donee was in a position to overbear the donor. In these cases, such persons must show that they did not influence the donor in making the gift.[23]

In such a case there is a presumption of undue influence,[24] and the onus on a beneficiary who attempts to discharge the presumption is a heavy one even when the sale is done at fair market value. The onus on the fiduciary is much heavier when the transaction is a gift.[25]

When an executor or a beneficiary acquires property of an estate without an order of the Court, or fails to rebut the presumption of undue influence, the other party is entitled to a rescission, or when that is not possible, to damages.[26]

In circumstances where there is a challenge to an *inter vivos* gift which does not involve an attorney or a beneficiary, the onus is on the recipient of the gift to provide convincing and unimpeachable evidence that the donor intended to make the gift.[27] The onus is on the recipient (plaintiff) to show that the transaction was a gift; and that must be established by proving a clear and unmistakable intention on the part of the donor to make a gift of money to the plaintiff.

In weighing the conflicting evidence it is not sufficient that the preponderance of evidence may turn the scale slightly in favour of a gift. The preponderance must be such as to leave no reasonable

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[23] Feeney, Thomas G. & Jim Mackenzie. *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Toronto: Butterworths, 2000) at 42. [*Feeney*].
[24] *Goodman supra* note 75 *at* 114-115.
[25] *Re: Taerk*, [1957] OR 482 (CA), see also *Goodman, supra* note 45 at 114-115.
[26] *Treadwell v. Martin* (1976) 67, DLR 3rd 493 (NBAD); *Cheese v. Thomas*, [1994] 1 All E.R. 135 (C.A.).
[27] *Dell'Aquila Estate v. Mellof*, [1996] 6 WWR. 445 at 454 (Sask QB); *Johnston v. Johnston* (1913), 12 DLR 537 at 539 (Ont CA).

room for doubt as to the donor's intentions. If it falls short of going that far, then the contention of a gift fails.

In Halsbury's Laws of England[28], it is stated:

> A gift alleged to have been made by a deceased person cannot, as a general rule, be established without some corroboration … there is no hard and fast rule that the alleged donee must be disbelieved if uncorroborated. It must be examined with scrupulous care, even with suspicion, but if it brings conviction to the tribunal which has to try the case, that conviction will be acted on.

In addition, it should be noted that the *Ontario Evidence Act*[29] makes it clear that corroborative evidence is required when dealing with actions by or against the heirs of an estate. Section 13 of *Ontario Evidence Act* provides as follows:

> **13.** In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. [30]

LITIGATION – CASELAW REVIEW

Introduction

Litigation involving fiduciary accounting is often contentious, time-consuming and costly. With parameters set out in the *Trustee Act* and the *Substitute Decisions Act*, the focus on fiduciary accounting has changed fairly dramatically. While the obligations and responsibilities have not significantly been altered there has been a change in the nature of the litigation and the volume of complaints, problems and litigation arising from these circumstances, has increased. The remainder of this paper will provide an update on case law in this area.

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[28] (4th) Vol 20 at 15.
[29] RSO 1990, c E 23.
[30] *Ibid*; see also B. A. Schnurr, *Estate Litigation – Requirement of Corroboration* 5 ETQ 42.

Case Law Update

Leave to Compel/Participate in Passings of Accounts

The Ontario Court of Appeal has recently addressed the issue of leave to compel a passing of accounts by an attorney or guardian of property under subsection 42(4) of the *Substitute Decisions Act*, as well as the ability of a party who is not served with the application to pass accounts to nevertheless participate in the proceeding.

Several recent court decisions have considered the circumstances in which leave ought to be granted under subsection 42(4)(6) of the *Substitute Decisions Act*. In *Lewis v Lewis,*[31] this issue was revisited. The Court of Appeal emphasized that the granting of leave to compel a passing of accounts is within the Court's discretion, and leave will not automatically be granted, even where the test for granting leave to appeal has been satisfied by the individual seeking leave to compel a passing of accounts.

Typically, to obtain an order compelling a passing of accounts:

1. the person seeking leave must have a genuine interest in the grantor's welfare; and
2. it must be reasonable to believe that a court hearing the matter may order the respondent to pass accounts.[32]

In considering whether or not to exercise its discretion to compel a passing of accounts, the Court may consider the extent of the attorney or guardian's involvement in the grantor's finances, as well as if the person seeking leave has raised a significant concern regarding the management of the grantor's property.

Furthermore, the Court of Appeal has recently suggested that parties who have been described as vexatious litigants may be denied participation in a passing of accounts on that basis, notwithstanding that the other elements of the test for granting leave to compel a passing of accounts may be satisfied.[33] Even if an application to pass accounts has been commenced, the ability to participate in the proceeding is not an automatic right and leave

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[31] 2020 ONCA 56.
[32] *Ibid* at para 5.
[33] *BMO Trust Company v Childs*, 2020 ONCA 21; leave to appeal denied.

to participate may be denied on the basis that the individual seeking to participate is a vexatious litigant.

While an adult child expected to one day be a beneficiary under a Last Will and Testament may have a contingent interest in his or her parent's estate, he or she will not automatically be granted leave to compel a passing of accounts and/or participate in such a proceeding, as these determinations appear to remain in the Court's sole discretion.

Contested Passings of Accounts

In *Toller James Montague Cranston (Estate of)*, the beneficiaries of the estate commenced a court application against the estate trustee seeking to (1) remove her as trustee, (2) requiring and directing her to immediately wind up and distribute all of the estate assets, and (3) requiring her to pass her accounts immediately. The estate trustee ultimately commenced an application to pass her accounts four months later.[34]

The beneficiaries argued that the estate trustee should provide a receipt for every expense she incurred in her role, and that in every instance where a receipt was not provided, she should be ordered to repay that amount to the estate.[35]

The Court affirmed that the standard required for an individual acting as estate trustee with respect to accounts is the standard of care of a person of ordinary care and diligence in managing their own affairs.[36] The Court then found that the estate trustee in this case had met the standard because she provided "an accurate record of all receipts and disbursements, provided detailed explanations under oath explaining the reasons for each expense, and also produced copious records to justify and corroborate the amount of each expense charged to the estate."[37]

The Court concluded as follows:

> While obtaining a receipt for all estate expenses is the recommended approach, I find that the estate trustee was not required to obtain a receipt for every expense in order to allow

[34] 2021 ONSC 1347 at paras 39-40.
[35] *Ibid* at para 49.
[36] *Ibid* at para 50; see also *Fales v Canada Permanent Trust Co*, [1977] 2 SCR 302 at para 315.
[37] *Supra* note 34 at para 55.

> her to be reimbursed for expenses she incurred, where she produced accurate accounts for all expenses, which were incurred for the benefit of the estate, along with volumes of corroborating documents.[38]

This litigation was in large part due to the beneficiaries' misconception that the estate trustee could not act without their consent. As a result, the Court went on to clarify that, while estate trustees act for the benefit of others, they do not act at their instruction.[39]

Finally, the Court found that the beneficiaries mistakenly believed that the estate trustee had a duty to equalize all interim estate distributions exactly, prior to the final passing of accounts. The Court clarified that, "in an intestacy, an exact equalization of distributions to beneficiaries is only required when the estate is fully and finally distributed and the estate is wound up."[40]

Treatment of Compensation

In *Toller James Montague Cranston (Estate of)*, in determining the quantum of compensation to which the estate trustee was entitled, the Court followed the Ontario Court of Appeal's approach in *Laing Estate v Hines.*[41] That is, it considered the tariff amount and compared that amount against the five factors approach set out in *Re: Toronto General Trusts Corp. v Central Ontario Railway.* This same approach has been followed in other recent court decisions.

For example, in *Estate of Françoise Poitras v Canadian Cancer Society*[42], the Court held that a calculation based on the tariff amount was a good starting point, but that a judge must ultimately determine what compensation is "fair and reasonable" in the circumstances of the case by considering the five factors set out in *Re: Toronto General Trusts Corp v Central Ontario Railway.*[43] In this case, after considering the five factors, the Court concluded that the Estate Trustee was entitled to compensation based on the usual formula, but that he was not entitled to an additional care and management fee.[44]

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[38] *Ibid* at para 61.
[39] *Ibid* at para 62.
[40] *Ibid* at para 67.
[41] 1998 CanLII 6867 (ON CA).
[42] 2021 ONSC 406.
[43] *Ibid* at paras 12-13.
[44] *Ibid* at paras 14-26.

Costs Treatment in a Contested Passing of Accounts

Tracey Lynn Matchett, in her capacity as Estate Trustee of the Estate of Sandra Lee Vaughan v Janice Lynn Durant

In a decision released on February 18, 2021, Justice Muszynski of the Ontario Superior Court of Justice held that the Applicant estate trustee was entitled to increased costs payable from the Respondent's interest in the estate.[45]

The facts in this case were as follows: the Deceased died in New Brunswick and the Applicant was appointed as estate trustee under the Deceased's Will in New Brunswick. Pursuant to the Will, the Estate was liquidated and a trust was settled. Per the instructions of the Applicant, the estate lawyers in New Brunswick prepared an accounting and a release. The Respondent, one of the beneficiaries of the estate, refused to sign the release and instead brought an *ex parte* motion in Ontario against the Applicant. The Respondent sought an order requiring the Applicant to file an Application to Pass Accounts. The Respondent also advanced allegations of impropriety and negligence against the Applicant in relation to her role as estate trustee.[46]

As a result of the Respondent's *ex parte* motion, an Order to Pass Accounts was issued. In response, counsel for the Applicant provided a "fulsome account" of the Applicant's attempts to informally account to the beneficiaries in New Brunswick. The Applicant also suggested that an informal accounting was preferable in order to save on costs.[47]

The parties were ultimately unable to agree on a process, and the Applicant filed an Application in the Ontario Superior Court of Justice. A few months later, the Applicant served a Request for Increased Costs (Estate Trustee) with a Costs Outline, requesting that she be awarded full indemnity costs payable out of the Estate.[48] The Applicant argued that she had incurred significant legal fees in her effort to respond to the Applicant's allegations against her.[49]

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[45] *Tracey Lynn Matchett, in her capacity as Estate Trustee of the Estate of Sandra Lee Vaughan v Janice Lynn Durant*, 2021 ONSC 1253 at para 4.
[46] *Ibid* at paras 8-14.
[47] *Ibid* at para 16.
[48] *Ibid* at paras 18, 20.
[49] *Ibid* at para 28.

Justice Muszynski confirmed that the accepted principle is that estate trustees are generally entitled to be fully indemnified for all costs properly related to the administration of the estate, including legal costs.[50] The Court also found that it was necessary and prudent for the Applicant to have responded to the Respondent's allegations in the manner that she did.[51] Finally, Justice Muszynski found that the Respondent's allegations were unsupported by the evidence, and that the Application to Pass Accounts was entirely unnecessary, given the process that was already underway in New Brunswick.[52]

In response to the Respondent's position that the Applicant should not be entitled to increased costs because she had already received a "generous" compensation, Justice Muszynski concluded that, because the Deceased's Will specifically set out a formula for the Applicant's compensation, this argument and the case law relied upon by the Respondent were irrelevant.[53]

In finding that the Applicant's increased costs should be payable from the Respondent's share of the Estate, Justice Muszynski concluded that the circumstances in this case were similar to those in *Bendont Estate (Re)*[54], where the beneficiary made unrealistic objections against the estate trustee.

Mervyn Estate, Re

On January 4, 2021, Justice Sproat released additional reasons to a passing of accounts judgment reported in 2020[55] respecting costs.[56] In these short reasons, Justice Sproat concluded that both sides were equally at fault and responsible "for the distrust that fuelled this litigation."[57] As a result, because a clear winner or loser in the litigation could not be identified, the Court concluded that all costs of the contested passing of accounts would be paid out of the assets of the estate and shared amongst the beneficiaries.[58]

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[50] *Ibid* at para 25.
[51] *Ibid* at para 29.
[52] *Ibid* at paras 31, 39.
[53] *Ibid* at paras 36-37.
[54] [2004] OJ No 2015.
[55] *Mervyn Estate, Re*, 2020 ONSC 6989.
[56] *Mervyn Estate, Re*, 2020 ONSC 8058.
[57] *Ibid* at para 4.
[58] *Ibid* at para 5.

Viertelhausen v Viertelhausen

In deciding to award the estate trustee in this case costs on a substantial indemnity basis, the Court adopted the principle that substantial indemnity costs are invoked when the court wishes to express its disapproval of the conduct of a party to the litigation.[59] The Court found that the Applicant's conduct was worthy of sanction and that her behaviour throughout the litigation was "reprehensible, scandalous [and] outrageous."[60]

Among the reprehensible conduct highlighted by the Court were the Applicant's unfounded allegations that the Respondent estate trustee had committed fraud in obtaining a certificate of appointment, and her claim that she had not been served with his notice of application for a certificate of appointment of estate trustee without a will.[61] The Applicant maintained this position during her cross-examination, despite vast evidence to the contrary.[62] The Applicant also alleged that the estate trustee acted improperly in the administration of the Deceased's estate, despite the fact that she had signed a comprehensive release together with the other beneficiaries.[63]

The Court found that this constituted reprehensibly conduct worthy of the court's sanction.[64] However, the Applicant's behaviour, while egregious, did not rise to the level required to warrant full indemnity costs.[65] For these reasons, the Court found that the Estate Trustee was entitled to his costs on a substantial indemnity scale payable by the Applicant personally.

Froud v Froud

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[59] *Viertelhausen v Viertelhausen*, 2020 ONSC 7890 at para 29; see also *Net Connect Installation Inc. v Mobile Zone Inc*, 2009 ONCA 772 at para 28.
[60] *Ibid* at para 30.
[61] *Ibid* at para 15.
[62] *Ibid* at para 31.
[63] *Ibid* at para 33.
[64] *Ibid.*
[65] *Ibid* at para 34.

In *Froud v Froud*, the Court clarified that a substantial indemnity costs award is not available simply because the losing party advances a position with which the Court ultimately disagrees.[66]

In this case, the Plaintiff advanced several claims against the Defendant, who was his sister and the estate trustee of their mother's estate. The Defendant was ultimately successful at trial and argued that, by seeking an exhaustive accounting from her back to 2009, the Plaintiff had complicated the matter more than was necessary. On this basis, the Defendant claimed that the Plaintiff had engaged in conduct worthy of sanction and that, as a result, she had incurred substantial and significant costs in defending the action and that she was therefore entitled to her costs on a substantial indemnity basis.[67]

In its analysis, the Court first clarified that determining costs is a discretionary power governed by section 131 of the *Courts of Justice Act*[68] and by Rule 57.01 of the *Rules of Civil Procedure*.[69]

The Court ultimately held that the appropriate scale of costs was partial indemnity for the following reasons:

> [The Plaintiff] was entitled to challenge [the Defendant] following their mother's death. Simply pursuing an unsuccessful litigation does not warrant a substantial indemnity costs award. [The Plaintiff's] actions fall far below the "malicious, counter-productive conduct" worthy of a court's censure. He was entitled to advance his position. In the end, I did not agree with his position, but he did nothing to abuse the process of the court.[70]

Cardinal v Perreault

In *Cardinal v Perreault*, Justice Tzimas considered the issue of awarding costs as between two estate trustees.[71]

The Applicant had initially asked the Respondent for an accounting of the estate, but the Respondent estate trustee refused to cooperate. As a result, the Applicant brought an application

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[66] *Froud v Froud*, 2020 ONSC 2986 at para 29.
[67] *Ibid* at paras 1, 8, and 14.
[68] RSO 1990 c C 43.
[69] *Ibid* at para 19.
[70] *Ibid* at para 29.
[71] *Cardinal v Perreault*, 2020 ONSC 4825.

for directions that resulted in the Respondent estate trustee commencing an application to pass accounts in respect of her administration of the estate and activities as attorney for property for the deceased. In the course of the litigation, the Applicant also advanced personal attacks against the Respondent's integrity.[72]

The Applicant was seeking his costs on a full indemnity basis and argued that, as co-estate trustee, he had an obligation to request an accounting from the Respondent. He further argued that he should never have been required to bring his Application for Directions and that the Respondent should have voluntarily provided him with a full informal disclosure upon request.[73]

The Respondent was also seeking her costs on a full indemnity basis. She argued that the overall outcome of her Application to Pass Accounts vindicated her and amounted to a rejection of the Applicant's allegations against her. The Respondent took the position that the Applicant should be personally responsible for these costs and that the beneficiaries should not be penalized. [74]

Justice Tzimas expressed concern at the conduct and approach to the litigation of both of the parties, suggesting that both parties lost perspective during the course of the litigation.[75]

Justice Tzimas concluded that the Applicant had a right to ask for an accounting from the Respondent, and that the Respondent's initial resistance to this request was "astonishing and problematic."[76] However, the Court also concluded that the Applicant ultimately lost perspective during the litigation when he began to attack the Respondent's integrity and personal dignity "without even a basic evidentiary foundation for his allegations."[77]

In addressing the Respondent's arguments, Justice Tzimas concluded that, although the overall outcome of the Application did disprove many of the Applicant's allegations, it was not accurate to describe the outcome as "an absolute success" and that the Respondent would have been in a far better position had she been more efficient in her response to the request for an accounting.[78]

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[72] *Ibid* at paras 1-2, 19.
[73] *Ibid* at paras 7-9.
[74] *Ibid* at paras 10-12.
[75] *Ibid* at para 14.
[76] *Ibid* at para 15.
[77] *Ibid* at para 18.
[78] *Ibid* at paras 18, 27.

Justice Tzimas ultimately held that neither party was able to provide a legal foundation for their claims for full indemnity costs.[79] After reviewing both parties' conduct, much of which neutralized the other, Justice Tzimas concluded that a fair and just costs award was in the Respondent's favour in the sum of $48,000, representing her costs on a partial indemnity basis.

Finally, Justice Tzimas ordered that the Applicant personally bear such costs personally rather than out of the assets of the estate for the following reasons:

> Impugning somebody's integrity in the absence of a credible evidentiary foundation is reprehensible. The estate and the remaining beneficiaries should not be burdened by [the Applicant's] decision to pursue allegations that lacked any evidentiary foundation. It is one thing to challenge somebody for ill-advised or misguided actions or decisions. It is quite another to impugn one's integrity. [The Applicant's] decision to engage in the latter has its consequences.[80]

[79] *Ibid* at para 28.
[80] *Ibid* at para 38.

Tab 9

LOCATING MISSING BENEFICIARIES

An estate trustee's duties in administering an estate include, among other things, the distribution of all estate assets in accordance with the terms of the Will or the rules of intestacy. However, in order to make such a distribution, the trustee will be required to identify any and all heirs that may be rightfully entitled to a share of the estate.

In most cases this is often a simple and routine task, for example, where family members are expressly named, or are well known and can be readily identified. However, where a testator has a large extended family, complications may arise in both determining and locating beneficiaries, particularly, the next of kin on intestacy, or the intended recipients of a class gift.

In any event, an estate trustee must make "reasonable inquiries" to identify any and all beneficiaries. However, identification is only half the task, as once a missing beneficiary is identified he/she must also be located and notified of his/her interest in the estate.

This chapter focuses on the identification and location of missing heirs. First, it outlines the legal obligations of an estate trustee to identify and locate heirs. It explains the source of issues faced by trustees in identifying beneficiaries, both with a Will and upon intestacy. It then sets out the steps that should be taken by a trustee to locate missing heirs, and identifies various issues encountered by trustees, such as having to declare a missing beneficiary dead, or having to apply to the court for a determination on the issue of missing beneficiaries. Finally, the paper considers the issue of liability, not just for the estate trustee, but also for solicitors acting for or advising the estate trustee.

Legal Obligation of Estate Trustee to Locate Missing Heirs

While not a statutory requirement, an estate trustee has a duty to ascertain all heirs who might be rightfully entitled to a share in the estate.[1] However, there is little available in either statutes or case law to guide executors as to the precise extent or breadth they must go to ascertain next of kin or missing heirs.

In Ontario, the only legislative guidance dealing with the extent of the search concerns children born outside of marriage. Section 24(1) of the *Estate Administration Act* requires a trustee to make "reasonable inquiries" to locate a beneficiary or someone who may be entitled "by virtue of a

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[1] *Re Short Estate*, (1941) 1 W.W.R. 593 (B.C.S.C.).

relationship traced through a birth outside marriage."[2] "Reasonable inquiries" is not defined, however a logical starting point for an estate trustees in this regard would be to specifically ask family and friends of the deceased of the likelihood of a child being born outside of marriage. Section 24(2) goes on to state that if the result of the trustee's inquiries and a search of the Registry General records suggests no child exists, the estate trustee will not be liable for failing to distribute property to an existing child.[3]

While this provision speaks specifically to the duty of an executor to satisfy him or herself that there are no beneficiaries who are children born outside marriage, the standard of "reasonable enquiries" is applicable to the search for any beneficiary.

With respect to the extent of the search that must be undertaken, the *Trustee Act*[4] provides some guidance. Section 53 provides, that while placing a notice or advertisement may be sufficient for the trustee in giving notice to creditors of the existence of the estate before final distribution, it is not sufficient notice with respect to heirs.[5] Therefore, it is clear that an executor has an obligation to do more in alerting beneficiaries to the existence of an estate than simply placing a notice in a newspaper.

Various judicial decisions indicate that the extent of the estate trustee's duty may differ depending on the particular circumstances. Factors such as the size of the estate[6] or bequest[7] may determine the extent of the search for a missing beneficiary. A court will likely require more extensive enquiries be made when an estate is large.[8] However, even when an estate is small, the court may determine that further searches need to be conducted.[9]

The Source of the Beneficiary Identification Issue

Distribution to beneficiaries under terms of a Will

If the deceased made a Will, the persons named as beneficiaries in the Will are entitled to inherit in accordance with the deceased's instructions.

The terms of the Will may be quite clear, for example where family members are expressly named, or are well known and can be readily identified. However, difficulties arise where the terms of the

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[2] *Estate Administration Act*, R.S.O 1990, c. E22, s. 24.
[3] *Ibid*, s. 24(2).
[4] R.S.O. 1990, c. T.23.
[5] *Ibid*, s. 53.
[6] *Re Ashman* (1907), 15 O.L.R. 42, 10 O.W.R. 250; *Jones v. British Columbia (Public Trustee),* [1982] 5. W.W.R. 543 (B.C.S.C).
[7] *Re Ramsey*, [1943] 2 D.L.R. 784 (Ont. H.C.); *Kossak Estate v Kosak*, (1990) 72 O.R. (2d) 313 (Ont. H.C.).
[8] *Parker (Re),* (1982), 139 D.L.R. (3d) 292.
[9] *Re Davis*, [1934] O.W.N. 62 (Ont. H.C).

Will are not clear, and where the deceased's family is not close or well known. For example, where rather than being identified by name, the Will identifies beneficiaries as a class such as, my children, my first paternal cousins or my next of kin.

The issue arises when it comes time to identify each individuals within the class with a degree of certainty.

Distribution to beneficiaries on intestacy

If the deceased dies without a Will, they die intestate. If a person leaves a valid Will, but it fails to dispose of the entire estate, whether intentionally or through inadvertence, they are said to die partially intestate. In both instances the *Succession Law Reform Act*[10] will apply.[11]

Sections 44 and 47 sets out the priorities of the persons and classes of persons, who are deemed to inherit pursuant to the statute. It is important to note that no distinction is made between persons born within or outside marriage or between relatives of the half blood and whole blood.[12] In addition, descendants and relatives conceived before and born alive after the death of the intestate are included in the scheme of distribution as if they were alive on the date of death of the deceased.[13]

For the estate trustee, this means that all next of kin will need to be identified, including all children born outside of marriage. In some instances even very distant relatives may be entitled to inherit if there are no next-of-kin closer in relationship.

Surviving Spouse - No Issue

We should note that the surviving spouse of an intestate deceased is allowed to decide whether to make an application for his/her entitlement under the Family Law Act for equalization payment,[14] or to take under Part II of the *Succession Law Reform Act*. However, in this paper, we will only deal with a spouse's entitlement under Part II of the *Succession Law Reform Act*.

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[10] R.S.O. 1990, c.26.
[11] In the case of partial intestacy, the *SLRA* will only apply to the portion not covered by the will.
[12] Anne E.P. Armstrong, Estate Administration: A Solicitor's Reference Manual, (Thomson Carswell) at Special Instruction 33 "*Distribution on Intestacy*" SI-39 at [3].
[13] *Ibid*, at [3].
[14] *Family Law Act*, R.S.O. 1990, c F.3, s.5.

Where the deceased is survived by a spouse and no issue, the spouse takes the entire estate of the deceased.[15] However, the *Family Law Act*[16] defines "spouse" as "two persons who, (a) are married...". Therefore, in Ontario all individuals must be married, rather than common law, in order to classify as a spouse.

Surviving Spouse – With Issue

If the deceased is survived by a spouse and issue of any degree, the spouse is entitled to a preferential share of $200,000. However, if there is only a partial intestacy, the spouse's preferential share will amount to $200,000 less the net value of any property which the spouse receives under the deceased's Will.[17] Therefore, if the amount received under the Will exceeds $200,000, there can be no preferential share.[18] Where the net value of the total intestate estate does not exceed $200,000, the spouse is entitled to the entire estate notwithstanding there are issue of the deceased alive at his death.[19]

Where the net value of the estate exceeds the preferential share, the residue is distributed according to the number and degree of issue surviving.[20]

Where there is only one surviving child of the deceased or no surviving children but surviving issue of only one child of the deceased, the spouse takes half of the residue to the estate and the issue take the other half.[21]

Where more than one child or the issue of more than one deceased child, or one child of the issue of one or more deceased children are alive at the intestate's death, the spouse takes one third of the residue to the intestate estate and issue take the remaining two thirds.[22]

No Spouse - Surviving Issue

Where the deceased dies leaving issue but no spouse, the issue are entitled to the entire estate. As between themselves, the issue of the deceased take their share per stirpes.[23] However, there

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[15] *Succession Law Reform Act*, R.S.O. 1990, c.26, s. 44.
[16] R.S.O. 1990, c. F.3.
[17] *Ibid*, s. 45(3)(a).
[18] *Ibid*, s. 45(3)(b).
[19] *Ibid*, s. 45(1).
[20] *Ibid*, s. 47(1).
[21] *Ibid*, s. 46(1).
[22] *Ibid*, s. 46(2).
[23] *Ibid*, s. 47(1).

is one exception. Where a deceased dies intestate leaving grandchildren, but no children, the grandchildren take per capita. Had one child survived, the issue would take per stirpes.

Ascendants and Collaterals

Where the deceased dies intestate leaving no surviving spouse or issue, the estate is distributed to the surviving parent, or where both parents survive, to each parent in equal shares.[24] If no parents survive the deceased, the estate is share by any surviving brothers or sisters with one qualification. If there are children of a deceased brother or sister alive at the death of the intestate, the children take the share their parent would have received had he survived the deceased.[25] In order for the rule to apply, there must be at least one brother or sister alive at the deceased death. The children of the deceased brother or sister divide their parent's share as if the parent had died intestate with respect to that particular property.

Where no spouse, issue, parents or brothers/sisters survive the deceased, the estate is divided equally among any surviving nieces and nephews.[26]

If the deceased dies intestate without any surviving spouse, issue, parents, brothers/sisters, nieces/nephews, the estate is distributed among the next of kin who are of the closest degree of kindred to the deceased. The Succession *Law Reform Act* sets out the manner in which degrees of kindred should be established, directing that "degrees of kindred shall be computed by counting upward from the deceased to the nearest common ancestor and then downward to the relative".

In some instances it may be very difficult to determine beneficiaries pursuant to these provisions with precision. However, great care must be taken to ensure that some degree of certainty can be achieved as to the identity of relatives, to prevent the correctness of the distribution from being challenged.

How to Identify a Missing Heir

Initial Searches

A good starting point is to make contact with the family, friends and neighbours of the deceased. These individuals may have important information, relevant to those who will need to be contacted during the administration of the estate, and may offer assistance in creating a family tree.

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[24] *Ibid*, s. 47(3).
[25] *Ibid*, s. 47(4).
[26] *Ibid*, s. 47(5).

The estate trustee should also examine the personal effects of the deceased, including correspondence, to determine both the existence and location of other family members. Enquiries might also be made of the deceased's employer, co-workers and other professionals, such as the deceased lawyer, accountant or doctor, who may be able to offer information.

Some general searches of historical and current public records would also be good starting point.[27] Generally, the estate trustee has authority to request information with respect to death, birth, and marriage records. Additionally, there are an abundance of genealogical websites and search engines on the Internet that may assist the estate trustee in his or her preliminary searches.[28]

However, after such self-help remedies have been exhausted, the estate trustee should consider seeking the assistance of a professional.

A Professional Researcher

Often, estate trustees may consider hiring a professional researcher or a genealogist to assist them in the location of missing heirs. The Archives of Ontario can provide a list of accredited researchers both in Canada and internationally.[29]

A professional researcher will be able to access databases not available to the estate trustee and will often be able to obtain information in a more precise way. They routinely consult genealogical search engines and attend cemeteries to determine family relationships and the status of beneficiaries. These researchers will generally charge for their service or, instead, in exchange for a finder's fee, should they be successful in their search.

When looking to retain a professional researcher, the estate trustee should look for someone who can provide the estate trustee with their methodology for locating a missing heir. The parameters of the search should be clear and communicated in writing to prevent expenses associated with unnecessary searches. It is also be especially useful to hire someone familiar with heirship searches and already familiar with sections 44 and 47 of the *Succession Law Reform Act* and other relevant statutes. An estate trustee may consider asking their solicitor to refer someone to prepare an heirship report.

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[27] For example, the Office of the Registrar General (Ontario), P.O. Box 4600, 3rd Floor, 189 Red River Road, Thunder Bay, Ontario *P7B* 6L8, t: 1-800-461-2156, e: cbsinfo@cbs.gov.on.ca, website: www.mgs.gov.on.ca.
[28] For example, www.cyndislist.com; www.rootsweb.com; www.ancestry.com; or www.jewishgen.org.
[29] See, http://www.archives.gov.on.ca/en/index.aspx.

Ultimately, it is the responsibility of the estate trustee to search for heirs and he or she should examine all materials provided by the professional researcher and authenticate documents attached to their report. The estate trustee has to ascertain the links suggested by the researcher report. Wherever possible, the trustee should verify the information provided in the report with other family members.

How to Locate and Notify a Missing Heir

Once a missing beneficiary has been identified, the estate trustee must locate and notify that beneficiary of his or her interest in the estate.[30]

Many estate trustees find success searching online, for example, using Google or Canada 411[31], for contact or other information. However, if this is not successful, the estate trustee must turn to another means.

The courts have consistently held that an estate trustee should advertise for a person entitled to share in an estate in the locality where the claimant was known to reside or where he or she is reasonably likely to reside.[32] This notice should provide as much detail as possible about the deceased's life in order to assist in his or her identification and possible persons entitled. However, while newspaper advertisements once served as sufficient notice in some cases, it is foreseeable that rapid technological advances, such as the internet, may warrant more extensive means of public notification.[33]

In some cases, these sorts of advertisements will tip off so-called heir hunters. Heir hunters are professional genealogists who work the other side of the missing-beneficiary issue. They keep an eye on probate cases, in which it seems likely that beneficiaries are unknown or cannot be easily found. They then attempt to locate beneficiaries, and convince them to enter into contracts that will provide a percentage of their inheritance to the heir hunter. Heir hunters often refer beneficiaries to lawyers, to ensure that they will receive payment for their work.

If it is suspected that the beneficiary is located overseas, it is possible that some consulates or embassies may also be helpful in assisting the estate trustee to search for heirs who live in their respective countries, however they have no obligation to provide assistance.[34]

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[30] *McGrath v. Atlantic Trust Co.* (1969), 8 D.L.R. (3d) 255 (N.S.C.A).
[31] For example, http://findaperson.canada.411.ca.
[32] *Re Ashman* (1907), 15 O.L.R. 42 (H.C.J); *Stewart v Snyder* (1898), 30 O.R. 110 (H.C.J.).
[33] Anne E.P. Armstrong, *Estate* Administration: A Solicitor's Reference Manual, (Thomson Carswell) at Special Instruction 19 "*Personal Representative's Duties and Powers*", SI-20.4 at [3].
[34] Monique Charlebois, "*The Estate Trustee's Duty to Search for Heirs*," 23 E.T.P.J. (2004) 209 at 221.

In every event the estate trustee should maintain records of the searches he/she has conducted and should insist the same any individual hired to assist on their behalf.

Missing persons and the Absentees Act, and the Declarations of Death Act, 2002

Declarations of Death Act, 2002

Pursuant to the *Declarations of Death Act*,[35] an 'interested person', being among others, an estate trustee, may apply to the Superior Court of Justice for an order that a missing individual be declared legally dead.

Under the *Declarations of Death Act* the court is authorized to determine whether a person is dead (1) on the basis of circumstantial evidence (circumstances of peril), or (2) a common law rule which presumes a person dead after an unexplained absence of seven years or more.[36]

In order to successfully obtain a declaration of death, the individual making the application must be able to demonstrate that:

a. he/she has not heard of or from the person since their disappearance in circumstances of peril - or within the 7-year period;
b. to his/her knowledge, after making reasonable inquiries, no other person has heard from the individual;
c. there is no reason to believe that the person is alive; and
d. there is sufficient evidence to find that the person is dead.[37]

The courts have been hesitant to make declarations of death unless it is clear on the facts that an individual is indeed dead. Therefore, even where a person has been missing for more than 7 years, the courts will expect any applicant to have taken reasonable steps to locate them.[38]

In the event the court is not satisfied that there is sufficient evidence to declare an individual dead, section 3 of the *Declarations of Death Act* also permits the court to make an order under the *Absentees Act.*

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[35] *Declarations of Death Act*, S.O. 2002, c. 14, s. 1-2.
[36] *Ibid*, s 2(3)-2(6).
[37] *Ibid*, s 2(4) and 2(5).
[38] *See, Wasylyk v. Wasylyk*, 2012 ONSC 7029.

Absentees Act

Where a person is missing but there is insufficient evidence to determine whether or not he or she is alive or dead, application may be made to court for an order under declaring the person an "absentee" under the *Absentees Act*[39].

An 'absentee' is defined as a person, who having his or her usual place of residence or domicile in Ontario, has disappeared, whose whereabouts are unknown, and as to whom there is no knowledge as to whether he or she is dead or alive.[40]

In such circumstances, the court may make an order for the custody, care and management of the property of the absentee, and committee may be appointed for this purpose.[41] The committee is subject to the same powers and duties as a guardian of property under the *Substitute Decisions Act, 1992*[42]. In addition, the committee is specifically authorized to expend monies for the purpose of locating the absentee and ascertaining whether he or she is alive or dead.[43]

Court Application to Ascertain Heirs

If an estate trustee has remained unsuccessful in attempts to locate estate beneficiaries, or is unsure whether all heirs have been ascertained, as a last resort, he or she may also go to court for advice and direction. An application can be brought pursuant to Rule 14.05(3) of the *Rules of Civil Procedure* for a determination on the issue. This will ensure that distribution is made to proper beneficiaries, without further delay.

However, we again stress the importance of documenting all steps fully so that adequacy of attempts can be considered, and proven, if necessary, before the court. If/when an application for determination is brought the estate trustee will need to provide an affidavit detailing all efforts made to locate the proper beneficiaries and serve anyone with an interest in the estate. Documentation presented to the court typically includes search results from online databases and a report prepared by the researcher.

Courts are hesitant to make an order that adequate attempts have been made to locate missing beneficiaries due to the significant consequences if one cannot be found and later emerges. The

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[39] R.S.O. 1990, c.A.3.
[40] *Absentees Act*, R.S.O. 1990, c. A.3, s. 1.
[41] *Ibid,* s. 4.
[42] 1992, c. 32, s. 1.
[43] *Absentees Act*, R.S.O. 1990, c. A.3, s. 6-7.

court may require that additional steps are taken or that a period of time passes to ensure that the missing beneficiaries will not come forward at a later time.[44]

Liability

The importance of identifying and locating beneficiaries must not be overlooked, as an estate trustee can be personally liable in negligence for not making sufficient inquiries to locate rightful heirs. Consequently, a solicitor representing an estate trustee should also be sure to advise his or her client to be diligent in locating heirs to relieve themselves from possible liability.

In most cases an estate trustee will rely on their solicitors to advise and guide them as to how to ascertain the identity of heirs. Solicitors should ensure that advice given to the estate trustee respecting the requisite efforts that should be made to ascertain heirs will give protection to that solicitor from a claim to negligence at the suit of disappointed heirs who have not been located. It cannot be emphasized too strongly that you should put in writing to your client that he/she is the estate trustee and while you are prepared to assist them in their search for heirs, he or she must bear the ultimate responsibility of determining the identity of those person who share in the estate.

[44] See, *Puffer v. The Public Guardian and Trustee*, 2012 ONSC 3579.

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TAB 3

PRACTICE GEMS: PROBATE ESSENTIALS 2014

Locating Missing Beneficiaries

Ian Hull, C.S.
Laura Betts
Hull & Hull LLP

September 23, 2014

cpd Continuing Professional Development

HULL & HULL LLP
Barristers and Solicitors
Trust Experience™

LOCATING MISSING BENEFICIARIES

Ian M. Hull and Laura Betts

Ian M. Hull
Tel: (416) 369-7826
Fax: (416) 369-1517
Email: ihull@hullandhull.com

Laura Betts
Tel: (416) 640-3949
Fax: (416) 369-1517
Email: lbetts@hullandhull.com

Hull & Hull LLP
Barristers and Solicitors

TORONTO
141 Adelaide Street West, Suite 1700
Toronto, Ontario M5H 3L5
TEL: (416) 369-1140
FAX: (416) 369-1517

OAKVILLE
228 Lakeshore Road East
Oakville, Ontario L6J 5A2
TEL: (905) 844-2383
FAX: (905) 844-3699

www.hullandhull.com
www.hullestatemediation.com

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Locating Missing Beneficiaries

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Introduction

An estate trustee's duties in administering an estate include, among other things, the distribution of all estate assets in accordance with the terms of the Will or the rules of intestacy. However, in order to make such a distribution, the trustee will be required to identify any and all heirs that may be rightfully entitled to a share of the estate.

In most cases this is often a simple and routine task, for example, where family members are expressly named, or are well known and can be readily identified. However, where a testator has a large extended family, complications may arise in both determining and locating beneficiaries, particularly, the next of kin on intestacy, or the intended recipients of a class gift.

In any event, an estate trustee must make "reasonable inquiries" to identify any and all beneficiaries. However, identification is only half the task, as once a missing beneficiary is identified he/she must also be located and notified of his/her interest in the estate.

This paper focuses on the identification and location of missing heirs. First, it outlines the legal obligations of an estate trustee to identify and locate heirs. It explains the source of issues faced by trustees in identifying beneficiaries, both with a Will and upon intestacy. It then sets out the steps that should be taken by a trustee to locate missing heirs, and identifies various issues encountered by trustees, such as having to declare a missing beneficiary dead, or having to apply to the court for a determination on the issue of missing beneficiaries. Finally, the paper considers the issue of liability, not just for the estate trustee, but also for solicitors acting for or advising the estate trustee.

Legal Obligation of Estate Trustee to Locate Missing Heirs

While not a statutory requirement, an estate trustee has a duty to ascertain all heirs who might be rightfully entitled to a share in the estate.[1] However, there is little available in either statutes or case law to guide executors as to the precise extent or breadth they must go to ascertain next of kin or missing heirs.

In Ontario, the only legislative guidance dealing with the extent of the search concerns children born outside of marriage. Section 24(1) of the *Estate Administration Act* requires a trustee to make "reasonable inquiries" to locate a beneficiary or someone who may be entitled "by virtue of a relationship traced through a birth outside marriage."[2] "Reasonable inquiries" is not defined, however a logical starting point for an estate trustees in this regard would be to specifically ask

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[1] *Re Short Estate*, (1941) 1 W.W.R. 593 (B.C.S.C.).
[2] *Estate Administration Act*, R.S.O 1990, c. E22, s.24.

family and friends of the deceased of the likelihood of a child being born outside of marriage. Section 24(2) goes on to state that if the result of the trustee's inquiries and a search of the Registry General records suggests no child exists, the estate trustee will not be liable for failing to distribute property to an existing child.[3]

While this provision speaks specifically to the duty of an executor to satisfy him or herself that there are no beneficiaries who are children born outside marriage, the standard of "reasonable enquiries" is applicable to the search for any beneficiary.

With respect to the extent of the search that must be undertaken, the *Trustee Act*[4] provides some guidance. Section 53 provides, that while placing a notice or advertisement may be sufficient for the trustee in giving notice to creditors of the existence of the estate before final distribution, it is not sufficient notice with respect to heirs.[5] Therefore, it is clear that an executor has an obligation to do more in alerting beneficiaries to the existence of an estate than simply placing a notice in a newspaper.

Various judicial decisions indicate that the extent of the estate trustee's duty may differ depending on the particular circumstances. Factors such as the size of the estate[6] or bequest[7] may determine the extent of the search for a missing beneficiary. A court will likely require more extensive enquiries be made when an estate is large.[8] However, even when an estate is small, the court may determine that further searches need to be conducted.[9]

The Source of the Beneficiary Identification Issue

Distribution to beneficiaries under terms of a Will

If the deceased made a Will, the persons named as beneficiaries in the Will are entitled to inherit in accordance with the deceased's instructions.

The terms of the Will may be quite clear, for example where family members are expressly named, or are well known and can be readily identified. However, difficulties arise where the terms of the Will are not clear, and where the deceased's family is not close or well known. For example, where rather than being identified by name, the Will identifies beneficiaries as a class such as, my children, my first paternal cousins or my next of kin.

The issue arises when it comes time to identify each individuals within the class with a degree of certainty.

Distribution to beneficiaries on intestacy

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[3] Ibid, s. 24 (2).
[4] R.S.O. 1990, c. T.23.
[5] *Trustee Act*, R.S.O. 1990, c. T.23, s. 53.
[6] *Re Ashman* (1907), 15 O.L.R. 42, 10 O.W.R. 250; *Jones v. British Columbia (Public Trustee)*, [1982] 5. W.W.R. 543 (B.C.S.C).
[7] *Re Ramsey*, [1943] 2 D.L.R. 784 (Ont. H.C.); *Kossak Estate v Kosak*, (1990) 72 O.R. (2d) 313 (Ont. H.C.).
[8] *Parker (Re)*, (1982), 139 D.L.R. (3d) 292.
[9] *Re Davis*, [1934] O.W.N. 62 (Ont. H.C).

If the deceased dies without a Will, they die intestate. If a person leaves a valid Will, but it fails to dispose of the entire estate, whether intentionally or through inadvertence, they are said to die partially intestate. In both instances the *Succession Law Reform Act*[10] will apply.[11]

Sections 44 and 47 sets out the priorities of the persons and classes of persons, who are deemed to inherit pursuant to the statute. It is important to note that no distinction is made between persons born within or outside marriage or between relatives of the half blood and whole blood.[12] In addition, descendants and relatives conceived before and born alive after the death of the intestate are included in the scheme of distribution as if they were alive on the date of death of the deceased.[13]

For the Estate Trustee, this means that all next of kin will need to be identified, including all children born outside of marriage. In some instances even very distant relatives may be entitled to inherit if there are no next-of-kin closer in relationship.

Surviving spouse with no issue

We should note that the surviving spouse of an intestate deceased is allowed to decide whether to make an application for his/her entitlement under the Family Law Act for equalization payment[14], or to take under Part II of the *Succession Law Reform Act*. However, in this paper, we will only deal with a spouse's entitlement under part II of the *Succession Law Reform Act*.

Where the deceased is survived by a spouse and no issue, the spouse takes the entire estate of the deceased.[15] However, the *Family Law Act*[16] defines "spouse" as "two persons who, (a) are married...". Therefore, in Ontario all individuals must be married, rather than common law, in order to classify as a spouse.

Surviving spouse with issue

If the deceased is survived by a spouse and issue of any degree, the spouse is entitled to a preferential share of $200,000. However, if there is only a partial intestacy, the spouse's preferential share will amount to $200,000 less the net value of any property which the spouse receives under the deceased's Will.[17] Therefore, if the amount received under the Will exceeds $200,000, there can be no preferential share.[18] Where the net value of the total intestate estate does not exceed $200,000, the spouse is entitled to the entire estate notwithstanding there are issue of the deceased alive at his death.[19]

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[10] R.S.O. 1990, c.26.
[11] In the case of partial intestacy, the *SLRA* will only apply to the portion not covered by the will.
[12] Anne E.P. Armstrong, Estate Administration: A Solicitor's Reference Manual, (Thomson Carswell) at Special Instruction 33 "*Distribution on Intestacy*" SI-39 at para 3.
[13] Ibid.
[14] *Family Law Act*, R.S.O. 1990, c F.3, s.5.
[15] *Succession Law Reform Act*, R.S.O. 1990, c.26, s. 44.
[16] R.S.O. 1990, c. F.3.
[17] Ibid, s. 45(3)(a).
[18] Ibid, s. 45(3)(b).
[19] Ibid, s. 45(1).

Where the net value of the estate exceeds the preferential share, the residue is distributed according to the number and degree of issue surviving.[20]

Where there is only one surviving child of the deceased or no surviving children but surviving issue of only one child of the deceased, the spouse takes half of the residue to the estate and the issue take the other half.[21]

Where more than one child or the issue of more than one deceased child, or one child of the issue of one or more deceased children are alive at the intestate's death, the spouse takes one third of the residue to the intestate estate and issue take the remaining two thirds.[22]

No Spouse, but Surviving Issue

Where the deceased dies leaving issue but no spouse, the issue are entitled to the entire estate. As between themselves, the issue of the deceased take their share per stirpes. [23] However, there is one exception. Where a deceased dies intestate leaving grandchildren, but no children, the grandchildren take per capita. Had one child survived, the issue would take per stirpes.

Ascendants and Collaterals

Where the deceased dies intestate leaving no surviving spouse or issue, the estate is distributed to the surviving parent, or where both parents survive, to each parent in equal shares.[24] If no parents survive the deceased, the estate is share by any surviving brothers or sisters with one qualification. If there are children of a deceased brother or sister alive at the death of the intestate, the children take the share their parent would have received had he survived the deceased.[25] In order for the rule to apply, there must be at least one brother or sister alive at the deceased death. The children of the deceased brother or sister divide their parent's share as if the parent had died intestate with respect to that particular property.

Where no spouse, issue, parents or brothers/sisters survive the deceased, the estate is divided equally among any surviving nieces and nephews.[26]

If the deceased dies intestate without any surviving spouse, issue, parents, brothers/sisters, nieces/nephews, the estate is distributed among the next of kin who are of the closest degree of kindred to the deceased. The Act sets out the manner in which degrees of kindred should be established, directing that "degrees of kindred shall be computed by counting upward from the deceased to the nearest common ancestor and then downward to the relative".

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[20] Ibid, s. 47(1).
[21] Ibid, s. 46(1).
[22] Ibid, s. 46(2).
[23] Ibid, s. 47(1).
[24] Ibid, s. 47(3).
[25] Ibid, s. 47(4).
[26] Ibid, s. 47(5).

In some instances it may be very difficult to determine beneficiaries pursuant to these provisions with precision. However, great care must be taken to ensure that some degree of certainty can be achieved as to the identity of relatives so that the correctness of the distribution cannot be challenged.

How to Identify a Missing Heir

Initial Searches

A good starting point is to make contact with the family, friends and neighbours of the deceased. These individuals may have important information, relevant to those who will need to be contacted during the administration of the estate, and may offer assistance in creating a family tree.

The estate trustee should also examine the personal effects of the deceased, including correspondence, to determine both the existence and location of other family members. Enquiries might also be made of the deceased's employer, co-workers and other professionals, such as the deceased lawyer, accountant or doctor, who may be able to offer information.

Some general searches of historical and current public records would also be good starting point.[27] Generally, the estate trustee has authority to request information with respect to death, birth, and marriage records. Additionally, there are an abundance of genealogical websites and search engines on the Internet that may assist the estate trustee in his or her preliminary searches.[28]

However, after such self-help remedies have been exhausted, the estate trustee should consider seeking the assistance of a professional.

A Professional Researcher

Often, estate trustees may consider hiring a professional researcher or a genealogist to assist them in the location of missing heirs. The Archives of Ontario can provide a list of accredited researchers both in Canada and internationally.[29]

A professional researcher will be able to access databases not available to the estate trustee and will often be able to obtain information in a more precise way. They routinely consult genealogical search engines and attend cemeteries to determine family relationships and the status of beneficiaries. These researchers will generally charge for their service or, instead, in exchange for a finder's fee, should they be successful in their search.

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[27] For example, the Office of the Registrar General (Ontario), P.O. Box 4600, 3rd Floor, 189 Red River Road, Thunder Bay, Ontario P7B 6L8, t: 1-800-461-2156, e: cbsinfo@cbs.gov.on.ca, website: www.mgs.gov.on.ca.
[28] For example, www.cyndislist.com; www.rootsweb.com; www.ancestry.com; or www.jewishgen.org
[29] See, http://www.archives.gov.on.ca/en/index.aspx

When looking to retain a professional researcher, the estate trustee should look for someone who can provide the estate trustee with their methodology for locating a missing heir. The parameters of the search should be clear and communicated in writing to prevent expenses associated with unnecessary searches. It would be especially useful to hire someone familiar with heirship searches and already familiar with sections 42 and 47 of the *Succession Law Reform Act* and other relevant statutes. An estate trustee may consider asking their solicitor to refer someone to prepare an heirship report.

Ultimately, it is the responsibility of the estate trustee to search for heirs and he or she should examine all materials provided by the professional researcher and authenticate documents attached to their report. The estate trustee has to ascertain the links suggested by the researcher report. Wherever possible, the trustee should verify the information provided in the report with other family members.

How to Locate and Notify a Missing Heir

Once a missing beneficiary has been identified, the estate trustee must locate and notify that beneficiary of his or her interest in the estate.[30]

Many estate trustees find success searching online, for example, using Google or Canada 411[31], for contact or other information. However, if this is not successful, the estate trustee must turn to another means.

The courts have consistently held that an estate trustee should advertise for a person entitled to share in an estate in the locality where the claimant was known to reside or where he or she is reasonably likely to reside.[32] This notice should provide as much detail as possible about the deceased's life to assist in his or her identification and possible persons entitled. However, while newspaper advertisements once served as sufficient notice in some cases, it is foreseeable that rapid technological advances, such as the internet, may warrant more extensive means of public notification.[33]

In some cases, these sorts of advertisements will tip off so-called heir hunters. Heir hunters are professional genealogists who work the other side of the missing-beneficiary issue. They keep an eye on probate cases, in which it seems likely that beneficiaries are unknown or cannot be easily found. They then attempt to locate beneficiaries, and convince them to enter into contracts that will provide a percentage of their inheritance to the heir hunter. Heir hunters often refer beneficiaries to lawyers, to ensure that they will receive payment for their work.

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[30] *McGrath v. Atlantic Trust Co.* (1969), 8 D.L.R. (3d) 255 (N.S.C.A).
[31] For example, http://findaperson.canada.411.ca.
[32] *Re Ashman* (1907), 15 O.L.R. 42 (H.C.J); *Stewart v Snyder* (1898), 30 O.R. 110 (H.C.J.).
[33] Anne E.P. Armstrong, Estate Administration: A Solicitor's Reference Manual, (Thomson Carswell) at Special Instruction 19 "*Personal Representative's Duties and Powers*", SI-20.4 at para 3.

If it is suspected that the beneficiary is located overseas, it is possible that some consulates or embassies may also be helpful in assisting the estate trustee to search for heirs who live in their respective countries while others may provide no assistance.[34]

In any event the estate trustee should maintain records of the searches he/she has conducted and should insist the same any individual hired to assist on their behalf.

Missing persons and the *Absentees Act*, and the *Declarations of Death Act, 2002*

Declarations of Death Act, 2002[35]

Under section 2 of the *Declarations of Death Act*, an estate trustee may apply to the Superior Court of Justice, for an order to have someone declared legally dead in absentia. Pursuant to section 3, the court is authorized to determine whether a person is dead on the basis of circumstantial evidence (circumstances of peril), or a common law rule which presumes a person dead after an unexplained absence of seven (7) years or more.[36] In order to obtain a declaration of death, the estate trustee must show that (a) he/she has not heard of or from the person since their disappearance in circumstances of peril or within the 7-year period, (b) to his/her knowledge, after making reasonable inquiries, no other person has heard from the individual, (c) there is no reason to believe that the person is alive, and (d) there is sufficient evidence to find that the person is dead.[37] However, even where a person has been absent less than seven (7) years, it is still possible for the court to determine such person's death on the basis of an inference of fact.

In the event the court is not satisfied that there is sufficient evidence to declare an individual dead, section 3 of the *Declarations of Death Act* permits the court may make an order under the *Absentees Act*.[38]

Absentees Act

Where a person is missing but there is insufficient evidence to determine whether or not he or she is alive or dead, the estate trustee may apply to court for an order under the *Absentees Act* declaring the person to be an "absentee".

An absentee is defined as a person, who having his or her usual place of residence or domicile in Ontario, has disappeared, whose whereabouts are unknown, and as to whom there is no knowledge as to whether he or she is dead or alive.

In such circumstances, the court may make an order for the custody, care and management of the property of the absentee, and committee in the form of a trust company may be appointed

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[34] Monique Charlebois, "*The Estate Trustee's Duty to Search for Heirs*," 23 E.T.P.J. (2004) 209 at 221.
[35] S.O. 2002, c. 14.
[36] See, Lindsay Histrop, "*Proceedings Relating to the Presumption of Death*" in Brian Schnurr, ed., Estate Litigation, 2d ed. (Scarborough: Thomson Carswell, 1994), chapter 10.
[37] *Declarations of Death Act*, S.O. 2002, c. 14 Schedule, s. 4.
[38] R.S.O. 1990, c.A.3.

for such purpose. The committee is subject to the same powers and duties as a guardian of property under the *Substitute Decisions Act, 1992*[39]. In addition, the committee is specifically authorized to expend monies for the purpose of locating the absentee and ascertaining whether he or she is alive or dead.

Court Application to Ascertain Heirs

If an estate trustee has remained unsuccessful in attempts to locate estate beneficiaries, or is unsure whether all heirs have been ascertained, as a last resort, he/she may also go to court for advice and direction. An application can be brought pursuant to Rule 14.05(3) of the Rules of Civil Procedure for a determination on the issue. This will ensure that distribution is made to proper beneficiaries, without further delay.

However, it is important to document all steps fully so that adequacy of attempts can be considered, and proven, if necessary, before the court. If/when an application for determination is brought the estate trustee will need to provide an affidavit detailing all efforts made to locate the proper beneficiaries and serve anyone with an interest in the estate. Documentation presented to the court typically includes search results from online databases and a report prepared by the researcher.

Courts are hesitant to make an order that adequate attempts have been made to locate missing beneficiaries due to the significant consequences if one cannot be found and later emerges. The court may require that additional steps are taken or that a period of time passes to ensure that the missing beneficiaries will not come forward at a later time.

Liability

The importance of identifying and locating beneficiaries must not be overlooked, as an estate trustee can be personally liable in negligence for not making sufficient inquiries to locate rightful heirs. Consequently, a solicitor representing an estate trustee should also be sure to advise his or her client to be diligent in locating heirs to relieve themselves from possible liability.

In most cases estate trustees rely on their solicitors to advise and guide them as to how to ascertain the identity of heirs. Solicitors should ensure that advice given to the estate trustee respecting the requisite efforts that should be made to ascertain heirs will give protection to that solicitor from a claim to negligence at the suit of disappointed heirs who have not been located. It cannot be emphasized too strongly that you should put in writing to your client that he/she is the estate trustee and while you are prepared to assist them in their search for heirs, he/she must bear the ultimate responsibility of determining the identity of those person who share in the estate.

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[39] S.O. 1992, c. 30.

Conclusion

In locating beneficiaries, an estate trustee will be held to the standard of reasonable efforts. If the trustee goes through the steps available to him or her independently, then consults a researcher or private investigator, the expectation of reasonable efforts may be satisfied. If this search indicates beneficiaries exist, an estate trustee has a duty to locate and notify those beneficiaries of their entitlement under the estate. However, if diligent searches do not yield beneficiaries, or certainty that no beneficiaries exist, then court action is available to finalize the matter and permit distribution of the estate. It is important to provide evidence of all searches in order to validate court action but also to protect the estate trustee from potential liability.

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the Declarations of Death Act 2002, S.O. 2002, C.14 as amended

AND IN THE MATTER OF the Absentees Act, R.S.O. 1990, C. A.3, as amended

AND IN THE MATTER OF the Application of _____

AND IN THE MATTER OF _____ of the City of Toronto, in the Province of Ontario

BETWEEN:

XXX

Applicant

- and -

XXX

Respondents

APPLICATION UNDER the *Declarations of Death Act*, 2002, S.O., c. 14 as amended

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on _____, at _____, at 330 University Avenue, Toronto, Ontario, M5G 1R7.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date ____, 2014

Issued by _____
Local registrar

Address of court office: 330 University Avenue
Toronto, Ontario, M5G 1R7

TO: Respondent

AND TO: Respondent(s) if more than one

APPLICATION

1. The applicant makes application for:

   (a) An Order declaring that the missing individual died on date within the meaning of the Declarations of Death Act, 2002, S.O., C. 14, as amended; and

   (b) In the alternative to 1(a) above,

      (i) A Declaration that the missing individual is an absentee within the meaning of section 1 of the Absentees Act, R.S.O., C. A.3, as amended; and

      (ii) An Order appointing the Applicant as Committee of the property of the missing individual and approving the Management Plan of the Applicant.

2. The grounds for the application are:

   (a) The missing individual disappeared on date, in circumstances of peril;

   (b) The Applicant has not seen or heard of or from the missing individual since his disappearance;

   (c) To the Applicant's knowledge, and after making all reasonable inquiries, no other person has seen or heard of or from the missing individual since his disappearance;

   (d) The Applicant has no reason to believe that the missing individual is alive;

   (e) There is sufficient evidence to find that the missing individual is deceased;

   (f) Until such time that the missing individual is declared deceased, it may be necessary to appoint a Committee for the custody, due care and management of his property;

   (g) Rule 14. 05(2), 17.02(b) and 38 of the Rules of Civil Procedure;

   (h) *Declarations of Death Act* 2002, S.O. 2002 C. 14, as amended;

(i) *Absentees Act* R.S.O., 1990, C. A. 3, as amended; and

(j) Such further and other grounds as the parties may submit and this Honourable Court may consider.

3. The following documentary evidence will be used at the hearing of the application:

(a) The Affidavit of Applicant sworn date;

(b) Such further documentary evidence as may be delivered by any of the parties and allowed by this Honourable Court.

Date

Contact Details

Lawyers for the Applicant

Applicant and

Respondent

Court File No:

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at

NOTICE OF APPLICATION

Court File No. _____

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	_____, THE _____
	)	
JUSTICE _____	)	DAY OF __, 2014

IN THE MATTER OF THE ESTATE OF _____

BETWEEN:

XXX

Applicant

- and -

XXX

Respondents

ORDER

THIS APPLICATION, for an Order, *inter alia*, declaring that the missing individual died on date in accordance with the *Declarations of Death Act, 2002* was heard in part this day at 330 University Avenue, Toronto, Ontario.

ON READING the Application Record and Factum of the Applicant, on being advised of the consent of the Respondent having advised that they take no position in the current Application, and on being advised that any other relevant party has been served with a copy of this Application, but has not advised of their position; and on hearing the submissions of the lawyer(s) for the Applicant,

1. **THIS COURT ORDERS AND DECLARES** that in accordance with section 2(4) of the *Declarations of Death Act, 2002*:

   (a) The missing individual disappeared in a circumstance of peril on date;

   (b) the Applicant has not heard from the missing individual since his disappearance on date;

(c) to the Applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the missing individual since his disappearance on date;

(d) the Applicant has no reason to believe that the missing individual is alive;

(e) there is sufficient evidence to find that the missing individual is dead.

2. **THIS COURT ORDERS AND DECLARES** that the missing individual died on date.

Applicant and Respondents

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at

ORDER

C:\Users\Ben\Desktop\Meird -(LauraEdits) Order (Declaration of Death).docx

Tab 10

HULL & HULL LLP
Barristers and Solicitors
Trust Experience™

WILL DRAFTING MISTAKES – BEYOND THE BASICS

Halton County Seminar – May 9, 2014

Ian M. Hull and Suzana Popovic-Montag

Ian M. Hull
Tel: (416) 369-7826
Fax: (416) 369-1517
Email: ihull@hullandhull.com

Suzana Popovic-Montag
Tel: (416) 369-1416
Fax: (416) 369-1517
Email: spopovic@hullandhull.com

Hull & Hull LLP
Barristers and Solicitors

TORONTO
141 Adelaide Street West, Suite 1700
Toronto, Ontario M5H 3L5
TEL: (416) 369-1140
FAX: (416) 369-1517

OAKVILLE
228 Lakeshore Road East
Oakville, Ontario L6J 5A2
TEL: (905) 844-2383
FAX: (905) 844-3699

www.hullandhull.com
www.hullestatemediation.com

INDEX

WILL DRAFTING MISTAKES – BEYOND THE BASICS

1. Discretionary Trusts

A discretionary non-vested trust should be considered when the person creating a trust wants to ensure that the income beneficiary's rights to income and capital during the term of the trust are not vested. As a result, the trustee is given absolute discretion over how much, if any, income or capital is paid for the benefit of the person with a disability.

An essential element in creating a capital discretionary trust is that a person with a disability does not have a vested right to receive either income or capital from the trust.

The *Ontario Disability Support Program Act,* 1997 ("the ODSP") defines those persons who are entitled to governmental benefits because of disability. In general terms, to qualify that person must:

1. have a disability defined by the Act[1];
2. be over 18 years old; and
3. an Ontario resident.

The leading decision in the area is an Ontario case, *The Minister of Community and Social Services vs Henson.*[2] Where the Court held that a discretionary trust established for a disabled

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[1] Defined in s. 4(1) of the ODSP as a "substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more; the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and the impairment and its likely duration and the restriction in the activities of daily living have been verified by a person with the prescribed qualifications."

beneficiary would not result in a loss of government benefits by a beneficiary as the beneficiary had no vested right to receive either income or capital from the trust.[3]

The essential ingredients of a discretionary trust are that the trustee have a "mere power" as opposed to a "trust power".[4]

The important components of the discretionary trust in the Henson decision were:

- the trustee had absolute discretion;
- the trust provided that the assets did not vest in the beneficiary;
- the income was to be accumulated and then paid out to the association;
- the trust indicated that the government benefits could be maximized; and
- there was a giftover following the death of the beneficiary.[5]

The drafting of the discretionary trust must be carefully done to enable the trustee to plan distributions from the trust so that the government and other benefits received by the special needs trust individual are not affected.

Attached as a Schedule is a precedent of a Henson trust that may be of some assistance.

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[2] (1987), 28 E.T.R. 121, 26 O.A.C. 332 (Div. Ct., affirmed) (1989) 36 E.T.R. 192 (Ont. C.A.).

[3] Note: In Alberta, pursuant to Section 5.4 (2) of the Assured Income for the Severely Handicapped Act, R.S.A. 1980, c. A-48 ("AISH") the Province of Alberta requires special planning considerations. Pursuant to the AISH, the director may deem that an AISH recipient has an interest in the income or capital with fully discretionary trust in certain circumstances.

[4] Kenneth v. Pike, Estate Planning for Families Who Have a Son or Daughter with a Mental Handicapp (1992): The Fundy Regional Council Association for Community Living (at page 87-88).

[5] Ibid, at page 95.

THE ONTARIO DISABILITY SUPPORT PROGRAM ACT, 1997 ("ODSPA")

In 1997 the Province of Ontario brought in the Ontario Disability Support Program Act, 1997[6] ("ODSPA"). The ODSPA superceded the *Family Benefits Act* provisions which related to persons with disabilities.

Part I of the ODSPA deals with eligibility for income support.

The Act provides that an individual is considered to have a disability if he or she has suffered from a continuous or recurrent physical or mental impairment that is substantial in nature and which is expected to last a year or more. The impairment must have a "direct and cumulative effect ... on the person's ability to attend to his or her personal care, function in the community and function in the workplace, results in substantial restriction in one or more of these activities in daily living." Furthermore, the effect on activities of daily living must be verified by "a person with the prescribed qualifications and is typically a member of a health profession that has been approved by the Director of the ODSPA.[7]

Income support under the ODSPA is only available to qualified Ontario residents:

- whose expenses and other budgetary needs exceed their income;
- whose assets do not exceed a base of $5,000.00 for a single person, plus $2,500.00 for a spouse and an additional $500.00 for every non-spouse dependant;
- who provide all required information necessary to determine eligibility;
- along with any dependants, meet any other prescribed eligibility conditions;

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[6] S.O. 1998, c. 25, see Schedules E, F and G for Statute and Companion Regulations, R.O. 222/98-226/98 and 275/98.
[7] See Section 4 of the ODSPA.

- the disabled person cannot own more that $5,000 in assets excluding, among other things, "an interest in a trust from an inheritance or from life insurance proceeds to a maximum of $100,000."[8]; and
- with respect to income, the disabled person must not receive gifts or other voluntary payments in excess of $4,000 in any 12 month period[9] and earn more than $160 per month. There are other exceptions, most important of which are payments for disability related items or services which are not included in the income limits[10].

Section 5(2) of the ODSPA provides that income support will be disallowed for a person who is addicted to or otherwise dependent upon alcohol, drugs or other chemically acted substances, unless the individual has a substantial mental or physical impairment.

Part II (sections 19-31) sets out a comprehensive scheme for the review and appeal of income support decisions.

2. When Gifts and Legacies are Considered in Lieu of Compensation

Where a legacy is given to an executor named in the Will, there is a presumption that it was intended as executor's compensation. The onus is on the executor to rebut that presumption by demonstrating circumstances that show that the legacy was intended in addition to the normal right to executor's compensation.

The general rule is that a legacy appointed to an executor is given to him/her in that character and the burden is on him to show something in the nature of the legacy or other circumstances arising on the Will to repel that presumption. The presumption will be rebutted if it should appear, either from the language of the bequest or from the fair construction of the whole Will,

[8] Section 28 of Regulation 222/98.
[9] Section 43(1).13 of Regulation 222/98.
[10] Section 43(1).9 (i) of Regulation 222/98.

that the bequest to the person who is named as an executor is given to him/her independently of that character.[11]

The description of the executor/ legatee is, in some circumstances, sufficient to rebut the presumption. For example, in *Re Greenaway*[12], the words, "for his own use absolutely" after the legacy to the executor were held to be sufficient to rebut the presumption. In *Re Ross*[13] the following factors were considered relevant:

1. Only 2 of the 3 executors benefit as beneficiaries under the Will;
2. The amounts of the legacies to the executors/beneficiaries are different;
3. The substantial size of the legacies indicate that they are not merely to compensate them for time and effort;
4. There is no reference to "executor and trustee" in the clauses dealing with the legacies to the 2 executors;
5. The clause dealing with the legacies to the executors/beneficiaries do not immediately follow upon their appointment as executors; and
6. The reason for the generosity of the legacies is apparent.

The case-law establishes that the presumption that a legacy is intended in place of compensation is relatively easy to rebut.

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[11] *Re Bassett* (1911), 19 O.W.N. 420 (H.C.).
[12] [1954] 3 D.L.R. 657 (Man. Surr. Ct.).
[13] [1976] 3 W.W.R. 465 (B.C.S.C.).

Furthermore, one should consider the more recent case of *Re Kotowski Estate*[14] where the fact that the legacy is coupled with "some endearing words", the Court held that was sufficient to entitle the executor to the bequest and to reasonable compensation as executor.

In *Re Stanley Estate*[15], the Court considered the reference to the executor/legatee as "trusted friend" and "in her personal capacity". The Court held that such language created sufficient evidence to rebut the presumption.

Calculation of Compensation Generally

The statutory basis for executor's claim for compensation is Section 61 of the *Trustee Act*:

> "A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice."

This provision is applied in the following manner:

The executors are entitled to apply 2.5% on all receipts and 2.5% on all disbursements. The results of this mathematical calculation is then applied against 5 discretionary factors, namely, the following:

(a) The size of the trust;

(b) The care and responsibility involved;

(c) The time occupied in performing the duties;

(d) The skill and ability shown; and

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[14] (1987), 22 E.T.R 174 (Man. Q.B.).
[15] (1996), 13 E.T.R (2d) 102 (O.C.G.D.).

(e) The success resulting from the administration.

The results of this testing process enables a judge to determine whether the claim for compensation is excessive or not and, as a result, will enable the judge to make adjustments as required.

For example, one factor which would support a claim for full compensation at the 2.5% rate would be the Executor's involvement with the negotiation of a sizeable claim against the Estate.

From that compensation, you are generally required to do the following:

1. Deduct the costs of preparing the Estate accounts in Court format for Passing; and
2. Any agent's fees, including payments to lawyers or accountants who perform executor's work, as opposed to legal or accounting work.

As well, executors are not entitled to take compensation until the consent of all of the residuary beneficiaries is obtained or the Court orders such compensation to be taken.

Because of the 5 factors, it is not unusual for there to be a reduction in the "usual percentages" from 2.5% to some lesser percentage depending upon the type of the assets in the Estate and the type of distribution. For example, where there are liquid assets, such as GICs or bank accounts, it is not unusual to receive a lesser percentage for receipts of those items. Similarly, where assets are distributed *in specie* to the beneficiaries without converting them to cash, a reduction on the disbursement side is generally applied.

3. Forfeiture Of Gifts In A Will

An effective means of dissuading beneficiaries from frivolous or unwarranted challenges to a will is to provide a clause in the will that if its validity is challenged by the beneficiary who receives the gifts, that beneficiary's entitlement to the gift is forfeited.

Such a clause is often referred to as an "in terrorem" clause and is really a condition imposed by the willmaker on the gift.

Such a condition if carefully and properly drawn is legal and enforceable and while it is true that, like all clauses of forfeiture, the courts will construe such a clause strictly, such clauses must be approached with great care and some trepidation if a challenge to the will is being considered by the beneficiary who receives the gift.

A condition of this nature is particularly effective in avoiding litigation in situations where the willmaker has designated unequal gifts among, say his children, for whatever reason, which gifts are perceived as unfair by one or more of the children, for whatever reason.

If such a gift to a disappointed beneficiary is substantial and meaningful, that beneficiary should be seriously dissuaded form a frivolous or spiteful challenge to the validity of the will if such a clause is included in the will, whereas if it were not present and his gift, in any event of the litigation would be substantial, such a frivolous or spiteful challenge might well be taken.

In preparing such a clause, the draftsman must be careful to limit the condition to challenges to the validity of the will and not to proceedings relating to interpretation or related matters over which the Court has exclusive jurisdiction, otherwise the clause may well be ineffective.

A more comprehensive treatment of this topic is contained in *Canadian Forms of Wills*, Sheard, Hull, Fitzpatrick, Fourth Edition, page 119.

A form for such clause is contained at page 119 of that text as follows:

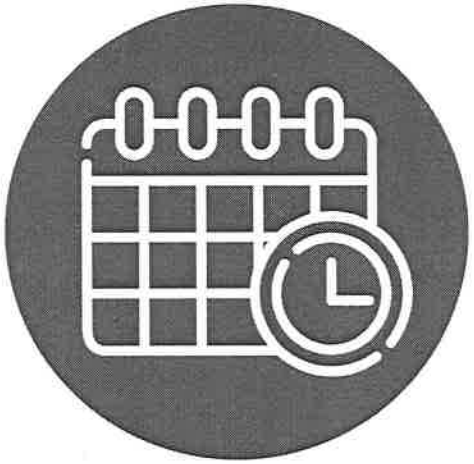
> "I declare that if any beneficiary of this my Will shall, within ___ years after my death and without the consent in writing of my Trustees, which my Trustees in their discretion may give or withhold, institute any action or proceeding in which the validity of this my Will or any Codicil thereto is sought to be impeached, then, in every such case, such beneficiary shall absolutely forfeit and lose all interest in and right to any gift to him hereunder or under any Codicil hereto and every gift so forfeited shall fall into my residuary estate unless it is a gift of a share of my

> residuary estate, in which case it shall devolve as though such beneficiary had died at the time such action or proceeding was instituted."

Clauses of forfeiture are not illegal or invalid unless it goes so far as to attempt to oust the jurisdiction of the Court to determine questions of construction which it would not normally be held to do; or unless it purports to prevent a legatee from taking proceedings necessary for the protection of his or her rights, in which case it would be repugnant to the bequest.[16]

[16] Canadian Forms of Wills, Sheard Hull Fitzpatrick, 4th Edition, Carswell at page 119, see Feeney on Wills, paragraph 16.61.

Tab 11



Deadlines and Limitation Periods in Estates

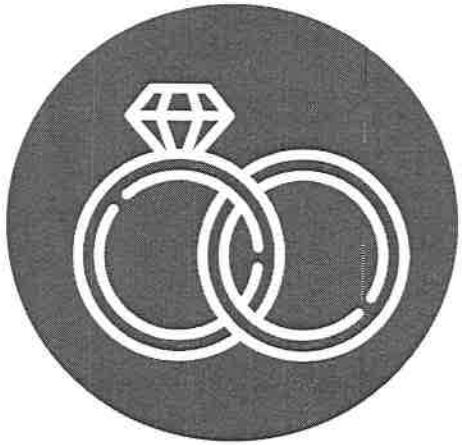
With Ian Hull and Suzana Popovic-Montag

eStateAcademy

Deadlines and Limitation Periods

Election under the *Family Law Act (FLA)*

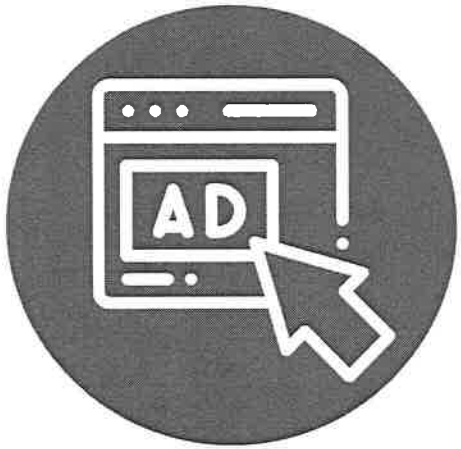
- Married spouses may choose to take under their surviving spouse's Will (or on intestacy if applicable), or seek an equalization of Net Family Property
- **6 months from date of death** to make an election
- If the election is not made within 6 months of death, the surviving spouse is deemed to have elected to take under the Will (or on intestacy), unless the deadline is extended



Will Challenges

- Governed by the *Limitations Act*
- Typically **2 years from date of death** subject to the discoverability principle - *Leibel v Leibel*, 2014 ONSC 4516

Deadlines and Limitation Periods



Dependant's Support Claims

- Applications for dependant's support should be commenced within **6 months of probate**, unless the deadline is extended by the court
- May be greater flexibility where probate is never obtained and/or there are undistributed assets remaining in the estate

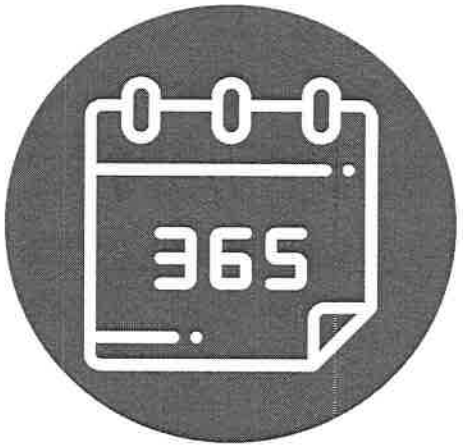
Claims by Creditors

- Generally a limitation period of **2 years from date of death**, subject to the discoverability principle
- Potential exposure of estate trustees if distributions are made while there are outstanding claims by creditors
- Option of advertising for creditors

Deadlines and Limitation Periods

Executor's Year

- Generally, an estate trustee has **one year** to administer the estate before beneficiaries may have a legal entitlement to demand payment
- Begins from the date of death (may be date of probate where there is no will) and may be flexible depending on complexity of estate

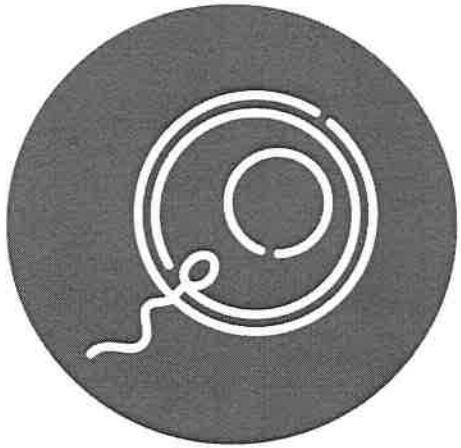


Rule of Convenience

- Where a will does not specify a time for payment of a legacy, interest will accrue after the Executor's Year has passed
- May apply even where the delay in the administration of the estate is attributable to the legatee – *Rivard v Morris*, 2018 ONCA 181

Deadlines and Limitation Periods

Posthumous Conception



In order to qualify as a "child" under the *Succession Law Reform Act*:

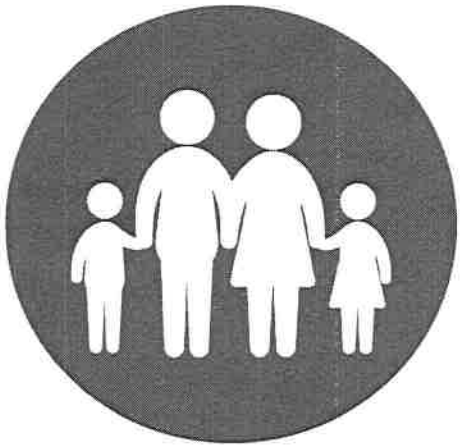
- the deceased's spouse must notify the Estate Registrar in writing within **6 months of date of death** that they intend to use the deceased's reproductive material to conceive a child;
- the posthumously-conceived child must be born within **3 years of date of death**; and
- the court must make declaration of parentage on application made **within 90 days of the child's birth**, subject to an extension by the court.

Dependant Support Claims

WHO IS A DEPENDANT:

Dependant can be any of:

1. Spouse of the deceased – As defined by s. 29 of the *FLA*
2. Parent of the deceased – includes grandparents or an individual that has demonstrated an intent to treat the dependant as a child
3. Child of the deceased, including, in some circumstances, adult and posthumously-conceived children
4. Brother or sister of the deceased



The deceased must have been providing support or have been under a legal obligation to support the dependant immediately before death

Dependant Support Claims

THE APPLICATION

- Order for support can be sought where the deceased did not make adequate provision for support of a dependant
- Courts have great discretion in making an order for support: interim support, transfer of certain assets, periodic payments, or lump sums, etc.
- Section 72 of the *Succession Law Reform Act* and claw-back of assets passing outside of an estate

Dependant Support Claims

DETERMINATION OF AMOUNT

S. 62 (1) of the *SLRA* sets out criteria the court may consider in determining the amount and duration of support, including, but not limited to:

1. The dependant's current assets and means, including any they may acquire in the future;
2. The dependant's age, physical and mental health;
3. The dependant's accustomed standard of living and needs; and
4. The nature and proximity of the relationship with the deceased

Moral obligations may also be considered – *Cummings v Cummings*, 2004 CanLII 9339 (ONCA)

Tab 12

When does a Beneficiary have a Specific Interest in Trust Assets?

When does a Beneficiary have a Specific Interest in Trust Assets?

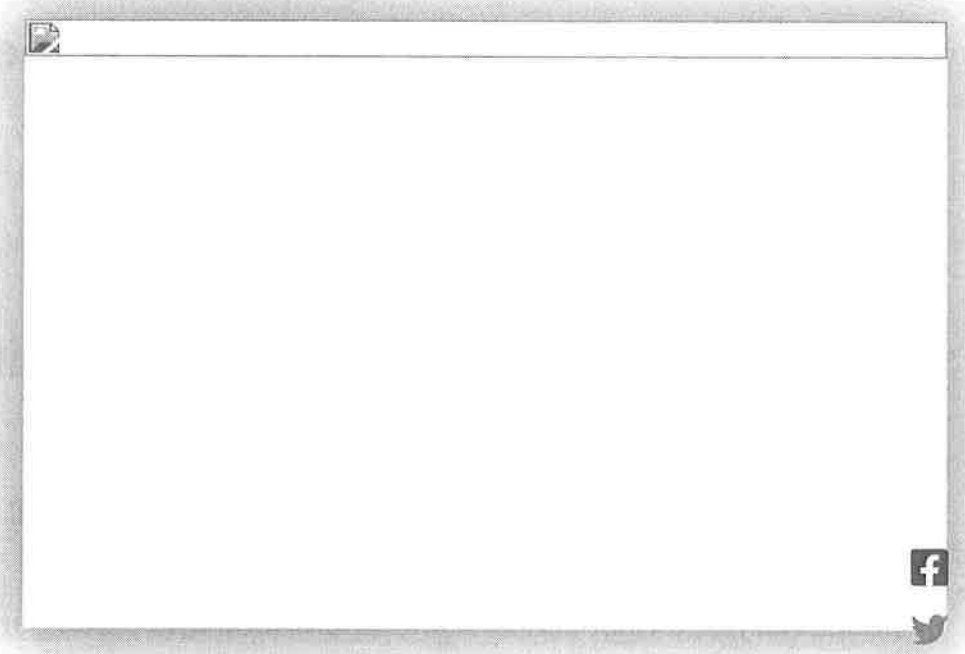
By Hull & Hull LLP | December 19, 2017 | 4 minutes of reading | Leave a Comment

A beneficiary of a trust can have either a vested or a contingent interest in the trust's assets. For example, if a trustee holds an asset in trust for another person, with no further conditions attached, the beneficiary's interest in that asset will be vested. However, if the trustee holds the same asset in trust for a beneficiary, subject to the condition that the beneficiary attain the age of 30, that beneficiary's interest depends on them reaching the age of 30, and is therefore contingent. Whether a beneficiary's interest is vested or contingent can have different consequences depending on the particular circumstances.

In *Spencer v Riesberry*, 2011 ONSC 3222 (affirmed in *Spencer v Riesberry*, 2012 ONCA 418), the Ontario Superior Court of Justice considered the nature of a beneficiary's interest in a trust. Specifically, in the context of matrimonial litigation, the court considered whether a spouse's beneficial interest in real property held by a trust could be considered as "property in which a person has an interest" for the purpose of s. 18(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, such that the property in question could be considered the matrimonial home. If a property is considered to be a matrimonial home, pursuant to s. 4 of the *Family Law Act*, it cannot be deducted or excluded from the calculation of net family property and can contribute to increasing the owner spouse's net family property.

In this case, a married couple, Sandra and Derek, had been residing, with their children, in their family home on Riverside Drive. In 1993, Sandra's mother, Linda, had purchased the Riverside Drive property and settled it in a trust (the "Trust"). Sandra and Derek resided in the residence prior to their marriage in 1994, as well as during the marriage. The couple separated in 2010.

The beneficiaries of the Trust were Sandra, Linda, and Linda's three other children. Three other properties were added, by gift, to the Trust over subsequent years, and each of these other properties were occupied by one of the other three children and their families.



The terms of the Trust provided that the trustee was to hold the trust property, subject to a life interest in favour of Linda. Upon Linda's death, the trustee was to divide the trust property into equal parts so that there is one part for each beneficiary living at the date of Linda's death.

The court considered the nature of Sandra's interest in the Riverside Drive property in the context of her net family property and whether it could be characterized as a matrimonial home. Due to the terms of the Trust, the court held that Sandra did not have a specific interest in the Riverside Drive property. Although she was a beneficiary of the Trust, which owned the Riverside Drive property, it does not follow that Sandra was specifically entitled to that property in particular. Sandra's interest in the Trust was characterized as a contingent beneficial interest, as her ultimate entitlement under the Trust depended on various factors. For instance, as the division of Trust property amongst beneficiaries would happen only upon Linda's death, the assets to be distributed would consist of whatever is held by the Trust at that time. Additionally, the beneficiaries must be alive at the time of Linda's death in order to receive their share.

On this basis, the Court concluded that Sandra did not have a specific interest in the Riverside Drive property such that it could be considered a matrimonial home. As Sandra was a contingent beneficiary of the Trust, the Court did find that she held an interest in the Trust's assets generally, which was required to be valued and included as part of the equalization calculations. However, as the interest is not subject to the special treatment given to the matrimonial home, it can be deducted or excluded from net family property, as applicable. Overall, as Sandra's interest in the Trust's assets was contingent and not vested, it had a significant effect on the matrimonial proceedings with her spouse.

Thanks for reading and happy holidays!

Rebecca Rauws

You may also enjoy these other blog posts:

- Trusts and family property – when can you trust a trust?
- Varying or Terminating Trusts
- Real Estate and the Matrimonial Home

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The Need to Diversify

January 4, 2017

Happy new year everyone! I'm sure that we're all a bit sluggish coming back from...

Simple mistakes are sometimes the hardest to avoid.

January 5, 2017

As a professional, one is never pleased to hear of a colleague being found liable...

Tab 13

Tab a

HULL & HULL LLP
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Trust Experience™

TRUSTS, ESTATES & THIRD PARTIES: COMPLIANCE IN MODERN PRACTICE

Ian M. Hull
Suzana Popovic-Montag

HULL & HULL LLP
Barristers and Solicitors

TORONTO
141 Adelaide Street West, Suite 1700
Toronto, Ontario M5H 3L5
TEL: (416) 369-1140
FAX: (416) 369-1517

OAKVILLE
228 Lakeshore Road East
Oakville, Ontario L6J 5A2
TEL: (905) 844-2383
FAX: (905) 844-3699

Websites: www.hullandhull.com
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INDEX

THE FAMILY MEETING – A PRE-EMPTIVE STRIKE AGAINST ESTATE LITIGATION

Introduction

As the transfer of wealth from one generation to the next proceeds in Canada, the inevitable growth in estate litigation will no doubt continue. In fact, statistically the transfer of wealth in Canada is moving along at an extraordinary rate.

Trusted advisors continue to be faced with clients who come to see them hoping to create an estate plan that is geared in part to either resolving future conflicts or facing those conflicts in the estate planning process itself.

There currently exists an excellent regime whereby lawyers, estate planners, accountants, insurance agents and other allied professionals work together with the client to create a plan that makes sense both from a tax standpoint and from the family dynamics perspective.

Many of these existing estate plans work as the percentage of estate matters that are litigated continue to be proportionately relatively small. However, while the amount of litigation, on a percentage basis, may be small, two difficulties arise in the litigation context. First, even that small percentage of estate litigation that does get created on the death of the client is usually extremely painful for the family, both financially and emotionally. Second, even when you think you have all the "t"s crossed and the "i"s dotted, the advent of estate litigation usually occurs on a fairly random basis. In other words, no matter how hard you try, if the underlying family dynamics have not been considered, then even the best laid plans may well fall into the "black hole" of estate litigation.

Presumably, more than just good documentary planning on the part of your client is now needed.

Historically, the whole estate plan was structured without the input of those who are most affected by the result, namely, the family members. It is the additional component of the family dynamics that is a significant litigator of estate litigation.

Within the confines of the estate litigation arena, the process and the fight can be incredibly harmful to family relationships. These proceedings are often emotionally devastating and financially problematic.

Before examining some of the common causes of and possible alternatives to estate litigation, it is helpful to consider the main estate planning techniques.

What is a Will?

A will is a written statement that sets out how you want your assets to be disposed of on your death. A will creates an almost unchangeable estate plan, after your death, which can only be varied if everyone with a financial interest in the estate agrees. As a result, it is important that it accurately describes your wishes. After you die, your will provides a framework for the appointment of an executor, who is responsible for the administration of your estate. Your will gives the executor the power to deal with your assets and to distribute them to the beneficiaries you have selected.[1]

Powers of Attorney

A power of attorney allows you to plan for situations where you may become incapable and unable to make decisions about your property or your health. With a power of attorney, you appoint another person (known as the "attorney"), although the person does not have to be a lawyer to make those decisions on your behalf. A power of attorney is only effective during your lifetime and terminates on your death.[2]

There are two different types of powers of attorney; one is a power of attorney for property, which allows the attorney to manage your property for you, and the other is a power of attorney for personal care, which allows the attorney to make health care decisions for you if you become incapable of making those decisions yourself. You do not have to appoint the same person to both positions.

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[1] Hull, I.M., Advising Families on Succession Planning: The High Price of Not Talking (LexisNexis) (2005) at page 9.
[2] *Ibid* at page 47.

Trusts

Trusts offer a number of benefits as an estate planning tool, from lowering or deferring taxes to providing a more flexible method of distributing assets. But before we look at the benefits, it's important to understand the basics of how trusts work.

A trust is created when you as the settlor transfer ownership of certain assets to a trustee, who holds and manages the assets for the benefit of the beneficiaries. The beneficiaries are able to enjoy the benefits of the assets but do not legally own them. For example, if you transfer your cottage to your brother in trust for your children, your brother legally owns the cottage, but your children, and not your brother, are entitled to use the cottage.

Trusts can either be *inter vivos* trusts, which are created during your lifetime, or testamentary trusts, which are created in your will and take effect on your death. Different tax rules apply to the two types of trusts: *inter vivos* trusts are taxed at the highest marginal tax rate and testamentary trusts are subject to the graduated tax rates that apply to individuals.

There are many different types of trusts that may be useful as part of your estate plan. These include:

- **Income trusts.** You can create a trust that gives the beneficiaries the income earned by the trust's capital assets (like an investment account, for instance). For greater flexibility, the trustee may also be given the right to decide how much income should be paid to the beneficiaries. The trustee may even be given the right to pay part of the capital to the beneficiaries over a period of time as well.
- **Spendthrift trusts.** If you have a family member who does not handle money well or who has a history of financial problems, you may be concerned about giving them access to a large sum of money. A spendthrift trust allows you to ensure that they have the income they need, while preventing them from depleting the capital.
- **Trusts for special needs beneficiaries.** If you have a child with special needs, you can use a trust to secure their long-term future. A special form of trust is created to ensure that the child isn't disqualified from receiving provincial disability support benefits.
- **Spousal trusts.** Transferring property to a trust for the benefit of your spouse allows you to defer the capital gains taxes that will arise on your death until the trust disposes of the property or your spouse dies.

- **Family trusts.** These are useful for income-splitting amongst family members, particularly if the family owns a business.
- **Incentive trusts.** An incentive trust is used to motivate beneficiaries who expect to inherit a large amount of money to lead a productive life.

Advantages of a Trust

Trusts offer many advantages, both to the settlor and the beneficiaries:

- **Tax reduction.** Since testamentary trusts are taxed at the same graduated rates as individuals, they can be used to income-split among the beneficiaries. In addition, money can be distributed from the trust so as to minimize the tax consequences to the beneficiaries. For example, capital gains, which are taxed more favourably than other types of income, can be paid by the trust to the beneficiaries and taxed in their hands.
- **Protection from creditors**. Assets that are held in a trust are usually protected from the beneficiaries' creditors.
- **Money management.** If a child inherits a large sum of money at a young age, he or she may not be able to properly manage that money. If the money is held in a trust, the trustee can ensure that the child's living costs and other appropriate expenses are covered, but can delay distributing the bulk of the funds until the child is older and more financially responsible.
- **Gifts to minor children.** In Ontario, children can't legally own property until they are 18. If you want to leave assets to minor children, you must create a trust or the Office of the Official Guardian will administer the money until the child turns 18.
- **Dispute resolution between children.** Transferring a contentious asset, like a cottage, to a trust for the benefit of your children allows the trustee to make decisions about that cottage and can reduce the conflict between your children.
- **Protection for a second spouse.** A trust can allow you to balance the needs of your children from your first marriage with the needs of a second spouse. You can transfer property to a trust that will provide income to your spouse during his or her lifetime. On your spouse's death, your children will receive the remaining capital from the trust.[3]

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[3] *Supra* note 1

Bringing in the Family – Protecting the Family from Legal Challenges

Trying to convince your client to open up the full family dynamics during his or her lifetime is a difficult sales pitch. Typically, your client does not even want to deal with the issue of death one-on-one with you, as the trusted advisor, let alone face the prospect of bringing in various family members, including non-blood related.

Having said that, it only takes one dissatisfied beneficiary to start estate litigation. That's what the pre-estate family conference is designed to prevent.

When preparing your estate plan, you want to leave your family with a legacy that they all accept, rather than a costly dispute that will erode the value of your estate and may permanently divide your family members.

Traditional estate planning focuses on developing a comprehensive estate plan, including a will disposing of your assets. While this is important, it does nothing to prevent unhappy family members from bringing a legal action to challenge that will – and it really does take only one dissatisfied beneficiary to start litigation and drain the value of your estate.

In our experience, having litigated over estate matters ranging from those that were planned almost to perfection right through to those that were a mess (often created by either the planning process itself or the client (*i.e.* homemade wills or handwritten wills)), the ability of a lawyer to accurately predict that an existing estate plan will run smoothly after death is, in our view, very much in doubt.

Currently, disputes come from all angles within the client's world and they are usually very surprising to the family members. For example, your client might be quietly sending $500.00 per month to relatives overseas, an amount that would not attract much attention to him or her when preparing an estate plan but many, nonetheless, result in a claim by the relatives against the assets of the estate as dependants upon your client's death.

More to the point of the family dynamic itself, many family members do not know and understand the nature and effect of the will itself. As an illustration, many matters are litigated over the question of executor's compensation. In particular, if one family member is chosen over another as executor, the fact that that individual was chosen may bring with it an emotional

consequence after your client's death. One brother may be upset by the fact that he is not "running the show", so to speak, and an easy way to get at his sister/executor is to make trouble in the context of the compensation that she might claim.

Another example of a problem that may arise in a well-planned, carefully constructed estate plan is the transfer of wealth through a family-run company. For instance, if one of the siblings is currently running the company and is given the shares of the parent's, it may be an entirely justified, fair and/or equal distribution in the context of the other siblings; however, the event itself may either come as a surprise to the other siblings or, more importantly, may be seen as an unequal distribution which is challenged in the context of an estate litigation proceeding.

What is the Solution?

Of course, there is no definitive solution to this problem as the frailties of human nature prevail, and it is impossible to predict with certainty that any steps taken before death on behalf of your client will result in the perfect, unchallenged and undisrupted administration of his or her estate.

However, there are two aspects which should be considered.

(a) The Existing Approach

There is simply no substitute for good, effective and comprehensive estate planning. By using well-qualified counsel, with the assistance of the necessary allied professionals and trusted advisors, one takes a giant step forward in the preventative strike regime.

From a documentary standpoint, consideration should be given to the drafting techniques employed through the estate planning process. For example, the use of *inter vivos* trusts, trusts within the will, *in terrorem* clauses (*i.e.* it will cost you big time if you litigate) included in the will and other drafting tools can go a long way to create a bulletproof estate plan.

(b) The Family Meeting Approach - Enter the Professionally-Mediated Family Conference

Notwithstanding all of the efforts on the part of your client to create an individual estate plan that is protected from attack, the one important consideration missing in the existing approach is the role of the beneficiaries themselves.

In fact, arguably, the whole estate planning process should also be looked at from the bottom up and this view from the bottom should, in our opinion, be conducted live, as opposed to projected by the client's estate planning professionals.

A family conference gives you the opportunity to explain your wishes to family members and describe how you intend to dispose of your estate. It provides a forum for discussion that ensures both you and your intended beneficiaries are comfortable with your proposed dispositions.

It also allows you to address the emotional issues that may arise around your will, and if necessary, make changes to your estate plan so that everyone is satisfied.

We hope to provide an overview of the steps you can take to protect your estate plan, and explain how the pre-estate family conference can play an integral role in the estate planning process.

To the extent that it is possible, full, direct family participation in the estate plan can presumably add another important and effective pre-emptive strike against problems after death.

As to the "sales pitch", presumably a five-minute discussion with your client advising him or her that if the estate plan comes under attack for any reason, which can ultimately never be entirely foreseen or predicted, then tens of thousands of dollars will be spent on lawyers, accountants and other professionals cleaning up the mess. This prospect alone will, no doubt, send shivers down your client's back. However, you will also likely be faced with the sensible reaction on the part of your client that if his/her beneficiaries can't get along, then so be it. Further, then, your client's impression may be that it will be their loss if they want to fight amongst themselves.

Having said that, the one thing that will likely resonate in your client's mind, in any event, is the fact that his or her whole estate plan can be fought over and substantially restructured, ignoring many of his or her wishes in the context of a fight later in the day.

Finally, your client needs to understand that the impact of the estate plan may result in emotional strife within the family that could ruin relationships or make it worse within the family for the rest of their lives, and bitter feelings may be harboured in respect of your memory.

Presumably, the three-part combination of an incredible waste of money, completely ignoring your wishes and the lifelong emotional impact on the family will leave its mark in your client's mind.

PROTECTING YOUR ESTATE FROM CHALLENGES

Your will is the cornerstone of your estate plan. One of the best ways of protecting your estate from challenges is ensuring your will is professionally drafted and distributes your assets to the people you intend. Here are a few steps you can take during your lifetime to reduce the likelihood of a successful challenge to your will.

- **Have proof of your mental capacity.**

  A will is invalid if you didn't have the mental capacity to sign it when the will was made. Ask your lawyer or your doctor to take detailed notes on your mental capacity and your ability to provide and understand instructions at the time.

- **Guard against claims of undue influence.**

  Your will can be challenged on the basis that someone has forced you to sign a document that does not reflect your real intentions. If you are elderly, unhealthy, frail or highly dependent on one person when you make your will, have your lawyer and doctor prepare detailed notes on your mental condition at the time.

- **Ensure your will is properly executed.**

  Your will can be challenged if it is not properly executed. Your lawyer will ensure that it is properly witnessed and that the witnesses sign the necessary affidavits. Any changes you later make to your will must also be properly signed and witnessed.

- **Document any gift you make during your lifetime.**

  If you make large gifts during your lifetime, make sure that the appropriate legal documents are prepared and that your lawyer makes notes as to your mental capacity. This is particularly important if you are making unequal gifts – for example, if you give money to only one of your children.

- **Draft your will to protect against challenges.**

  Careful will drafting can help reduce challenges to your estate. For instance, your will can contain a clause providing that if a beneficiary challenges your will, they will lose their right to receive anything from your estate. Another possibility is to have your beneficiaries sign a contract not to challenge your will. Your lawyer will help you decide what might work best for you.

THE HIGH COSTS OF ESTATE LITIGATION

Protecting your estate from challenges becomes even more important when you consider the financial and emotional costs involved in defending an estate during the litigation process. People generally focus on the fees and disbursements they pay to their lawyer, but the emotional costs of litigation can leave family members permanently estranged.

Traditionally, the estate was ordered to pay the costs of all of the parties involved in litigation, regardless of who was successful. However, in recent years, courts have moved away from this approach and are focusing on the success the parties achieve in the litigation. This can mean that parties may have to bear their own costs, or that someone who unsuccessfully challenges a will may be ordered to pay the estate's costs.

There are several stages in estate litigation, and your costs climb as you move through each stage. These stages and their approximate costs are:

Obtaining an order organizing the litigation	$5,000 to $10,000
Collecting and disclosing evidence to establish your case	$2,000 to $20,000
Attending discoveries to give sworn evidence	$10,000 and up, plus the costs of preparing the transcripts ($2.00 to $3.50 a page, with an approximate length of 200 pages
Preparing for and attending a pre-trial conference	$3,000 to $7,500
Preparing for and attending at trial	$15,000 to $30,000 a day for trial plus fees for preparation time
Appeal of court's decision	$40,000 and up

MEDIATION

Mediation is a non-binding process in which people attempt to reach an agreement on the issues between them with the help of a trained mediator. Mediation is far less costly than the court process (overall mediation costs generally range from $7,500 to $25,000) and allows people to reach an agreement themselves, rather than have a decision imposed on them by a

judge. The downside, of course, is that if mediation is unsuccessful, you'll have to pay both the mediation costs and the litigation costs, which will add to your financial burden.

MOST FREQUENT CAUSES OF ESTATE LITIGATION

Even if you have a comprehensive estate plan and you've taken all the necessary steps to bulletproof your will, you may still find yourself the subject of litigation. Here are some of the most frequent causes of estate challenges.

- **Lack of a comprehensive estate plan.**

  It's important that your estate plan covers all of your assets and that it's kept up-to-date, so that it reflects any changes in your personal circumstances or intentions.

- **Inadequate estate planning advice.**

  Make sure you have advice from estate planning professionals (lawyers, accountants, financial planners or insurance professionals) about your estate plan. Obtaining professional advice also reduces the likelihood of poorly drafted documents that may create confusion about your true intentions.

- **Acrimonious family members.**

  If your family members are acrimonious and are likely to challenge your wishes, make sure your estate plan is as enforceable as possible. Keep in mind that if an estate dispute starts, family members may adopt positions that are completely unreasonable and be resistant to all rational advice.

- **Actions of your personal representatives.**

  The executors and trustees that you appoint must behave in a scrupulously fair manner towards all family members. Make sure you are selecting individuals who will be able to set aside any pre-existing feelings they may have about your estate or the beneficiaries and will be able to establish a good relationship with your family members.

THE FAMILY CONFERENCE SOLUTION

You can protect your family from the high costs of estate challenges by using a family conference to solve disputes before they become litigious. With the assistance of the mediator, you can use the conference to tell family members about your estate plan and, hopefully, obtain their approval of that plan.

Before the Family Conference

There are a number of steps you need to take before the family conference takes place to ensure that it runs smoothly, including determining who to invite. In general, you should invite all of the adult members of your family who may be affected by your estate plan. At a minimum, your spouse and children should attend.

You also need to decide where to hold the meeting. A neutral location, such as the mediator's office, is usually the best choice.

Finally, you should prepare an agenda before the meeting to ensure that all of the issues you want addressed are raised. The mediator will work with you and your lawyer to prepare the agenda and become familiar with your estate plan and any issues that are likely to be contentious.

At the Conference

The meeting will generally start with the mediator explaining his or her role to the family members and outlining the rules governing the meeting. Typically, the mediator asks family members to sign two agreements at the beginning of the meeting:

- The Family Conference Agreement, which emphasizes the neutral role of the mediator and the confidential nature of the meeting. It also provides that the mediator cannot be subpoenaed or required to give evidence about the family conference.
- The Rules for the Family Conference, which are designed to promote an atmosphere of mutual respect and courtesy.

The meeting often starts with the mediator outlining the family conference process and providing a brief outline of your proposed estate plan. You, and possibly your spouse, will also provide brief opening statements, which reiterate your goals for the family conference. Your lawyer will then provide a detailed explanation of your estate plan and answer questions that your family members may have.

Once your family members have been fully informed of the details of your estate plan, they can be split into smaller groups of caucuses where they can openly discuss their concerns. The mediator will move between the caucuses and the parents to determine what issues are dividing

the family. The mediator will promote negotiation on these issues and suggest possible ways of resolving them.

The ultimate goal of the family conference is to have all family members sign a Family Constitution, approving the estate plan and agreeing not to contest the will. If the meeting goes well, this can happen in a single session. In some cases, subsequent meetings will need to be held.

Need for Full Disclosure

If the family conference is to succeed, it is essential that you fully disclose the details of your estate plan to your family members. If you fail to do so, you will create an atmosphere of mistrust that will poison the process. In addition, if after your death your family members discover that you did not fully disclose the details of your estate plan, they are more likely to challenge your will.

There are a number of sensitive topics that may be difficult to discuss with your family members, including unequal treatment of your children, spendthrift beneficiaries, and succession issues with respect to your family business. The mediator can help you plan the best way to address these topics with your family.

What if Some Family Members Won't Attend?

Some family members may refuse to attend the family conference. If that occurs, the rest of the family should still meet so that you can obtain their agreement to your proposed estate plan. Once the Family Constitution is signed, the mediator can then send it to the non-participating family members and invite them to sign it.

In some cases, all of your family members may attend the family conference, but some family members may refuse to approve your proposed estate plan. If that happens, you may want to amend your estate plan to satisfy as many of their concerns as possible without sacrificing your personal goals. Make sure that all of your family members receive a copy of the Family Constitution, even if they won't sign it.

Even if some family members won't sign the Family Constitution, it is likely that a court will never the less consider the process favourably if your will is challenged. It will also be difficult

for those family members to argue that you lacked testamentary capacity or were unduly influenced, because your lawyer will have comprehensive notes about the family conference. In addition, circulating the Family Constitution to all of your family members shows your clear intentions as to how you want your assets divided.

In the end, whether or not all family members participate in the process or agree with the result, holding a family conference and developing a Family Constitution are key steps in protecting your estate from litigation.

After the Conference

Once the Family Constitution is signed, your lawyer and other professional advisors will prepare the necessary documents, including wills, trusts, powers of attorney and deeds of gift, to implement your estate plan. Once that is done, you'll need to be diligent in reviewing your estate plan regularly to make sure it still reflects your wishes. You should review your estate plan immediately if you have any major changes in your personal circumstances, and you should review it every few years if no such changes occur. If you make substantial changes to your estate plan, you'll need to hold another family conference.

INCENTIVE/PURPOSE/PRODUCTIVITY TRUSTS

Introduction

One of the important consequences of the considerable transfer of wealth from the baby boom generation to their children and grandchildren, is the individual impact it will have on those beneficiaries. Having said that, in our experience, the "problems of wealth" resonate at all levels, even when relatively modest inheritances are passed on to the next generation(s). The extent of this phenomenon is illustrated by the fact that new terminology has surfaced in the United States to describe the baby boomer children as "trust babies", and the enjoyment of the new wealth as the epidemic of "affluenza".

As a result, it may be worthwhile to explore the concept of how one can deal with the potentially unmotivated child that has received the financial protection of being named as a beneficiary in a substantial trust. The key, of course, is to incentivize that beneficiary.

Essentially, by using the traditional trust mechanism, some suggestions have been made to revise that existing structure to help encourage or discourage certain types of behaviour on the part of the particular beneficiary. Of course, no matter what legal arrangements are created, the fundamental questions are the same: What does it take to motivate people and what is the best way to facilitate the development of a productive individual?

The Current System

To date, trusted advisors have generally focused their attention on creating an estate plan that is fundamentally based on avoiding tax and, typically, if there is a need to either protect the surviving spouse during his or her lifetime or the children of that relationship, a life interest arrangement is created. In this situation an individual (*i.e.* executor/trustee) is charged with the management of the capital and, at all times, balancing the interests of the life tenant and the income beneficiary.

A recent trend coming out of the United States is to add a twist to the traditional estate planning process by trying to draft into trust documents language that will control the behaviour of the beneficiaries.[4] Essentially, the suggestion of those who propound the incentive trust approach is that estate planners need to move away from the traditional approach of drafting an estate plan with the goal of tax savings, creditor protection and estranged spouse protection, and begin to draft trust documents that will assist to modify the behaviour of the beneficiaries.

Trusts for Children

In considering adding a new layer to the whole trust drafting process, some thought must be given to the fundamentals behind the creation of a trust and why trusts themselves are used for the protection of children.

The obvious goals of a settlor/testator are to protect the financial interests of minor beneficiaries, and while many clients do not like to admit it, an obvious result of any trust arrangement is the fact that the settlor and/or testator is given the privilege of, in some measure, "ruling from the grave".

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[4] For a comprehensive review of the incentive trust concept see Marjorie J.D. Stephens, "Incentive Trusts: Considerations, Uses, and Alternatives", (2003) ACTEC Journal 5.

In her article, "Incentive Trusts: Considerations, Uses and Alternatives"[5], the author, Marjorie Stephens, considers those the traditional reasons for creating a trust for children. She notes that there are obvious problems that come from this traditional estate planning technique, which include the fact that the money received by the children/beneficiaries may act as a disincentive to future education. Furthermore, those children may begin to depend on the trust money and not rely solely on their own personal resources. The author goes on to say that the most important consideration in respect of distributing the wealth, in the context of a trust environment, is a determination as to when the particular child becomes mature enough to handle both the income and the capital of the trust.

Obviously, it is up to the estate planners and lawyers to create a protection system that typically results in the income and capital being given to the beneficiaries, with a view to eventually having them receive the money without any "strings attached". In fact, ideally, most settlors and/or testators would prefer that the income, and capital if necessary, of the trust be used for support of the children up to the age of 20, and then focus the spending, when the children are in their 20's, solely on education. The prospect that the child will enjoy the income for any other purpose, during their 20's, is not as desirable for many clients. However, it is difficult to control the use of the income, and capital, even in the best of circumstances.

Drafting Challenges

Historically, motivating the child beneficiary was not something that was usually addressed in the structure of the trust document. The concept underlying an incentive trust is that the trustee will reward certain behaviour. For example, the trust could be drafted in such a way that the more productive the child is financially, the more money she will receive from the trust. The purpose is obvious, namely, encouraging the child to live a productive life.

The concept of the incentive trust was, in part, first developed in a Wall Street Journal article dated November 17, 1999, entitled "Trust Me, Baby". Some suggestions made in that article included the idea of matching earned income and creating a specific fund to set up a business or professional practice. Another suggestion was that the monthly income could be paid to a stay-at-home mother or father, or specific language could be included to deny distributions if the child did not enter into a premarital agreement when he or she married. More dramatic suggestions included drafting trust clauses which provided that the child would be denied any

[5] *Supra* note 4

money from the trust if he or she failed a drug test, and in an effort to incentivize the child, the trust could include a clause that provided for more money to the child if he or she was receiving therapy.

Obviously, these types of clauses create their own problems and consideration has to be given as to whether or not they are capable of being administered. This is presumably the lawyer's challenge. As with any trust document, broad language usually needs to be incorporated so that unknown future events can fall within the confines of the drafting language. Therefore, it is difficult to draft in all of the desirable behaviour, in the context of an incentive trust.

From an administration standpoint, if the specific benefit is tied to specific behaviour, then it is not that difficult for the trustee to attend to the administration of the assets. However, given the necessity for broad and vague language in the drafting, encouraging a productive child can be much more difficult to administer.

At the outset, it is suggested that the following steps be considered:

(1) The objects and purposes of the trust need to be defined;
(2) Consideration must be given to broad and specific behaviours that need to be encouraged; and
(3) Consideration must also be given to whether or not the provisions of the trust, as drafted, can indeed be administered.

Psychological Considerations

In her article, Marjorie Stephens[6] sets out some of the psychological considerations that are relevant to the structure of a trust designed to incentivize behaviour. The starting point for any incentive trust is the idea that the settlor/testator is trying to motivate an individual. The two presumptions are that (a) money can motivate that particular individual; and (b) the settlor/testator will use his or her power wisely and that the individual appointed to administer those powers will do so judiciously.

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[6] *Supra* Note 4 at page 14.

Marjorie Stephens[7] notes that, in her view, one should not try to use the reward method to control an individual as that does not motivate a beneficiary. In fact, the key to success is that the child takes control over his or her own life and that the use of the exercise of control enables or encourages the child to do such.

The foundation to any incentivizing behaviour is confidence that the child believes he or she can get things done. In the process of motivating the child and creating a confident child/beneficiary, there must be economic independence for that individual.

In Marjorie Stephens'[8] view, one should not draft "bail out" provisions in the trust. Rather, every effort should be made to foster a feeling that the child must take responsibility for his or her own conduct. Encouraging independent decision-making, accepting responsibility for the consequences of one's actions and establishing and fostering strong relationships are the foundations to creating economically independent and competent beneficiaries.

Practical Considerations

In an effort to reach the goal of a financially independent and confident child/beneficiary, practical considerations need to be considered when drafting the trust provisions.

Obviously, the greatest need for economic assistance for the child is usually between the ages of 20 to 40, and therefore a careful distribution scheme needs to be set out during this period of the child's life.

Marjorie Stephens[9] notes that:

> Money is not the "problem". Individuals are not "de-incentivized" by money, but rather by the dynamics around the money. Money means control over the individual, not by the individual ....The solution to this problem, as is suggested, is proper, comprehensive communication.

As a consequence, it is suggested that you start, at an early stage, discussing the financial arrangements and the emotional issues surrounding financial support. Sometimes it is useful to involve the child directly in the decision-making process, including investments and distribution.

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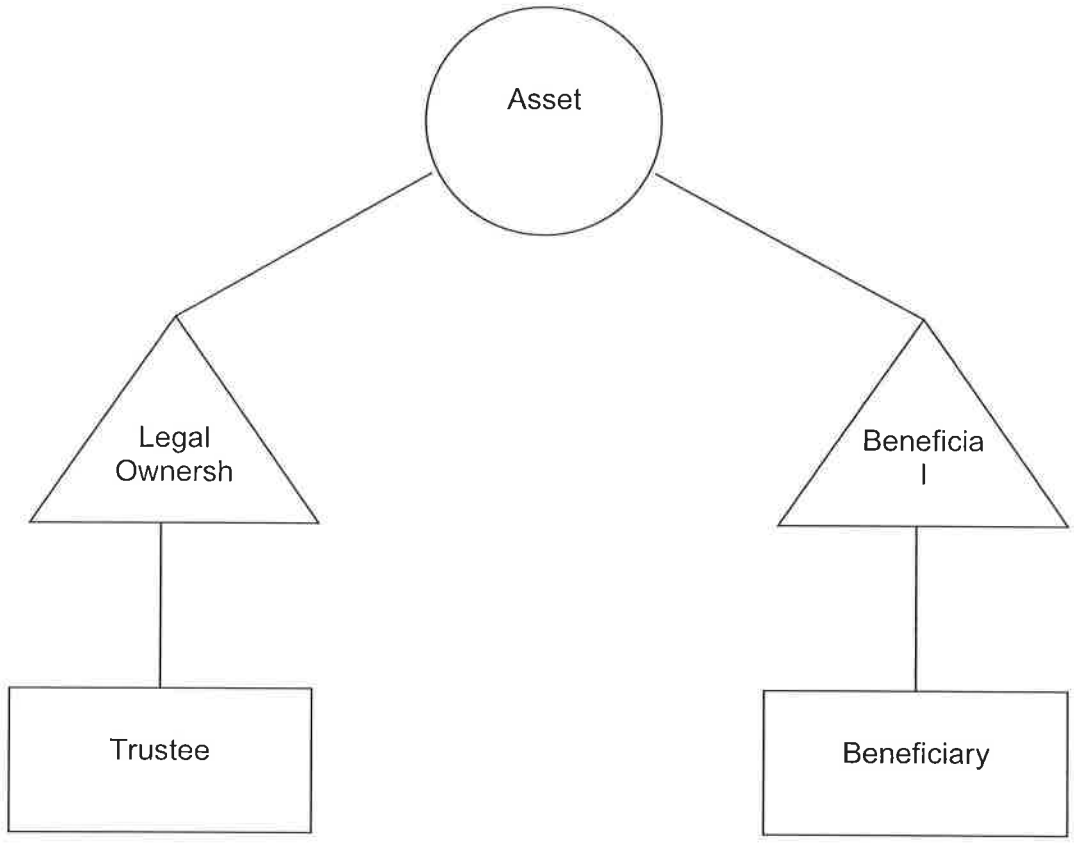
[7] *Supra* Note 4 at page 12-13.
[8] *Ibid* at page 13.
[9] *Ibid* at page 14.

Knowledge is a form of control and releasing that information is an important part of the shift in control. Essentially, as the beneficiary matures, so does your trust in that beneficiary and therefore a pro-active approach to involving the beneficiary in the process is important.

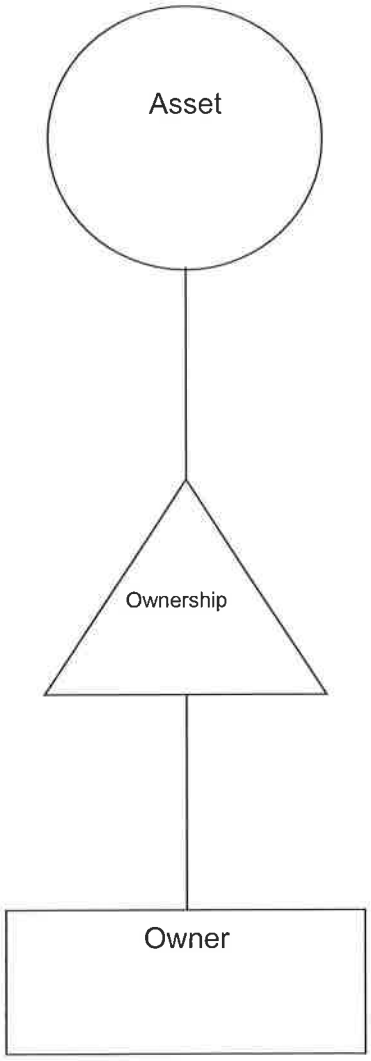
Conclusion

In summary, while the concept of incentivizing beneficiaries and influencing behaviour through the trust mechanism is novel, it seems to us that small steps can be taken to develop an estate plan that moves toward creating confident and financially independent children. This process involves both creative drafting and important psychological considerations in the confines of the family unit.

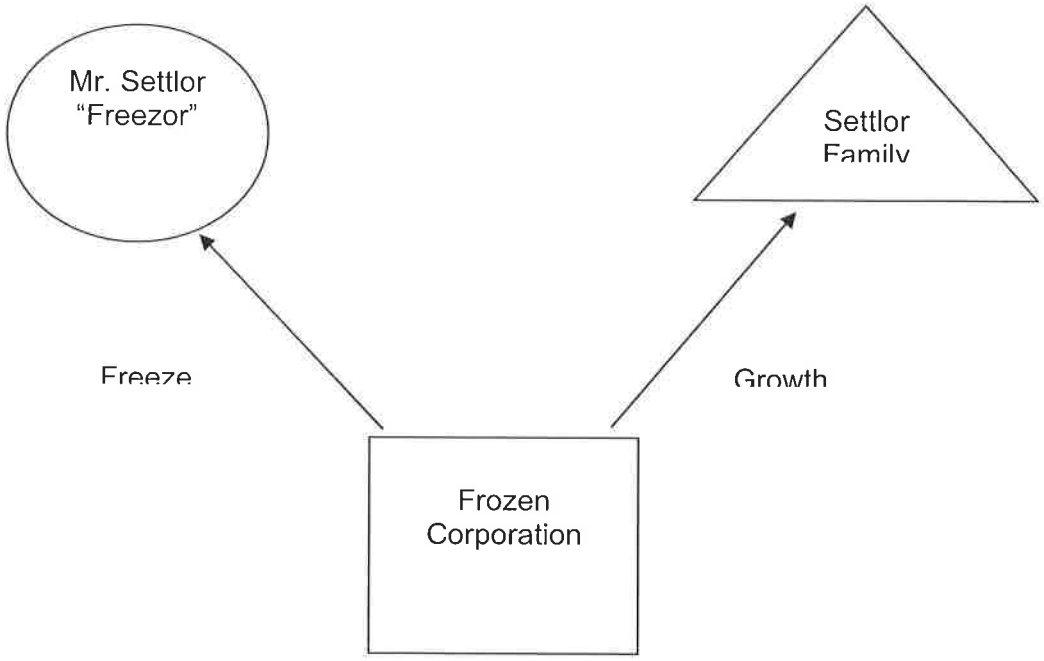
Trust Concepts



Traditional Concept of Ownership



Estate Freezes – Basic Freeze



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Tab b

Substantial Compliance

With Jordan Atin and Ian Hull

Agenda

1. The Legislation
2. The pre-requisites
3. The Ontario cases
4. The Impact

Requirement for Valid Execution

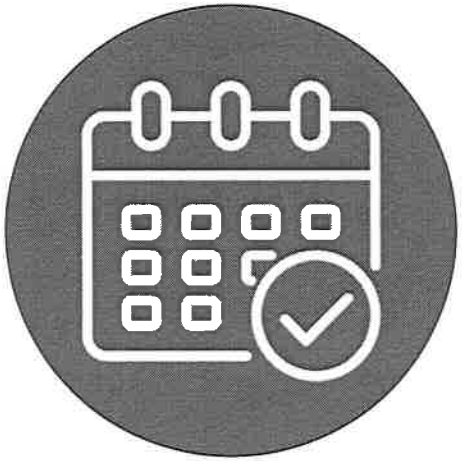
1. In Writing
2. Signed/Signature acknowledged by Willmaker
3. If the document is not entirely in the Willmaker's own handwriting:
    a. # 2 must be in presence of 2 witnesses present at same time
    b. Both witness subscribe the will in the Willmaker's presence

Substantial Compliance Legislation

If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the will of the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it had been properly executed or made.

Section 21.1(1) *Succession Law Reform Act*

Basic Prerequisites



1. Death after January 1, 2022.
2. Document is not a "electronic". *(Electronic Commerce Act, 2000)*

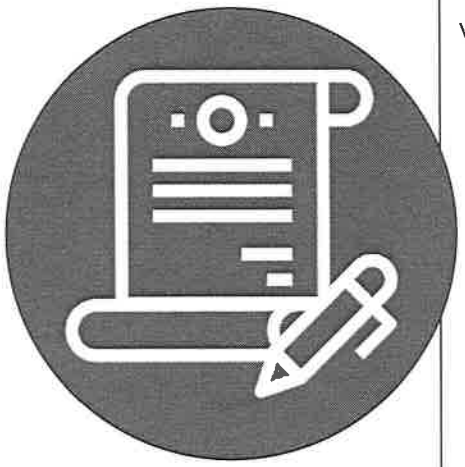
Legal Prerequisites

On the balance of probabilities with the burden on the propounder:

1. Is the document "authentic"
2. Does it set out "the testamentary intentions" of the deceased.

"Records a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death."

Easy Case



Couple had wills and powers of attorney prepared by a law firm and all were properly signed and witnessed except that the lawyer missed signing the wife' will.

1. Document drafted by a lawyer as a will.
2. Everyone intended the will to be signed.
3. Error was unintentional.
4. Error made not by Willmaker, but by the lawyer.
5. Willmaker thought the Will was valid.
6. The originals were stored at the lawyer's office.
7. "No Hint" that it is was revoked or changed.
8. Application was unopposed.

Cruz v. PGT

The deceased prepared his own will.

The deceased gave the will in a sealed envelope to his chosen executor.

He did not have the will witnessed. But he knew it needed to be witnessed. So, he put a note to the executor in the envelope asking the executor to get the will witnessed. It was never witnessed before death.

1. Document handed to the executor by the deceased and the executor swears as to the authenticity and his continuity of possession of the will in a sealed envelope.
2. Document purports to be a will
3. Document was signed by the deceased.

Zerbe Estate (unreported)

Deceased left document entitled "Last Will and Testament of Reinhard Klemens Zerbe" The Deceased also attached a note to the Testamentary Document. Both documents were signed and dated on the same day. The Testamentary Document solely benefitted the Deceased's girlfriend. The Note was addressed to his friend Stephen whom the Deceased appointed as executor of his estate and asked that that he get the Testamentary Document witnessed:

Hi Stephen, This will is just a very simple will. I did not get a chance to get it witnessed...please get this done as soon as possible...

1. The envelope received was never opened until death.
2. The handwriting on the note and envelope was the deceased's.
3. Deceased never spoke about the documents, never mentioned wanting to change it, never expressed contrary intentions.

Grattan Estate (unreported)

The Deceased met with her lawyer to have a new will prepared. The previous will left her estate to her nephew.

A memorandum made by the lawyer specified that the residue of the estate was to go to her brother. The lawyer noted that the Deceased was estranged from her nephew.

3 days later, the lawyer sent the Deceased the draft Will by email.

The Deceased made changes to it (the spelling of a name and the location of the Deceased's residence) and returned it to the lawyer. No substantive changes were made – no changes to the provisions of which specified who would take as beneficiary, no addition of any new provision or provision naming a new beneficiary residual or otherwise.

The lawyer replied to the Deceased, asking her to schedule an appointment to finalise the will.

The Deceased did not respond. The will was not finalised, signed, or witnessed. Fifteen days later, the Deceased died.

Grattan Estate (unreported)

Test George v. Daily 1997 (Manitoba Court of Appeal)

1. *Document or writing; and*
2. *"whether there was a deliberate or fixed and final expression of intention as to the disposal of his/her property on death;"*
3. *not every expression made by person whether made orally or in writing respecting the disposal of his/her property on death embodies his/her testamentary intention."*

Does not need to be signed by the Willmaker

Does not need to be prepared by the Willmaker

Manitoba Legislation differs from Ontario - allows a document to be valid "notwithstanding that the document or writing was not executed in compliance with *any or* all *of* the formal requirements imposed by this Act.

White v. White

An application for disclosure of testamentary documents in a potential will challenge case.

Daughter booked an appointment for his mother to consult with a lawyer about mother's will.

Mother and lawyer had several conversations over ensuing weeks about updating mother's will.

A few days later Mother suffered a stroke and was taken to the hospital by ambulance.

Lawyer visited mother in hospital, but mother that she was not feeling up to discussing her will and asked lawyer to come back another day.

Mother died a few days later without meeting lawyer or finalizing a new will.

White v. White

Obiter:

Lawyer said that she wanted to have a telephone conversation with mother.

"That does not sound like a will was ready for signing. A draft will is just a draft. It is common to see changes made as late as during the execution ceremony. The court frequently sees wills containing handwritten interlineations made just before a will is signed."

Approval of a document as a will requires that it records "a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death."

"It is hard to see how a draft will can meet that threshold."

Tab c

PROVING DUE EXECUTION

LAW SOCIETY OF ONTARIO, THE SIX MINUTE ESTATES LAWYER

Kimberly A. Whaley

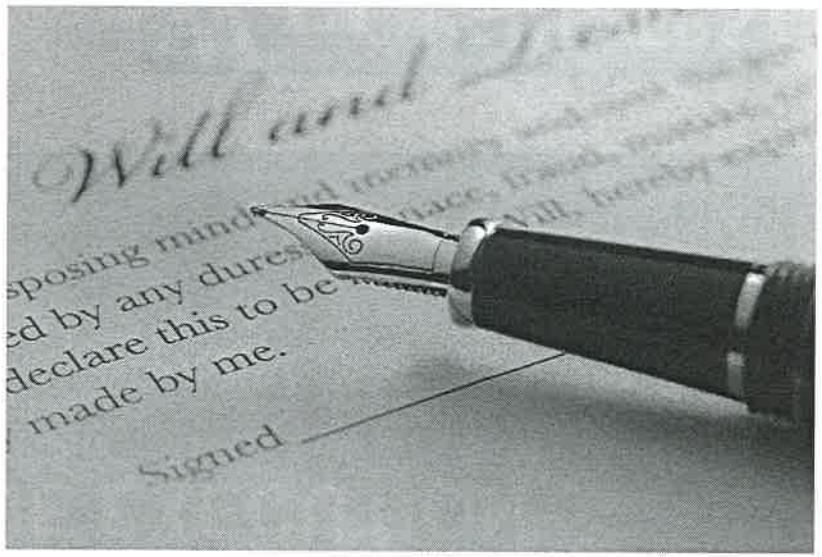
May 25, 2022

WEL PARTNERS

WHALEY ESTATE LITIGATION PARTNERS

Introduction

- Formalities of due execution have long been settled in law
- Function is to assure that a testator's estate is distributed in accordance with his/her intentions
- Requirements of due execution vary among Canada's Jurisdictions



WEL PARTNERS
WHALEY ESTATE LITIGATION PARTNERS

Due Execution

- Traditionally, all jurisdictions were "strict compliance" jurisdictions
- Many provinces have since moved away from strict compliance in favour of **dispensing** or **validating provisions**

Proving Due Execution in Ontario

- **Ontario now has a validating provision** in the *SLRA* at section 21.1
- In order for a Will to be valid, it must be duly executed in accordance with section 3, 4, and 7 of the *Succession Law Reform Act*
  - *In writing;*
  - *Signed by the Testator; and*
  - *In the presence of two or more attesting witnesses.*

Signed by the Testator – *Re White*

- Testator suffered from complications of a stroke
- Testator's wife arranged for lawyer to prepare his Will
- Lawyer attended at Testator's home with 2 witnesses and reviewed Will with him
- When it came time to sign, testator could not do so
- Lawyer assisted testator in signing the Will
- Court held that any such assistance was done in the presence of the witnesses
- "was just the same as if he [the testator] signed it without any assistance"

In the Presence of Witnesses

Chesline v. Hemiston, [1928] 4 DLR 786

- Dispute regarding the order in which the witnesses signed the testator's Will and whether 1 of them actually witnesses the testator's signature
- Court determined that 1 witness signed before the testator and therefore Will did not comply with the formalities

Exceptions to Due Execution Requirements

- *SLRA*, section 5 – military personnel on active service

- *SLRA*, section 6 – Holograph Wills

Proving Due Execution

- Onus is on the propounder to demonstrate that the Will conforms to the formalities of the *SLRA*

- Where a Will appears on its face to be executed in accordance with the *SLRA*, it is presumed to be valid

CIBC Trust Corp. v. Horn

- Typewritten and properly executed Will
- Testator made subsequent handwritten alterations which were not dated or signed
- Court stressed that it did not have discretion to dispense with formal requirements
- Even if testator's intentions could be ascertained, the court did not have discretion to give effect to that intention in the absence of the formalities required by the *SLRA*

Dispensing or Validating Provisions

- Many Provinces have relaxed due execution requirements and have made modifications to legislation
- These modifications permit courts to declare Wills to be valid even if they do not fully comply with formalities

Robitaille v. Robitaille Estate

- Lawyer met with testator to discuss changes to her Will
- Before the Will could be executed, testator fell ill and was hospitalized
- Testator's daughter requested Will so that testator could sign
- Testator signed the Will and died a few days later
- The court held that the revised will represented a "deliberate or fixed and final expression of the testator's intention to dispose of her property on death"
- The Will was probated

Bishop Estate v. Sheardown, 2021

- S.58 – *WESA* – curative provision
- Unexecuted Will – final draft was prepared, not signed
- COVID-19 lockdown prevented testator from meeting lawyer to execute final draft; died 4 months later

Ontario's Validating Provision

- Ontario's new validating provision in section 21.1 of the *SLRA*:
  - If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the will of the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it had been properly executed or made. 2021, c. 4, Sched. 9, s. 5.
- No Electronic Wills: section 21.1(2) – *SLRA*

Sisson v. Park Street Baptist Church

- An exception to strict compliance
- Lawyer prepared Wills for a husband & wife but forgot to sign one of the Wills as a witness
- The Court held that although the *SLRA* does not contain a substantial compliance provision, the court could develop the common law to assist
- The Will was probated

Sills v. Daley

- Decision rejects substantial compliance and holding in *Sisson*
- Court refused to grant probate where a purported Will had been signed by only 1 witness
- Court held that absent a provision allowing a court to admit a document to probate that does not conform to the *SLRA*, it has no discretion

COVID-19 & Due Execution

- Emergency Order in Council – Bill 245 made permanent
- Making or acknowledgement of a signature on a Will may be satisfied using audio-visual communication technology
- At least 1 witness must be a licensee within the meaning of the *Law Society Act*
- Amended to permit execution in counterparts

THANK YOU!

WEL PARTNERS
WHALEY ESTATE LITIGATION PARTNERS

Tab 14

Hull & Hull LLP

CORPORATE ISSUES IN ESTATE ADMINISTRATIONS

Ian M. Hull

Tel: (416) 369-7826
Fax: (416) 369-1517
Email: ihull@hullandhull.com

Hull & Hull LLP
Barristers and Solicitors

TORONTO
141 Adelaide Street West, Suite 1700
Toronto, Ontario M5H 3L5
TEL: (416) 369-1140
FAX: (416) 369-1517

www.hullandhull.com
www.hullestatemediation.com

Subscribe to ***Hull & Hull LLP*** blogs and podcasts at http://estatelaw.hullandhull.com

CORPORATE ISSUES IN ESTATE ADMINISTRATIONS

INDEX

CORPORATE ISSUES IN ESTATE ADMINISTRATIONS

Introduction

As the transfer of wealth from one generation to the next proceeds in Canada, the inevitable growth in estate litigation will no doubt continue. In fact, statistically the transfer of wealth in Canada is moving along at an extraordinary rate.

Trusted advisors continue to be faced with clients who come to see them hoping to create an estate plan that is geared in part to either resolving future conflicts or facing those conflicts in the estate planning process itself.

There currently exists an excellent regime whereby lawyers, estate planners, accountants, insurance agents and other allied professionals work together with the client to create a plan that makes sense both from a tax standpoint and from the family dynamics perspective.

Many of these existing estate plans work as the percentage of estate matters that are litigated continue to be proportionately relatively small. However, while the amount of litigation, on a percentage basis, may be small, two difficulties arise in the litigation context. First, even that small percentage of estate litigation that does get created on the death of the client is usually extremely painful for the family, both financially and emotionally. Second, even when you think you have all the "t"s crossed and the "i"s dotted, the advent of estate litigation usually occurs on a fairly random basis. In other words, no matter how hard you try, if the underlying family dynamics have not been considered, then even the best laid plans may well fall into the "black hole" of estate litigation.

Presumably, more than just good documentary planning on the part of your client is now needed.

In fact, careful consideration needs to be undertaken in respect of the corporate elements of any estate plan and in particular the impact of any existing shareholders' agreements and estate freezes.

Business succession problems frequently referred to as problems of "family" property, are the almost inevitable results of passing on a business during your lifetime and/or dying with substantial wealth, I shall attempt in this paper to point up the principal causes of litigation by dealing separately with each of the principal headings set out above.

No Transition/Succession Plan

While little time need be spent in describing the undesirability of this state of affairs, you should not be surprised to know that many more people pass on a family business and/or die without a transition and estate plan than you would expect and always to the financial and other detriment of the family and ultimately the estate and its beneficiaries.

As you all know if you don't have a carefully drafted shareholders' agreement and a will the law makes one for you and anyone who would rely on legislators and lawyers to determine their affairs deserve what they get.

Family members and ultimately beneficiaries with special needs are disappointed and persons outside the statutes are often unfairly dealt with, which all lead to unwanted bad feelings and unnecessary legal and other problems.

No Current Or Updated Succession Plan

While my comments with respect to I above apply equally to this heading, the following changes in the circumstances of the client set out below can be the source of serious succession problems.

The particulars of the problems which can be raised are far too numerous to detail and will be evident in a case where proper updating of the succession plan has not occurred so as to deal with the client's assets in accordance with his or her wishes in view of the changed circumstances.

This frequently fans the embers of family and other rivalries to the point of combustion and the lawyers then come in to take a share of the business, which was clearly against the wishes of the client and is anaethma to those left behind.

Some of these changes in the circumstances of the client which can lead to litigation are as follows:

(a) A principal beneficiary such as the spouse predeceases the client,

(b) The sale of the client's business before his death,

(c) An unexpected inheritance by the client,

(d) A significant increase or decrease in the value of the client's assets,

(e) The onset of mental or other illness of a beneficiary or dependant causing disability,

(f) Tax or other related legislative changes affecting the succession plan,

(g) Sale of the family home or recreation property or other significant asset before death,

(h) Marriage or remarriage of the client,

(i) Designations or redesignations of beneficiaries in RRSPs or pension plans and other changes in entitlement thereunder arising otherwise than by the owner (the client) of the Plan,

(j) Naming or renaming beneficiaries under policies of insurance and other changes in entitlement thereunder arising otherwise than by the owner (the client) of the policy,

(k) Extramarital relations of the client,

(l) Secret trusts.

Inadequate Succession Planning Advice

It goes without saying that every succession plan must be attended with the degree of professional skill required in each particular case - some higher than others - the larger the business, the better the advisor should be, and there is a good deal of top notch professional advice available through insurance agents, chartered accountants, trust officers and lawyers.

The main thing for a client to recognize is that generally speaking the best advice available in any of those professions usually costs no more than other advice and if avoiding legal problems and the litigation is to be an important consideration of the client, then don't go second class.

As to who is an appropriate advise it would be presumptuous of me to say, however, do not overlook the skills of insurance agents to give this advice, for it is that profession that has the highest financial interest in maintaining succession planning skills.

Imagine a gathering consisting of a lawyer, an accountant, a life insurance agent, a trust officer all with equal and middle aged clients who announces his forthcoming marriage.

To the lawyer he sees a new will and an updated shareholders' agreement, a prospect about as exciting as changing a flat tire on the freeway.

To the accountant he sees another income tax return. A prospect about as exciting as the lawyers.

To the trust officer its another file.

To the insurance agent is a golden opportunity to sell a couple of policies which is always an exciting and profitable prospect if you're in that business.

Reluctance To Meet The Challenge To Seek Adequate Succession Planning Advice

While we can all understand and sympathize with this reluctance, the failure to overcome it can result in the consequences that await those who either have no succession plan or an inadequate succession plan set out above.

Family And Extended Family Feelings

(a) spouse of first marriage

(b) spouses of subsequent marriages

(c) common law spouses

(d) extra marital partners

(e) children

(f) grandchildren

(g) Children of all degrees born out of wedlock

(h) adopted children of all degrees

(i) strangers

(j) dependants.

A principle catalyst in promoting family problems ending in litigation is the unfortunate feelings and relationships which can and often do exist between persons before and after the client's passing on of the business and/or death, especially if there are multiple marriages and children from these marriages.

A few to look out for are the following:

(a) spouses of all marriages and relationships,

(b) children of the client from the first marriage and their siblings of the half blood and those born out of wedlock,

(c) grandchildren,

(d) nieces and nephews, especially when different relationships existed between different nephews and nieces and the client before death,

(e) dependants,

(f) the other man or woman.

The only way to avoid litigation where bad feelings exist is to ensure that the succession plan is as enforceable as possible and that all appropriate separation, marriage, cohabitation, partners, employment and shareholders agreements are in place prior to the death of the client.

The Frailties Of The Client

(a) extra marital relationships

(b) unexpected illness, mental or physical

(c) predators.

With respect to (a) above, while the subject has been death with earlier in this article, if that relationship does not become known to the family until after death there will invariably be trouble and unless provided for in say, a secret trust it frequently happens that unjustified claims or demands will be made.

With respect to (b) above no elaboration is necessary for if the illness is suffered after an adequate succession plan is in effect, presumably that event will have been dealt with to the

best of the ability of the planner and as little financial damage as possible will be incurred. If it is suffered before, then all of the problems set out above may well occur.

With respect to (c) above, little more need be said except to say that those with a reasonable expectation of participating in the bounty of the client should ensure that the client does not find himself caught in the toils of those whose motives may not be worthy of his concern.

Intransigence Of Family And Other Beneficiaries

When relationships between family and beneficiaries go awry in the administration of a business and/or an estate, the intensity of the feelings involved far transcends those that occur in most forms of litigation and frequently are as bitter or more bitter than those arising in matrimonial disputes.

The assertion of rights and positions put forward by the parties in this group are often not based on reason, nor is logic frequently encountered, no matter what appeals for such logic are made by their advisors. Thus it is not unusual for this stubborn interface to prevail through discoveries until pretrial when the stern admonitions of the pretrial judge usually has a salutary effect in the negotiations.

This attitude can probably be explained because persons involved in these disputes and litigation expect to receive large amounts of money which they probably never had before, did not earn and sometimes do not deserve.

It is much like a dog standing guard over a bone he fortuitously found on the road.

Badly Drafted Documents

(a) badly drafted by the draftsman

(b) insistence by client of intricate provisions which with the effluxion of time become ineffective, improvident or unwise.

(c) the contingency that no one thought of.

With respect to (a) above, nothing much can be done, except take whatever appropriate action is available.

With respect to (b) above, some clients insist on providing complicated schemes of distribution which frequently do not work out as planned.

With respect to (c) above, no matter what care and pains are take in drafting the airtight document there is always the contingency which no on thought of, or if thought of has been assumed as a risk. If it can happen, it will happen.

Nature Of The Assets Of The Estate

(a) stocks, bonds and cash

(b) insurance

  (i) designation of beneficiary

  (ii) death of beneficiary

(c) RRSPs – designations

(d) business interests

(e) pension – designations and special terms

(f) real estate

(g) inter vivos gifts

(h) existing trusts

The mix, nature, amount and manner in which the client has dealt with these assets during her lifetime, such as failing to redesignate a beneficiary in an RRSP when the designated beneficiary dies or should otherwise be replaced can often cause trouble. Other and numerous examples can be readily imagined from the subheadings set out above and it would be fruitless to attempt to deal with all of the possible problems which could be imagined.

Personal Representatives

In view of the very sensitive feelings that arise on the death of a loved one, those persons appointed as executors and trustees should be advised that their actions will be severely scrutinized by those interest in the will and that they must be seen to act with scrupulous care to be fair. Good relationships at the start will usually ensure a successful administration.

All too often executors and trustees come in to the administration of an estate with feelings and prejudices that precede the death of the client which is bound to cause trouble.

From what I have seen there is no more troublesome chore than being an executor and trustee who is continually at odds with a beneficiary and no amount of compensation is worth it.

The sources and numbers of problems involved in the administration of estates are infinite and to go further than counsel common sense on the part of the executor and trustee would serve no useful purpose.

All in all, while in many cases estate litigation cannot be avoided, a sound knowledge of the principal sources from which it arises can assist in avoiding it.

Frye V. Frye Estate – Shareholders Agreement dispute in action

On April 30, 2008, the Ontario Court of Appeal reversed the earlier Court's decision in *Frye v. Frye Estate*[1], in what the higher Court described as "another saga of siblings struggling for control of the family business after the death of their father."

In *Frye v. Frye Estate*, the five children of the deceased were involved in a proceeding brought by one child ("Jack") who contested the validity of a provision in his brother's Will that bequeathed his shares in the family business to his sister ("Cheryl"). At Trial, the Court held in Jack's favour and, not surprisingly, the matter was appealed by Cheryl to the Ontario Court of Appeal.

At issue was the elder father's estate and, in particular, the shares of his company, George H. Frye Holdings Ltd. The deceased died in November of 1991, leaving his company equally amongst his five children by Will. Initially, the Letters Patent under which the company was incorporated in 1968 provided that no transfers of shares of the company could occur without the express sanction of the Board of Directors. In 1991, all of the Frye children entered into a Shareholders' Agreement. At that time, their father was still alive and held all the shares in the company but was incompetent. Following their father's death, the children signed a unanimous agreement that amended and confirmed the 1991 Shareholders' Agreement. By doing so, the children amended the transfer of share provisions to provide that each of the shareholders were

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[1] 42 E.T.R. (3rd) 190, 91 O.R. (3rd) 721 (Ont. C.A.).

further restricted in respect of their dealings with their shares in the capital of the corporation and any offer to sell the shares had to first go to family members in an effort to preserve the company as a family business.

The son, Cameron, died after the father and after the Shareholders' Agreement had been signed; however, in his Will, he directed that his shares be transferred to his sister Cheryl. The son Jack challenged the validity of this gift.

The Court of Appeal undertook a careful analysis of the share transfer restrictions in the Shareholders' Agreement and looked at them in the context of the company's Letters Patent created in 1968.

At first instance, the Trial judge held that the transfer by Cameron through his Will was null and void, as he was contractually committed pursuant to the Letters Patent and the Shareholders' Agreement. In reversing this decision, the Court of Appeal analyzed the struggle between contractual obligations and the important policy expectation that one should not be constrained in bequeathing one's property by means of a Will.

The Appeal Court held that the shares vested in the Estate Trustees in trust for Cheryl when Cameron died, pursuant to the provisions of his Will; accordingly, it was their duty to administer the Estate on that basis. The Court went on to say that the Estate Trustees had to attempt to accomplish the transfer of the shares to Cheryl *in specie,* in whatever manner they thought most advisable. The Estate Trustees' present inability to obtain the required consents to the transfer of the shares to Cheryl did not provide a basis for voiding the bequest. Rather, in the meantime, the Estate Trustees were to hold the shares as bare trustees for Cheryl, and they were to exercise the rights associated with the shares as she directed. In the result, the Court of Appeal held that the gift of the corporate shares under Cameron's Will was valid.

In conclusion, the Court of Appeal has sent the clear message that Courts will continue to very carefully consider whether or not an individual's contractual obligations will override the provisions of his or her Will. It is important to note that, at the Court of Appeal level, sub-section 67(2) of the *Business Corporations Act*[2] was first considered in this case. That provision expressly contemplates corporate Articles and Shareholders' Agreements that restrict a transfer of shares. Specifically, it provides that a corporation shall treat "the executor, administrator,

[2] R.S.O. 1990, c. B.16.

estate trustee, heir or legal representative of the heirs, of the estate of a deceased security holder" "as a registered security holder entitled to exercise all the rights of the security holder that the person represents". Furthermore, the Court of Appeal noted that, pursuant to sub-section 67(2), Cameron's executors were therefore entitled to be treated as the registered holders of the shares he bequeathed to Cheryl. This statutory provision also assisted the Court of Appeal in coming to its conclusion that Cameron had the right to bequeath his shares to his sister Cheryl as he did by Will.

Estate Freezes- Litigation Considerations

The use of an Estate freeze is a fundamental tool in respect of the many Estate planning options for the wealthy client. The ultimate goal of a properly executed Estate freeze is the smooth intergenerational transfer of wealth.

From the litigation perspective, the Estate freeze and the resulting transfer of assets can in some circumstances be a "bumpy road".

A classic example of an Estate freeze gone wrong and ultimately aggressively litigated is the intergenerational transfer of wealth of the Estate of Harold Ballard.[3]

As a corporation grows and becomes more profitable, the tax implications become more and more of an issue. Given the potential capital gains which will be triggered on the death of the person who created the company, a typical Estate planning technique is to consider whatever steps are necessary to limit the tax liability on death so that the tax burden at that time is not so significant that it dramatically impacts the ongoing financial success of the company.

As a result, an Estate freeze can be effected which will allow for the future growth of the company to go to the benefit of his or her children.

The Estate freeze allows for the creator of the company's stake in the corporation to be converted into voting preference shares with the common shares owned by the children. The preference shares will retain voting control.

However, as John J. Chapman notes in his article "Estate Freezes Thirty Years Later"[4], with the belief that we all must have that our children will love us as much in the future as we so

[3] 820099 v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2nd) 13 (Ont. Ct. (Gen. Div.)).

desperately love them now, the founder of the company will shrug off warnings by some overly cautious lawyer of possible theoretical complications 20 or 30 years hence.

Some of the litigation problems created by the Estate freeze is the reality that with this planning tool is the certain degree of loss of control of the company from the perspective of the individual who created it.

The loss of control factor combined with the family dynamics that exist can be enough to create many litigation scenarios.

Again, from a litigation perspective the cases in this area seem to show that the effort to save taxes through the Estate freeze mechanism can create significant litigation complexities.

The October 21, 1988 information circular 88-2 in respect of Section 245 of the Income Tax Act describes an Estate freeze as follows:

> Under a typical Estate freeze arrangement a parent transfers to a newly formed corporation all of the shares of an operating company and elects under subsection 85(1) an Order to defer recognition of the gain on the transfer. The consideration for the transfer is preferred shares retractable at the option of the parent for an amount equal to the fair market value of the shares of the operating company transferred. The preference shares carry voting control. A trust for minor children of the parent subscribes for common shares of the new company for a nominal amount.[5]

Generally, the remedies available in the Estate freeze context are found through the commercial litigation protections such as the oppression remedy.[6]

The family dynamic that runs through the whole Estate freeze process are of course the difficulties that can arise as between child and parent. The Estate freeze itself usually creates a common shareholder for the child and this irrevocable gift to the child brings with it minority shareholder status. Furthermore, prior to the Estate freeze the creator of the company and typically the sole shareholder, will likely have operated without any scrutiny from others including the shareholders. With an Estate freeze the ability of the creator to set the company's

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[4] John J. Chapman "Sharper Than A Serpent's Tooth: Estate Freezes Thirty Years", [1996] 16 E.T.J. 47 at page 51.
[5] October 21, 1988, ITA Information Circular 88-2 - General Avoidance Rule - Section 245 of the Income Tax Act.
[6] For the purpose of this article I will refer throughout to the Canada Business Corporations Act, R.S.C. 1985 , c.C-44.

compensation, borrow money from the corporation, enter into related-party transactions and manage the business enterprise will now be subject to a battery of legal tests.[7]

Corporate Litigation Issues

The tax savings created by an Estate freeze demand that the child directly receives common shares and is the true "owner" of those shares. It is the ownership interest of these common shares that creates numerous rights to the child which can be important if the friendly family relationship changes in any significant way.

The business corporations statutes both federally and throughout the provinces are for the most part a series of checks and balances that provide a mandatory framework of corporate governance.[8]

The following is a list of some of the limits on the individual who created the company and his or her ability to govern generally and therefore may be used as a sword by the common shareholder children:

- Obligation to have audited financial statements;[9]
- To provide audited financial statements to the shareholders;[10]
- To hold annual shareholders meeting;[11]
- The veto of common shareholders (by way of a requirement of class veto) on fundamental changes to the corporation's affairs or structure, including a sale of substantially all assets or amalgamations;[12]
- The directors of the corporation are under an obligation to act in the best interests of the corporation;[13]

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[7] John J. Chapman "Sharper Than A Serpent's Tooth: Estate Freezes Thirty Years", [1996] 16 E.T.J. 47 at page 49.
[8] Supra Note 2 at page 53.
[9] C.B.C.A., S. 163. (The consent of all shareholders is required in order to dispense with the audit requirement.)
[10] Ibid. Section 155.
[11] Ibid. Section 133.
[12] Ibid. Section 176.

- The compensation agreements of the corporation and all its officers, directors and shareholders is subject to scrutiny;[14]

- If there is a disgruntle child a buyout by the individual who created the company will involve an insider trade requiring specific confidential facts having material bearing of the value to be disclosed to the child.[15]

In addition to the specific illustrations noted above, the individual who created the corporation and then the gifts to his children will generally be exposed to the scrutiny of the Court by way of winding-up applications and the oppression remedy sections of the relevant business statutes.[16]

Oppression Remedy

There are many cases involving intergenerational disputes and most in one way or another, rely on the oppression remedy.[17] As to the oppression remedy generally, the cases have been summarized generally as decisions which are based on the Court's impression of the particular facts; precedent is interesting but not significant. The result of oppression cases are not predictable.[18]

In his article "Estate Freezes Thirty Years Later" John J. Chapman tentatively suggests that the following three broad principals can be drawn:[19]

> 1. If it is a child who owns the shares the Court will typically insist upon compliance with specific statutory rights under the relevant and corporate statutes. The provisions of the corporate statutes such as the C.B.C.A. will in a sense override family desires or considerations. The fact that the shares were gifted as part of an Estate freeze is irrelevant.[20]

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[13] Ibid. Section 122(1). The best interest of the corporation have been judicial held to be the best interest of all of the shareholders "taking no one sectional interest to prevail over the others" See John J. Chapman Supra Note 2 at page 54.
[14] 29 Ibid, s. 120 (7).
[15] See John J. Chapman Supra Note 3 at page 54.
[16] See MacIntosh, "The oppression remedy: Personal or derivative?" (1991), 70 Can. Bar. Rev. 29.
[17] John J. Chapman Supra Note 3 at page 56.
[18] Supra Note 3 at page 56.
[19] Supra Note 3 at page 57-63.
[20] See H.R. Harmer, Ltd. [1958] 3 All E.R. 689, [1959] 1 W.L.R. 62 (C.A.).

2. The concept of "reasonable expectation" allows for one to have regard to the entire history of the relationship between the parties which in some cases may include the family dynamics.[21]

In Naneff v. Con-Crete Holdings Ltd.[22] the Court considered a case where the father built a concrete business and with his two sons as beneficiaries of the common shares and carried out an Estate freeze. The father retained the preference shares and the sons worked and contributed to the business.

The parents were religious and the younger son married a divorced women. The parents strongly disapproved and the relationship between the family members deteriorated until the younger son was fired. The father and the elder son kept the younger out of the business and the family and eventually the younger son wanted the business to be put up for auction so that he would have a chance to buy it and ultimately control the business. The father in turn wanted to purchase the younger son's interest.

The Court of Appeal considered the concept of the younger son's "reasonable expectations" and held:[23]

> At the outset I think it is important to keep in mind that this is not a normal commercial operation where partners make contributions and share the equity according to their contributions or where persons invest in a business by the purchase of shares. This is a family business where the dynamics of the relationship between the principals are very different from those between the principals in a normal commercial business. As the Courts below have correctly held, the fact that this is a family business cannot oust the provisions of Section 248 of the O.B.C.A. Nevertheless, I am convinced that the fact that this is a family matter must be kept very much in mind when fashioning a remedy under Section 248 (3) as it bears directly upon the reasonable expectation of the principals.

---

[21] Naneff v. Con-Crete Holdings Ltd. (1993), 11 B.L.R. (2nd) 218 (Ont. Ct. (Gen. Div.)), affd 19 O.R. (3rd) 691, 16 B.L.R. (2nd) 169, 73 O.R.A.C. 334 (Div. Ct.), rev in part 23 O.R. (3rd) 481, 85 O.R.A.C. 29 (C.A.).
[22] Ibid.
[23] Ibid at page 487 O.R.

The Court of Appeal held that the younger son had no reasonable expectation of control or even shared control during the father's life and therefore it fashioned a remedy in accordance to that finding.

3. The Court will consider in the right circumstances a winding-up of the corporation where the relationship between the parties have broken down to such an extent. The winding-up option has been described at no- fault commercial divorce.[24] In Safarik v. Fisheries Ltd.[25] litigation over an Estate freeze and the ultimate control of the company resulted in the Court considering an winding-up Order and ultimately ruling that the child should be ordered to be bought out.

In Safarik the Court went on to make a similar comment with regard to the unique characteristics of a family company and stated: [26]

> Family companies are very different from non-family companies. They are different because, usually when a young man joins his father in the business, he does so trusting his father to do right by him and the father intends to do right. Thus no contracts are drawn up. It is not unusual for differences to arise as they did here, not because either father or son is dishonourable but because each sees the world through different eyes.
>
> If this were not family company, but a company in which the Respondent had simply bought his common shares and in buying them had decided not to be a director for whatever reason, there would be no case for an Order under Section 295 (3).
>
> But, in my opinion, it is not erroneous to take a more liberal approach to the words "just inequitable" in the case of a family company in which one of the family after many years of service is no longer permitted to participate in the business.
>
> Taking such an approach, I am of the opinion that it is just inequitable to wind-up this company. I do not find this conclusion on any of the Judge's findings which may be said to amount to findings of "wrong doing".

---

[24] Supra Note 2 at page 58 and 62.
[25] Safarik v. Fisheries Ltd. (1995) 12 B.C.L.R. (3rd) 342, 22 B.L.R. (2nd) 1 (C.A.) Revg. 10 B.L.R. (2nd) 246 (B.C.S.C.).
[26] Ibid. at page 46 B.L.R.

Alternatives to Consider

Family Trusts

An alternative Estate planning technique, rather than an Estate freeze directly vesting the common shares in the names of the children, is to create a family trust for the common shares. Essentially, the trust will own the common shares and the owner is usually an individual who created the business and the trustees are often that individual plus trusted advisors.

The following is a list of some of the reasons for this Estate planning tool[27]:

- The trust mechanism allows unborn children to be beneficiaries and provide equally for all children to share in the growth of the corporation;
- The disposition of income is in the discretion of the trustee;
- Depending on the drafting of the terms of the trust children do not become the true owners of the shares until they have been so directed pursuant to the provisions of the trust;
- Flexibility can be created for the individual who created the business in dealing with the common shares such as the right to vote, sale and pledge to shares;
- New obligations are of course created for the individual who created the business as he or she now becomes the trustee.

Conclusion

In Summary, the corporate aspects of Estate Planning can dramatically impact on the potentially friendly and tax driven aspects of often used estate planning tools. The combination of aggressive civil litigation tactics and the frailties of family dynamics is both complex and often costly if the Shareholders Agreement and/or the Estate Freeze becomes subject to review by the courts.

In conclusion, when preparing a succession plan or administering an estate, the planner must not take on the task as a routine matter and must consider some of the complex issues that may

[27] Supra Note 2 at page 67-68.

arise. A succession planner should, after she has received her instructions, determined the facts and analyzed the problems related to the business succession, and the estate plan or administration; consult various precedents and forms; familiarize herself with the applicable law and roughly determine the basis that the succession plan or administration shall proceed on. Where appropriate, the succession planner should review these matters with other professionals such as tax and investment consultants.

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Tab 15

Tab a

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Majority Rule Clauses & The Court's Supervisory Jurisdiction

Majority Rule Clauses & The Court's Supervisory Jurisdiction

By Suzana Popovic-Montag | November 29, 2023 | 3 minutes of reading | Leave a Comment

Including a majority rule clause in a will that appoints more than one estate trustee is good drafting practice, as noted in our Solicitor's Tip from March 2023. Without such a clause, all decisions related to the administration of anestate must be unanimous, which can lead to gridlock during estate administration and result in the removal of one or more estate trustees if consensus cannot be reached.

If such a clause is included in a will, one may wonder – does it deprive the court of jurisdiction to issue directions as to the administration of the estate?

This question was recently addressed by the Alberta Court of Appeal in *Brodylo Estate (Re)*, 2023 ABCA 314. The appellants argued that a majority rule clause in the testator's will deprived the court of jurisdiction to give ancillary directions regarding the estate, and that the court could only intervene if the acts of the majority were illegal.

In a unanimous judgment, the Court of Appeal of Alberta confirmed that, even if a will contains a majority rule clause, the court retains its supervisory jurisdiction:

> *" While such a clause may reflect a testamentary intention that the personal representatives avoid going to court if they do not agree, such intention cannot oust the supervisory role of the court. "*

However, the court declined to delineate "the precise circumstances where a court may intervene in the face of a majority rule clause".

In the lower court decision, reported at 2022 ABQB 358, Justice Dario gave ancillary directions to the personal representatives of the estate to assist in determining the value of property held by the estate. An application for probate had already been rejected because only three of the four personal representatives named in the deceased's will had signed the application. One of the representatives refused to sign because she did not agree with the value of a home and land that was included in the application, the value assigned to company shares, or the amount charged by the appellants for their work as attorneys under the deceased's power of attorney. After the application for probate was rejected, the majority of personal representatives applied for an Order that would permit them to file the application in light of the majorityrule clause in the testator's will, which provided that if the trustees were unable to agree regarding any matter in connection with the estate, the decision of the majority "shall govern and shall be binding on all persons concerned".

Justice Dario found that the majority rule clause did not apply under the circumstances at hand and, more specifically, that the majority rule clause could not be used to:

- override the fiduciary duties that the personal representatives owed to each other;
- deny one personal representative of material information used by others to make decisions related to the estate; or
- oblige a personal representative to swear a document they believed to be false, particularly where supporting information was being withheld or there was insufficient information to substantiate an estate decision.

The lower court ordered the parties to meet again to try to resolve the outstanding issues, and directed them to apply to the court for a determination if they were unable to reach a resolution. The court also gave further directions regarding steps to be taken if the parties could not agree, including obtaining property appraisals with respect to the home and land either jointly (if they could agree on one appraiser) or separately (if they could not agree), and having an accountant review the financial statements to determine the value of the company shares.

Justice Dario's decision was upheld in its entirety on appeal, with the Court of Appeal commending the lower court's "practical and common-sense approach to the gridlock in the administration of the estate".

I hope you enjoy the rest of your day,

Suzana.

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Tab b

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The Annotated Powers of Attorney for Property and for Personal Care 2024

The Annotated Powers of Attorney for Property and for Personal Care 2024

By Shawnee Matinnia | February 5, 2024 | 3 minutes of reading | Leave a Comment

On January 24, 2024, I attended the Annotated Powers of Attorney for Property and for Personal Care 2024 CPD program hosted by the Law Society of Ontario. The program discussed issues faced by both estate planners and litigators in power of attorney disputes, while providing valuable insights into avoiding those same issues. Below are some of my key takeaways from the sessions.

General Updates:

- "Grantor not Donor": the name of the person giving the power of attorney ("POA") has been changed from "Donor" to "Grantor," which can be important when trying to distinguish between a POA granted under the *Substitute Decisions Act* ("*SDA*") and one granted under the *Powers of Attorney Act* ("*POAA*");
- Continuing Power of Attorney ("CPOAP"): will be terminated by, among other things, the execution of a new CPOAP, unless the Grantor provides that there shall be multiple CPOAPs [see *SDA* s. 12(1)(d)].

Issues Relating to Powers of Attorney for Property:

- Delayed effectiveness clauses: effectiveness of a POA occurring upon a specific event (i.e. upon a finding of incapacity), be mindful of delay in getting capacity

assessments and reports affecting the ability of an Attorney to act, could lose time as a result;

- Capacity: wording must be clear regarding the effect of capacity as capacity is fluid, if specifying the effectiveness of POA upon incapacity then consider what happens if the Grantor loses then regains capacity at a later time;
- POA effectiveness upon a finding of incapacity: Grantors often request springing of effectiveness clause in POA upon a finding of incapacity when the lawyer explains that an Attorney can act even when the Grantor maintains capacity;
- Compensation/expenses reimbursed from Grantor property: Attorney is held to a higher standard if compensation is taken, if no compensation is taken then held to the standard of an ordinary person (*SDA* s. 33);
- If Grantor has U.S. property: should seek legal advice from a lawyer in the specific jurisdiction, often Canadian POAs not accepted by U.S.; and,
- If Attorney relocates outside of Ontario: be mindful of adverse tax consequences, certainly additional tax requirements, need to report to the IRS and CRA.

Issues Relating to Powers of Attorney for Personal Care:

- Joint Appointments:
  - No legal restrictions on the number of Attorneys a Grantor can appoint;
  - If joint, Attorneys need to act jointly/unanimously unless the POA states otherwise;
  - If more than two Attorneys appointed, and if death/incapacity/resignation of one Attorney, the remaining Attorneys can still act but the planning lawyer should discuss with the Grantor what should happen in that instance;
- Joint and Several Appointments:
  - Majority rules clause:
    - Could include a majority rules clause to prevent a deadlock, provide a mechanism for dispute resolution;
    - Be mindful of using the word "must" in the clause, rather simplify that any two of three Attorneys can exercise power;
    - Unclear how healthcare practitioners and institutions will respond to such a clause, no available case law yet;

    - Could include a tiebreaker clause stating a specific Attorney's vote breaks the tie; and,
    - Could include a mediation/arbitration clause.
- Compensation:
    - Additional Challenges with Attorneys for Personal Care:
        - Difficult in proving what work was done, detailed and specific records should be kept; and,
        - Process of determining the appropriate amount of compensation is expensive and difficult.
    - POA should be clear regarding the Attorney's right to compensation and the quantum of compensation (hourly rate, taken at specific intervals, etc.).

Thanks for reading!

Shawnee Matinnia

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Tab c

LESS IS MORE

When to use a Shorter Will

With Jordy Atin and Ian Hull

Agenda

1. What is a Shorter Will?
2. What are the benefits?
3. What are the differences?
    a. Definitions
    b. Administrative Provisions
    c. Extras?
4. When should I NOT use a Shorter Will?

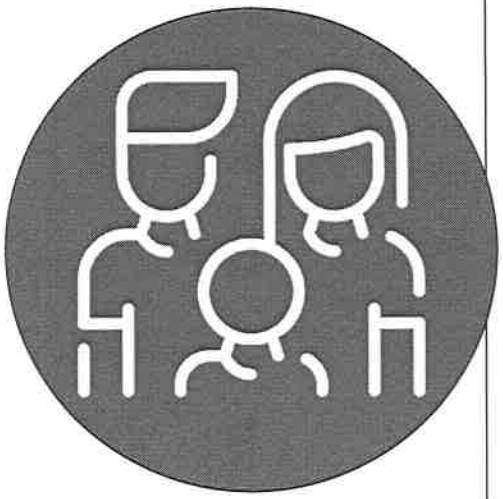
What is a Shorter Will

- Contains only the crucial provisions
- Boilerplate provisions are reduced
- Might not cover all of the less likely situations
- Has less guidance/precatory information for the trustees
- Relies more heavily on defaults under the common law and statutes.

Benefits of the Shorter Will

- Client comprehensive
- Less intimidating/overwhelming
- Easier to explain

Differences - Definitions



- Generic Definitions removed
  - "Trustee", "Beneficiary", Choice of Law, "Benefit", Statute Reference, "issue", "per stirpes", "Personal Effects" and "Digital Assets"
- Family Clause identifies beneficiaries and class members.
- Convenient Definitions still included: "Survival Date", Plural/Singular and Genders.
- Crucial Definitions still included as necessary: "Indexed"

Differences - Administrative Provisions

- Relies more on common sense/statutes/common law
  - Additions to Trusts
  - Graduated Rate Estate
  - Dealing with securities
  - Hiring of agents/advisors/delegation
  - Small trust wrap up
  - Trustee Act replacement
- Combining clauses
  - Power to sell and postpone sale
- Most commonly necessary included
  - In specie
  - Settle debts
- Necessary provisions based on plan
  - Charity provisions
  - Qualifying Spousal Trust limits
  - Trust Company provisions

Differences - Administrative Provisions

- Key protection
  - Even hand rule waiver
  - Transfer to successor trustee
- Comprehensive Trustee Protection deleted
- Less Common powers deleted:
  - Purchase by executor
  - Borrow, lend
  - Running a business
  - Leasing
  - Co-mingling

Differences - Extras

Extras?

- Extensive precatory guardianship provisions
- Less comprehensive trust powers

When should you NOT use a shorter Will

- Business owners
- Long term trusts
- Complicated assets
- Corporations
- Foreign planning
- Multiple Trusts
- Post mortem tax planning
- Long term asset trusts
- Pooled Trusts

Tab d

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Return to Mediation Brief

Capacity Clinic

Dr. Richard Shulman, MDCM, FRCPC, Geriatric Psychiatry
PO Box 20051, Oaktown Plaza
Oakville, Ontario, L6K 3YZ

December 2, 2022

Christine M. Lewis
Foreman, Rosenblatt & Lewis
Barristers & Solicitors
425 York Blvd.
Hamilton, Ontario L8R 3M3
cmlewis@yorklawcentre.com
(905) 525-3570 Telephone
(905) 523-0363 Fax

Dear Ms. Lewis,

Thank you for retaining me to provide a contemporaneous capacity evaluation of your client Blanche Levitt ("Blanche") to provide a clinical opinion regarding Blanche's:

1. Capacity to make inter vivos gifts.
2. To opine on any vulnerability to undue influence for giving inter vivos gifts.

Expert Qualifications

I trained in Medicine at McGill University (1989) and completed residencies in Psychiatry (1994) and Clinical Pharmacology (1996) with a simultaneous fellowship in Geriatric Psychiatry (1996) all at the University of Toronto. I am a psychiatrist certified by the Royal College of Physicians and Surgeons of Canada (RCPSC) (1994). I also have accreditation from the RCPSC in Clinical Pharmacology (1996). I was board certified by the American Board of Psychiatry and Neurology (1994) and with added qualifications in Geriatric Psychiatry (1995). I was in the first cohort who passed the inaugural 2013 RCPSC certification exam in Geriatric Psychiatry establishing Geriatric Psychiatry as a subspecialty in Canada. I am licensed (61184) to practice medicine in the province of Ontario. I am an Assistant Professor of the University of Toronto, Faculty of Medicine, Department of Psychiatry, in the Division of Geriatric Psychiatry. In 1998 I joined the Mississauga General Hospital which then merged with the Queensway Hospital to form the Trillium Health Centre where I was the founding and only Medical Director for Seniors Mental Health Services. In 2001, I opened the Geriatric Psychiatry Outpatient-Outreach Clinic at the Queensway site. In 2002 I opened the Seniors Mental Health Inpatient Unit (SMHU) at the Trillium Health Centre-Mississauga Site (8 beds, subsequently expanded to 11 beds). I have been the only Geriatric Psychiatrist to manage every admitted patient (approximately 100 to 140 annually) to the SMHU.

In 2013, Trillium Health Centre merged with the Credit Valley Hospital to form the Trillium Health Partners (THP). I was the inaugural Medical Director for Seniors Mental Health Services at THP from 2013 to 2020. I remain currently active in my clinical and academic roles at THP. Additionally, I am the first and only consultant Geriatric Psychiatrist to the Special Behavioural Support Units at Sheridan Villa Long Term Care (LTC) (2010-present) and Cooksville Care Centre LTC (2019-present) for persons with advanced dementia suffering from severe behavioural and psychological symptoms of dementia.

In my academic work, in addition to teaching to medical students and residents in Geriatric Medicine and Psychiatry, I was the lead Geriatric Psychiatrist for the development of the Mental Health First Aid (MHFA) Seniors Course created in conjunction with the Mental Health Commission of Canada and launched in September 2017.

I am the inventor of the Sour Seven Delirium Questionnaire for Caregivers, available for use freely on the Internet and one of only two tools of its kind available to assist laypersons to help detect delirium in seniors.

In addition to my clinical and academic work, I have worked as a consultant to private legal counsel as well as the Coroner's Office of Toronto, the College of Physicians and Surgeons of Ontario, and to the Canadian Medical Protective Association in matters related to standards of care in psychiatry, psychopharmacology, and geriatric psychiatry.

Regarding my experience in capacity evaluation, I have worked as an expert to legal counsel regarding independent medical/legal assessments regarding capacity to assign power of attorney, capacity to manage property and personal care; capacity to marry, to reconcile, and to separate; capacity to provide instructions and to provide evidence. I also perform both retrospective and contemporaneous assessments of testamentary capacity and capacity to provide inter vivos gifts. I have been accredited as an expert witness in contemporaneous and retrospective assessments by the Ontario Superior Court of Justice in numerous trials.

Regarding my academic work in capacity evaluation, in 2010 I lectured to and was published by the Law Society of Upper Canada on the medical-legal approach to estate planning and decision making for older clients. In 2013 I received a Professional Development Grant from the RCPSC to pursue my interest in capacity evaluation. I have been an invited lecturer to the Mississauga Halton Regional Ethics program as well as to the Mississauga Hospital Department of Family Medicine on "Ethical Principles & Challenges for Capacity Evaluations in the Elderly." In 2015, I was an invited panelist to the 18th Annual Estates and Trusts Summit and have published in Health Law in Canada. I am a regular guest blogger for *allaboutestates.ca*. I have been an invited discussant to the Estate Planning and Litigation Forum (2016) and to the York University Osgoode Hall Law School Continuing Professional Development Conferences on Advising the Elderly Client (2016) and Managing Consent and Capacity Issues in Wills and Estates Practice (2019). In 2021 I was an invited discussant regarding assessing capacity for a continuing professional development event, The Annotated Powers of Attorney for Property and for Personal Care 2021 hosted by the Law Society of Ontario. In 2022, I received another Professional Development Grant from the RCPSC to further pursue my interest in capacity evaluation and attended The Role of the Medical Expert in Estate Litigation conference held at Sunnybrook Health Sciences Centre.

Materials Reviewed

1. Blanche Levitt September 9, 2015, POA for Property and Personal Care.

2. Blanche Levitt July 6, 2015, testamentary capacity assessment report.

3. Blanche Levitt 2020 Will and Codicil.

4. Blanche Levitt investments: e mail dated September 13, 2022, from TD Wealth advisor, David Smart.

5. Blanche Levitt handwritten leger of inter vivos gifts provided by daughter Shelley Levitt.

Scope and Limitations of Report

This report relies only on the materials provided for review and my contemporaneous assessment of Blanche. No medical records were provided for review. In Ontario, personal health information contained within the provincial electronic health record, ConnectingOntario, may only be viewed for the purposes of providing direct health care. Capacity evaluations are not considered part of clinical healthcare and thus the ConnectingOntario records have not been accessed. Of note, evaluation of testamentary decision-making including capacity to give inter vivos gifts is not an element of any assessment that comprises standard clinical care, and thus records from a family doctor or geriatrics clinic may have no specific relevance.

Contrary to routine clinical practice, corroborative information from any of Blanche's family was purposely not pursued to avoid introducing any potential bias into the assessment by a potential beneficiary. Every attempt has been made to keep the opinions provided as fair, objective and non-partisan despite being retained on behalf of Blanche. A review of information that might become available in the future could, of course, either modify or substantiate the opinions expressed in this report.

Assessment

I assessed Blanche independently on October 25, 2022, in her Amica Retirement Home apartment located at 1066 Avenue Road, Toronto. We met alone after being received in the apartment by her daughter Shelley Levitt ("Shelley") and a granddaughter both of whom left immediately after introducing me. They were not interviewed to provide any information. The assessment took place from 4:10 PM to 5:10 PM. Blanche did not require assistance of a hearing device.

I began the assessment by explaining to Blanche that the assessment was an evaluation of decision-making capacity regarding giving inter vivos gifts, and to provide an opinion on any vulnerability to undue influence for these decisions at the request of her lawyer, Christine Lewis. I explained to Blanche the potential consequence of the assessment would be a clinical opinion for the benefit of her lawyer and that she had the right to refuse to participate. She agreed to proceed.

Blanche is 94 years old, (date of birth: March 13, 1928) and widowed. She said she could not remember when her late husband Norman died. She lives alone at the Amica Retirement Home.

She then said that she moved into the Amica Retirement Home after her husband died approximately 8 to 9 years ago. Blanche described she has four children: Howard, Fern, Shelley, and Stephen.

Blanche was asked to provide a description of her gift giving to her family. She described that she has provided gifts of money to all of her children and grandchildren typically in the range of approximately $1,000 depending on the situation. She said she had given often and has no recall of how much money she has given in total and is not concerned about it. She says these gifts have had no detrimental impact on her financial well-being and it gives her pleasure to support her children and grandchildren. She does not expect anything in return for providing these financial gifts.

I showed Blanche the summary ledger provided by her daughter Shelley that depicted the gift giving from September 2016 to September 2022 inclusive. Blanche did not recognize the amounts listed and was only able to say that she had not prepared that summary. Despite this memory aid, she could not recall the circumstances of any of the gifts or amounts on the ledger. There is also a note on the ledger saying that Shelly has received a monthly amount of $700 since separating in 2000. Blanche agreed with that statement.

Blanche could not say how much money she has gifted to each of the children or grandchildren over the years, and denied any concern about that as she said it would have had no impact on her financial well-being, as she said she is independently wealthy with approximately $3 million in investments managed by her investment advisor, David Smart, although she could not say which financial institution David works for.

Moving forward, she said she plans to continue giving gifts of money to her children and grandchildren as she sees fit, but currently had no specific plans and no specific amounts of in mind.

Blanche explained that she has no plans to change her Will which divides her estate equally amongst her four children, 25% each.

Blanche denied any reason for questioning her gift giving as she said she remains independent in managing her financial affairs. She explained that she pays her expenses by going to the TD Bank on Eglinton and walks there alone with her walker. She pays approximately $8,000 a month in rent to the retirement home which includes services of cleaning and meals. She pays for the nurse service to dispense medications twice daily. She does not know what medications she is dispensed. She does not receive any personal support worker services and says she is independent in showering and dressing.

Blanche described her past medical history as hypertension, and she was not sure if she has any other conditions. She stated that she had been hospitalized for blood clots and treated with anticoagulant medication but does not remember when that was, or what part of the body had the blood clots.

Blanche denies any alcohol or substance abuse. She describes having a past psychiatric history of depression but denies being on any antidepressant medications.

Blanche does not know if she has appointed a power of attorney for property. She thinks that perhaps her attorney for property is her investment adviser, David Smart, because he is managing her investments. Nevertheless, she said that she makes her own decisions and manages her financial affairs independently and said there has been no discussion about the need for substitute decision-making. She denied that Shelley is managing her financial affairs. She said she does not see the need for, nor want, a power of attorney for property. However, if she had to choose a power attorney for property she said she would choose Shelley with Fern and Stephen as the substitutes.

Despite claiming to function independently, Blanche said that Shelley helps her the most by organizing appointments and taking her to appointments. She agreed Shelley arranged for the meeting with her lawyer. She denied that Shelly is her caregiver, but agreed that has a very close and confidential relationship with Shelley. She said she also has close and confidential relationships with Fern and Stephen, who she referred to as Stevie.

Blanche says that she does not have a close relationship with Howard who she referred to as Howie. She admitted that there is conflict in the family. She said that her two daughters do not get along with Howie and said it's because of his "difficult personality." She initially denied that there was any conflict over money between her children but then said that she thinks Howie is jealous because she thinks he feels that she is giving more money to the other children than to him. She said she could not understand the basis for his jealousy because she believes that he is very wealthy. She described him as the "best labour lawyer in Canada" and provided an example of his wealth by saying that he had given a gift of $500,000 to Mount Sinai Hospital. She said he does not need gifts from her because he is wealthy. She suggested that perhaps he is worried about his inheritance. She said this worry would be unnecessary as she has treated all her children the same in her Will, but says Howie is not an executor.

Mental Status Examination

On mental status examination Blanche was pleasant, cooperative, alert, and attentive. Blanche has no impairment in speech or language comprehension or expression. There was no evidence of word finding difficulties. However, she is significantly repetitive, often repeating the same information said a few minutes previously, or asking the same question posed previously. Her description and narrative of events lacks detail and clarity. There was no abnormality of affect or mood. Thought content did not reveal any bizarre delusions.

Cognitive screening was conducted with the MoCA for which Blanche scored 20 out of 30. Blanche lost:

- 3 points on the tests of visuospatial and executive function; 1 point on the trail making Part B test, 1 point on the cube copy, and 1 point for being unable to set the time correctly on the clock drug test, incorrectly setting the time at 10 to 11 instead of 10 past 11, despite being provided clarification on the requested task.
- 1 point on the test of abstraction.
- 5 points on delayed recall; none of the words recalled with a category cue nor with multiple-choice cueing.
- 2 points on orientation, not being able to correctly state the day or date.

- She regains 1 point for lack of grade 12 education.

The MoCA is a clinical tool to screen for mild cognitive impairment and can be used to screen for dementia also. The MoCA cognitive domains assessed include visuospatial skills, executive functions, memory, attention, concentration, calculation, language, abstraction, memory, and orientation. It is a paper-and-pencil assessment requiring approximately 10 minutes to administer and is scored out of 30 points. Blanche's score is a positive screen for mild cognitive impairment (MCI).

A cut-off score of 18 is usually considered to separate MCI from dementia due to Alzheimer's disease (AD) but there is overlap in the scores since, by definition, AD is determined by the presence of cognitive impairment in addition to loss of autonomy. The average MoCA score for MCI is 22 (range 19-25) and the average MoCA score for mild AD is 16 (11-21).

At the end of the interview, I asked Blanche to summarize her understanding of the purpose of the assessment. She did not have a clear recall of the purpose of the assessment. Her reply was the assessment was to evaluate how good her mind is, but she was not sure of the reason for wanting to know that. When probed further, she replied the assessment was to evaluate whether she knows what she is doing. When confronted to explain why her lawyer asked for the assessment, she denied having any need for a lawyer and denied any desire to instruct a lawyer in any decisions.

Capacity for Inter Vivos Gifts

There is no statutory test for capacity to make a gift. A general recommendation is the legal test requires the following of the donor: [i] [ii]

1. The ability to understand the nature of the gift.
2. The ability to understand the specific effect of the gift in the circumstances.
3. The ability to have the intention to make a gift without consideration or expectation of remuneration.

The two most common reasons for making inter vivos gifts are to benefit or reward a person to whom the donor feels some affection or obligation, and for the purpose of estate and succession planning. Incapacity for providing an inter vivos gift is based on lack of ability to understand substantially the nature and effect of the transaction.[iii]

In my clinical opinion:

Blanche has the ability to understand the nature of a financial gift at the time of giving a financial gift, but would not be able to recall the gift once given.

Blanche has ability to understand the specific effect of a financial gift in the circumstances at the time of giving a financial gift, but again will not be able to recall the specific effect of the gift once given.

Blanche has the ability to have the intention to make a gift without consideration or expectation of remuneration.

In my clinical opinion, Blanche currently has diminished capacity to provide inter vivos gifts due to impaired working memory. Blanche does not recognize her limitations, nor does she recognize the manifestations of impaired working memory. I suggest that Blanche requires assistance to manage her gift giving, in keeping with the concept of supported decision making, although certainly not substituted decision making. Capacity can be maintained with assistance, as described in *Koch (Re)*, (1997), 33 O.R. (3d) 485 (S.C.) at p. 521[iv] where the court commented that capacity exists if the person is able to carry out decisions with the help of others.

Therefore, I conclude that from a clinical perspective, Blanche is currently able to provide inter vivos gifts, but only with supervision from a fiduciary.

I cannot provide a retrospective commentary regarding her capacity to have provided the previous inter vivos gifts between September 2016 to September 2022, as I have not received any medical information to review to provide an opinion.

Vulnerability to Undue Influence

The clinician expert's evidence should deal with the question of the testator's risk of vulnerability to undue influence.[v] Evaluation of risk of vulnerability to undue influence is particularly challenging, especially in distinguishing it from "due influence"—that is, the natural favoritism or special devotion to particular heirs that may be seen in families.

When a person uses his or her role and power to exploit the trust, dependency, and/or fear of a senior to deceptively gain financial control over the financial decision making by the senior; we call that elder financial abuse due to undue influence. [vi] Elder financial abuse by undue influence is the substitution of the senior's will with the true desires of another.[vii] Undue influence occurs when a person is subject to such psychological domination by another that the person cannot help but carry out the other's wishes. Undue influence therefore involves the substitution of the mind of the person exercising the influence for the mind of the person executing the instrument, resulting in an instrument that would otherwise not have been made. Although dependent and impaired seniors are particularly susceptible, it can happen to seniors who would otherwise be considered capable.[viii]

Risk of vulnerability to undue influence typically commences with the elderly testator becoming psychosocially isolated, increasingly emotionally dependent on the influencer. Those at high risk are the physically ill, those who have emotional impairments, cognitive impairment, or dementia. Elderly who are socially isolated are especially vulnerable.[ix]

A Subcommittee of the International Psychogeriatric Association (IPA) Task Force on Testamentary Capacity and Undue Influence undertook to establish consensus on the definition of undue influence and the provision of guidelines for expert assessment of risk factors for undue influence.[x] Although the historical legal review suggests the need for coercion, from a clinical perspective, the authors describe the concept of "subversion of will" as a more useful term that allows for influence to be defined relative to the vulnerability of the testator. There may be situations of intentional interference by continuous influence designed to overcome the will of the

testator. Subversion of will allows for a continuum of influence depending on the extent of cognitive impairment or emotional susceptibility.

The international task force has outlined the kind of risk factors that make a testator vulnerable to undue influence. These include:

1. Relationship risk factors namely, "confidential" or close relationships between vulnerable will-makers/testators and a range of family members, friends, associates or caregivers. That is, a confidential caring relationship that created opportunity for a beneficiary to control the testamentary act and/or a trusting relationship in which the testator invests significant trust or confidence in a beneficiary such that the testator required the aid of the beneficiary to complete the testamentary act.

2. Social or environmental risk factors such as dependency and isolation; change in family relationships or family conflict. That is, physical, psychological, or social factors that would lead to psychosocial isolation and vulnerability of the testator to undue influence due to lack of independence.

3. Psychological factors such as cognitive impairment, emotional vulnerability conferred by illness or loneliness; and personality traits such as dependency. That is, where there is vulnerability to influence through impaired mental capacity or emotional circumstances. Where an individual's mental capacity is diminished such as in dementia or due to marked physical frailty due to disabling medical illness, he or she may be more vulnerable to undue influence.[xi xii]

4. Legal risk factors such as the procurement of the will or gift by a beneficiary which is inconsistent with previous testamentary wishes.

The relationship between cognitive capacity and influence provides that the lower the cognitive status the less influence would be required increasing the individual's vulnerability to being unduly influenced, and conversely the higher the cognitive status, the greater the influence required for vulnerability to undue influence. [xiii]

In my clinical opinion, Blanche does have risk factors for vulnerability to undue influence. Blanche is cognitively compromised with impaired working memory, probably requires assistance to manage her financial affaires, and has a lack of understanding of her limitations.

To constitute vulnerability to undue influence, influencers must be in a position more than just of trust or confidence, but rather must also be in a position of power or authority toward those vulnerable to undue influence. Their power may be based on professional authority, disproportionate strength or status, or the nature of the relationship such that there is the potential for domination. The test of a "dominating influence" suggests the existence of an advisory relationship is relevant to the determination of risk of vulnerability to undue influence. Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and obtains a benefit from the transaction.

Blanche is insistent that she was not pressured or coerced by any of her children or grandchildren to provide financial gifts, but she could not recall the nature or circumstances of the prior gifts. She insists that she is not vulnerable to persuasion and is independent in her decisions. Despite having confidential relationships with three of her four children, she denies any of them have a dominating effect on her and neither of them are required as caregivers.

In my clinical opinion, Blanche may still have sufficient cognitive and emotional ability to resist any attempt of undue influence.

Although Blanche claims to function completely independently, I find this to be an unreliable statement and not in keeping with the level of impaired working memory and executive function seen during the assessment. Despite not having corroborated information, I suspect that she is not able to make property decisions independently and I suggest she requires supervision and/or supported decision making by a fiduciary to assure no undue influence is impacting her decisions to make inter vivos gifts.

I suggest that moving forward, in light of the family conflict, that any giving of inter vivos gifts be overseen by her attorneys for property or similar fiduciary.

Sincerely,

Richard Shulman, MDCM, FRCPC, Geriatric Psychiatry

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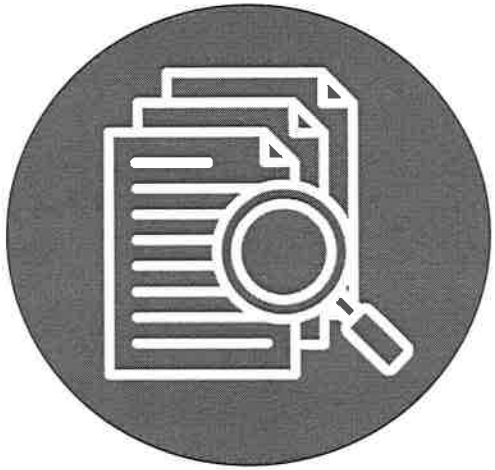


A Deeper Dig

Some Lesser Known provisions of the Succession Law Reform Act

With Jordy Atin and Ian Hull

Power to dispose of property by will

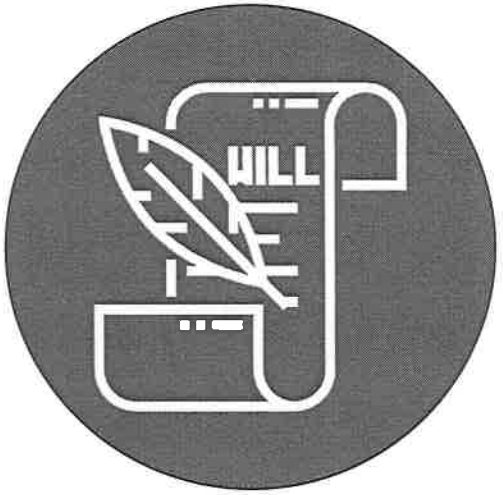
2 A person may by will devise, bequeath or dispose of all property (whether acquired before or after making his or her will) to which at the time of his or her death he or she is entitled either at law or in equity, including,

(a) estates for another's life, whether there is or is not a special occupant and whether they are corporeal or incorporeal hereditaments;

(b) contingent, executory or other future interests in property, whether the testator is or is not ascertained as the person or one of the persons in whom those interests may respectively become vested, and whether he or she is entitled to them under the instrument by which they were respectively created or under a disposition of them by deed or will; and

(c) rights of entry, whether for conditions broken or otherwise.

9 No appointment made by will in exercise of any power is valid unless the appointment is executed in the manner hereinbefore required, and every will executed in the manner hereinbefore required is, so far as respects the execution and attestation thereof, a valid execution of a power of appointment by will, despite the fact that it has been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity.



Operation of will as to interest left in testator

20 (1) A conveyance of or other act relating to property that is the subject of a devise, bequest or other disposition, made or done after the making of a will, does not prevent operation of the will with respect to any estate or interest in the property that the testator had power to dispose of by will at the time of his or her death.

Rights in place of property devised

(2) Except when a contrary intention appears by the will, where a testator at the time of his or her death,

(a) has a right, chose in action or equitable estate or interest that was created by a contract respecting a conveyance of, or other act relating to, property that was the subject of a devise or bequest, made before or after the making of a will;

(b) has a right to receive the proceeds of a policy of insurance covering loss of or damage to property that was the subject of a devise or bequest, whether the loss or damage occurred before or after the making of the will;

(c) has a right to receive compensation for the expropriation of property that was the subject of a devise or bequest, whether the expropriation occurred before or after the making of the will; or

(d) has a mortgage, charge or other security interest in property that was the subject of a devise or bequest, taken by the testator on the sale of such property, whether such mortgage, charge or other security interest was taken before or after the making of the will,

the devisee or donee of that property takes the right, chose in action, equitable estate or interest, right to insurance proceeds or compensation, or mortgage, charge or other security interest of the testator. R.S.O. 1990, c. S.26, s. 20.

DiMambro Estate v. DiMambro
2002 CarswellOnt 3910, [2002] O.J. No. 4393, 118 A.C.W.S. (3d) 311, 48 E.T.R. (2d) 22

Will to speak from death

22 Except when a contrary intention appears by the will, a will speaks and takes effect as if it had been made immediately before the death of the testator with respect to,

(a) the property of the testator; and

(b) the right, chose in action, equitable estate or interest, right to insurance proceeds or compensation, or mortgage, charge or other security interest of the testator under subsection 20 (2). R.S.O. 1990, c. S.26, s. 22.

Disposition of property in void devise

23 Except when a contrary intention appears by the will, property or an interest therein that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of,

(a) the death of the devisee or donee in the lifetime of the testator; or

(b) the devise or bequest being disclaimed or being contrary to law or otherwise incapable of taking effect,

is included in the residuary devise or bequest, if any, contained in the will.

Janicek v. Janicek
2018 CarswellOnt 1091, 2018 ONSC 681, 288 A.C.W.S. (3d) 199, 37 E.T.R. (4th) 315

Leasehold estates under devise of real property

24 Except when a contrary intention appears by the will, where a testator devises,

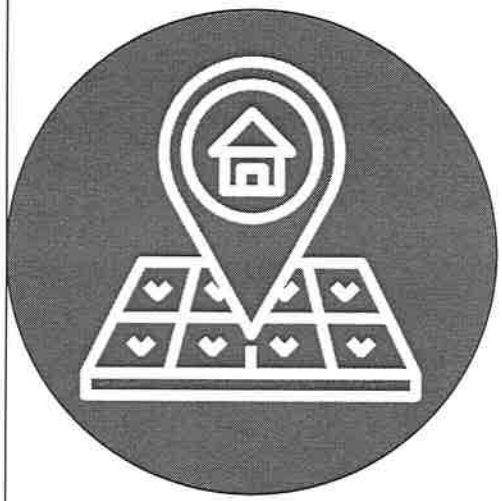
(a) his or her real property;

(b) his or her real property in a place mentioned in the will, or in the occupation of a person mentioned in the will;

(c) real property described in a general manner; or

(d) real property described in a manner that would include a leasehold estate if the testator had no freehold estate which could be described in the manner used,

the devise includes the leasehold estates of the testator or any of them to which the description extends, as well as freehold estates.



Disposition of property over which testator has power to appoint

Real property

25 (1) Except when a contrary intention appears by the will, a general devise of,

(a) the real property of the testator;

(b) the real property of the testator,

(i) in a place mentioned in the will, or

(ii) in the occupation of a person mentioned in the will; or

(c) real property described in a general manner,

includes any real property, or any real property to which the description extends, which he or she has power to appoint in any manner he or she thinks proper and operates as an execution of the power.

Personal property

(2) Except when a contrary intention appears by the will, a bequest of,

(a) the personal property of the testator; or

(b) personal property described in a general manner,

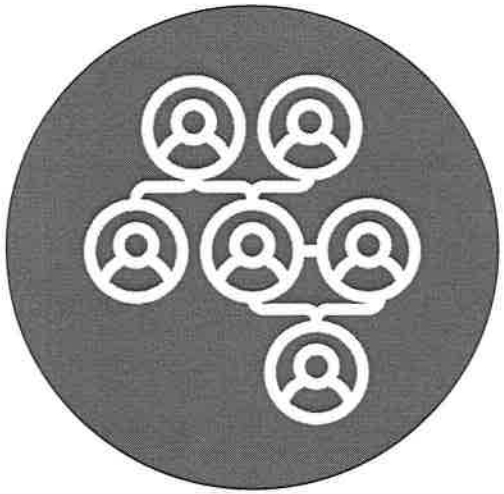
includes any personal property, or any personal property to which the description extends, which he or she has power to appoint in any manner he or she thinks proper and operates as an execution of the power. R.S.O. 1990, c. S.26, s. 25.

Real property passing under devise without words of limitation

26 Except when a contrary intention appears by the will, where real property is devised to a person without words of limitation, the devise passes the fee simple or the whole of any other estate or interest that the testator had power to dispose of by will in the real property.

Meaning of "heir" in devise of property

27 Except when a contrary intention appears by the will, where property is devised or bequeathed to the "heir" or "heirs" of the testator or of another person, the words "heir" or "heirs" mean the person to whom the beneficial interest in the property would have gone under the law of Ontario if the testator or the other person died intestate.



Import of words "die without issue", etc.

28 (1) Subject to subsection (2), in a devise or bequest of property,

(a) the words,

(i) "die without issue",

(ii) "die without leaving issue", or

(iii) "have no issue"; or

(b) other words importing either a want or failure of issue of a person in his or her lifetime or at the time of his or her death or an indefinite failure of his or her issue,

mean a want or failure of issue in the lifetime or at the time of death of that person, and do not mean an indefinite failure of his or her issue unless a contrary intention appears by the will.

Devise to trustee or executor

29 Except when there is devised to a trustee expressly or by implication an estate for a definite term of years absolute or determinable or an estate of freehold, a devise of real property to a trustee or executor passes the fee simple or the whole of any other estate or interest that the testator had power to dispose of by will in the real property.

When devise to trustee to pass whole estate beyond what is requisite for trust

30 Where real property is devised to a trustee without express limitation of the estate to be taken by the trustee and the beneficial interest in the real property or in the surplus rents and profits,

(a) is not given to a person for life; or

(b) is given to a person for life but the purpose of the trust may continue beyond his or her life,

the devise vests in the trustee the fee simple or the whole of any other legal estate that the testator had power to dispose of by will in the real property and not an estate determinable when the purposes of the trust are satisfied. R.S.O. 1990, c. S.26, s. 30.

Primary liability of real property to satisfy mortgage

32 (1) Where a person dies possessed of, or entitled to, or under a general power of appointment by his or her will disposes of, an interest in freehold or leasehold property which, at the time of his or her death, is subject to a mortgage, and the deceased has not, by will, deed or other document, signified a contrary or other intention,

(a) the interest is, as between the different persons claiming through the deceased, primarily liable for the payment or satisfaction of the mortgage debt; and

(b) every part of the interest, according to its value, bears a proportionate part of the mortgage debt on the whole interest.

Consequence of general direction to pay debts out of personalty or residue

(2) A testator does not signify a contrary or other intention within subsection (1) by,

(a) a general direction for the payment of debts or of all the debts of the testator out of his or her personal estate, his or her residuary real or personal estate or his or her residuary real estate; or

(b) a charge of debts upon that estate,

unless he or she further signifies that intention by words expressly or by necessary implication referring to all or some part of the mortgage debt.

Undisposed of residue

33 (1) Where a person dies having by will appointed a person executor, the executor is a trustee of any residue not expressly disposed of, for the person or persons, if any, who would be entitled to that residue in the event of intestacy in respect of it, unless it appears by the will that the person so appointed executor was intended to take the residue beneficially.

Where no person entitled to residue

(2) Nothing in this section prejudices any right in respect of any residue not expressly disposed of to which, if this Part had not been passed, an executor would have been entitled where there is not any person who would be entitled to the testator's estate under Part II in case of an intestacy. R.S.O. 1990, c. S.26, s. 33.

Survivorship
Succession

55 (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he or she is competent to dispose, shall be disposed of as if he or she had survived the other or others.

Simultaneous death of joint tenants

(2) Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person shall be deemed, for the purposes of subsection (1), to have held as tenant in common with the other or with each of the others in that property.

Provision in will for substitute representative

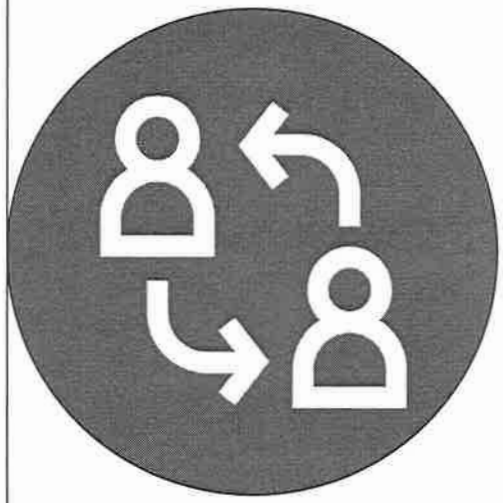
(3) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will,

(a) dies before the testator;

(b) dies at the same time as the testator; or

(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides shall be deemed to have occurred.



Tab 16

Hull & Hull LLP

Will Drafting Tips for the Appointment of Multiple Estate Trustees: Handling Disagreements During an Estate Administration

By *Suzana Popovic-Montag* - *March 2023*

It may be prudent to encourage a client to select more than one person to serve as estate trustee, particularly for large or complex estates. Often times, the role of estate trustee can be quite onerous for just one person. Having said that, clients should also be aware that the appointment of multiple estate trustees could end up making the estate administration process more complicated or more contentious, and that it may thereby take more time, if there is disagreement amongst the trustees as to how the estate ought to be administered.

As a result, it is wise for a will that appoints multiple estate trustees to also address how to proceed in the event of a disagreement amongst the trustees. At common law, all estate trustees must be unanimous in all decisions regarding an estate. If a dispute arises, it is not the case that the majority of estate trustees can simply choose how to proceed. The only way to overcome the requirement that estate trustees must act in concert, other than seeking guidance from a court, is to set out a dispute resolution procedure in the will to apply should a dispute arise.[1]

There are a variety of dispute resolution mechanisms that a client can choose from, such as:

- a simple majority rules provision;[2]
- a clause requiring a particular trustee to be in the majority in the event of any dispute; or
- a directive which requires the estate trustees to proceed to mediation or arbitration if they reach an impasse when administering the estate.[3]

A client may wish to know what would happen if a dispute resolution mechanism is not included in the will or if it is not effective in resolving a dispute. In that case, there are at least two ways that the trustees could handle disputes amongst themselves. The first, and less drastic, solution is to apply to the court for directions in an attempt to resolve the dispute. For example, in *Dewaele v. Roobroeck*, the estate trustees resorted to the court to address a number of disagreements, including how to value estate assets, what assets comprised the estate, and

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[1] See *Dewaele v. Roobroeck*, 2020 ONSC 7534 [*Dewaele*] at para. 51, citing *Kaptyn Estate (Re)*, 2009 CanLII 19933 (Ont. S.C.J.) at para. 16.

[2] For an example of a majority rules provision, see *Re Brodylo Estate*, 2022 ABQB 358 [*Brodylo*] at para. 7.

[3] See Lindsay Ann Histrop, *Estate Planning Precedents: A Solicitor's Manual* (Toronto: Thomson Reuters, 1995) (loose-leaf updated 2023, release 1), Appendix A:14. app. 12 – Will Drafting Checklist at 7. Executors.

how and when to distribute the estate assets.[4] However, clients should be aware of the potential cost of administering an estate in this manner. Obtaining assistance from the courts may reduce the size of the estate and thereby reduce the size of bequests left to the testator's beneficiaries, depending on how the cost of any court application is handled.

Another option in the face of disputes between multiple estate trustees is to apply to the courts to remove one or more of the trustees. This is likely an undesirable solution from the estate planning client's perspective, insofar that it would defeat the point of selecting multiple estate trustees. Removal will also only be warranted in cases where disagreement amongst the estate trustees makes the continued administration of the estate impossible or improbable.[5] Even then, however, if the different positions taken by the estate trustees regarding the administration of the estate are all reasonable, the court may decline to remove a trustee.[6] In the event of a dispute, there is no legal principle which permits the court to simply remove the minority of estate trustees who disagree and allow the majority to remain.[7]

It also warrants noting that a dispute resolution mechanism may not be useful in the face of all disputes. For example, a majority rules clause cannot be used to override executors' fiduciary duties to one another or to the estate's beneficiaries.[8] Accordingly, if a disagreement arises that relates to the fiduciary duties of the estate trustees, a majority rules clause is unlikely to have any meaningful impact. Similarly, if one of the estate trustees is not cooperative during the estate administration, a dispute resolution mechanism will be of little assistance, although if there is hostility due to a lack of cooperation, the dissenting executor may be removed by the court.[9]

In short, if a will appoints more than one estate trustee, best practice would be to also include a procedure for resolving any dispute that may arise amongst the trustees during an estate administration. While such a clause may not solve all the problems that could arise amongst the trustees, it could be helpful in averting a preventable stalemate. The possible consequences of a dispute not being effectively managed also highlight the need to exercise great care in the selection of estate trustees, who can work together in implementing the testator's wishes in the interests of the beneficiaries of the estate.

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[4] *Dewaele*, *supra* note 1 at paras. 4, 7.

[5] *Ibid.* at paras. 54-55.

[6] See, for example, *Nand Estate (Re)*, 2022 BCSC 1718 at paras. 78, 82. There must be a basis to conclude that an estate trustee has been unwilling or unreasonably refuses to carry out his duties so as to warrant the removal of that estate trustee.

[7] *Bartel Estate, Re*, 2006 MBCA 139 at para. 20.

[8] *Brodylo*, *supra* note 2 at para. 30.

[9] *Mailing v. Conrad*, 2003 CanLII 21143 (Ont. S.C.J.) at para. 17.

Tab 17

TIPS FOR AFFIDAVITS ATTESTING TO HOLOGRAPH INSTRUMENTS

By Suzana Popovic-Montag - February 2024

If you follow our blog, you may already know that two estate forms currently used in Ontario are being updated.[1] In fact, the new versions of Forms 74F and 74G can already be found on the Ontario Court Services website.[2] In light of the introduction of these new forms, the rest of this Solicitor's Tip focuses on Form 74F and information that ought to be included in an affidavit attesting to the deceased's handwriting on a holograph instrument.

Handwriting of the Deceased Must be Confirmed

When submitting a holograph instrument to probate, it is necessary to provide evidence confirming that it was actually written by the deceased. An affidavit ought to be sworn by someone who is "well-acquainted" with the deceased and frequently saw their signature and handwriting.[3]

Evidence of the Deponent's Relationship to the Deceased is Required

An application for a Certificate of Appointment of Estate Trustee (probate) in respect of a holograph instrument may be denied, even if the application is uncontested, if insufficient information is provided regarding the relationship between the deceased and the person attesting to the deceased's handwriting.[4] As such, it is good practice to provide information to the court regarding the deponent's relationship with the deceased and, if applicable, how the deponent is connected to the deceased's estate and/or the applicant seeking probate.

Whereas the current version of Form 74F does not really touch on such information,[5] the new version of Form 74F does, requesting much more information than its predecessor, including whether the deponent:

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[1] See Megan Zanette, "Upcoming Amendments to Estate Court Forms" (22 January 2024), online: Hull & Hull LLP, Knowledge <https://hullandhull.com/Knowledge/2024/01/upcoming-amendments-to-estate-court-forms/>.

[2] See Form 74F (Affidavit Regarding a Holograph Will or Codicil), online: Ontario Court Services <https://ontariocourtforms.on.ca/static/media/uploads/courtforms/civil/74f/rcp-e-74f-1123.docx> and Form 74G (Renunciation and Consent), online: Ontario Court Services. <https://ontariocourtforms.on.ca/static/media/uploads/courtforms/civil/74g/rcp-e-74g-1123.docx>.

[3] See Ian M. Hull and Suzana Popovic-Montag, *Macdonell, Sheard and Hull on Probate Practice*, 5th edition (Toronto: Thomson Reuters, 2016) at 307.

[4] See *Re Welgan (Estate of)*, 2004 ABQB 935.

[5] See Form 74F (Affidavit Attesting to the Handwriting and Signature of a Holograph Will or Codicil), online: Ontario Court Services <https://ontariocourtforms.on.ca/static/media/uploads/courtforms/civil/74f/rcp-e-74f-0921.docx>.

- is applying to be estate trustee with respect to the estate;
- is related to the person applying to be appointed estate trustee or in a personal relationship with that person;
- has a personal interest in the estate as a beneficiary;
- is married to a beneficiary of the estate; or
- has an interest in the estate pursuant to the will, or would have an interest in the estate if it were to be distributed on intestacy.[6]

Ideal Deponent Remains a Neutral Third Party

The affidavit attesting to the deceased's handwriting on a holograph instrument ought to be sworn by a neutral third party, if possible.[7]

Arguably, having the testator's handwriting and signature affirmed by a person who has an interest in the estate is inconsistent with the spirit of the *Succession Law Reform Act* – after all, under the *SLRA*, gifts to beneficiaries who witness a testator's signature on a will are void without a court order.[8]

While, traditionally, such affidavit evidence would often be obtained from bank-tellers, with the rise in online banking and fewer personal relationships, we often need to consider other sources. If there is no neutral third party who can attest to the deceased's handwriting, it is advisable to include evidence with the probate application addressing what steps were taken to find a neutral third party and that no neutral party could be found.[9] Under such circumstances, an application for probate may still be granted – as noted in *Probate Practice*, "[w]here the matter is not contentious, an affidavit from a member of the deceased's immediate family … should usually suffice."[10] However, an affidavit from a person with an interest in an estate may also be acceptable, even if the will is later contested.[11]

Key Take-Aways

When preparing a probate application in respect of a holograph instrument, the affidavit attesting to the deceased's handwriting ought to:

- confirm that the instrument was written by the deceased;

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[6] Form 74F (Affidavit Regarding a Holograph Will or Codicil), online: Ontario Court Services <https://ontariocourtforms.on.ca/static/media/uploads/courtforms/civil/74f/rcp-e-74f-1123.docx>.

[7] See *Re Welgan (Estate of)*, 2004 ABQB 961 at para. 15.

[8] *Succession Law Reform Act*, R.S.O. 1990, c S.26, ss. 4, 12.

[9] See *Re Welgan (Estate of)*, 2004 ABQB 961 at para. 15.

[10] Ian M. Hull and Suzana Popovic-Montag, *Macdonell, Sheard and Hull on Probate Practice*, 5th edition (Toronto: Thomson Reuters, 2016) at 307.

[11] See, for example, *Delongchamp v. Fex-Tinkis*, 2007 CanLII 29961 (ON SC). In this case, the party applying to be appointed estate trustee swore the affidavit attesting to the deceased's handwriting. The will was later challenged, but this "conflict" did not affect the outcome.

- establish how the deponent knew the deceased; and
- indicate whether the deponent has any connection with the application for a Certificate of Appointment of Estate Trustee or, alternatively, any connection to the estate.

The addition of a checklist to the new Form 74F should be helpful in assisting applicants to ensure that this information is covered and will highlight whether the deponent is neutral. If a neutral third party without any connection to the application or the estate cannot be found to swear the affidavit, this information also ought to be provided to the court with the application.

While an application for a Certificate of Appointment of Estate Trustee can be submitted for filing with the prior version of Form 74F until April 1, 2024, it may be a good idea to start using the new version of Form 74F now, given the additional pertinent information it provides to the court.

Tab 18

APPENDIX "B"

Document in Question	Per the Court: Is It a Valid Will?	Case Name
Manitoba		
Letter from accountant outlining testator's desired changes to his will.	[no] - Court found that a third-party document would have to be one that had been made at the request of the deceased, or with his/her knowledge; and, in any event, with his/her awareness that the document recorded the deliberate and final expression of his/her wishes as to the disposition of his/her property on death.	*George v. Daily 1997 CarswellMan 57*
The testator signed the will but the lawyer left without making any further effort to have the document executed.	[no]- They dismissed the application on the grounds that the testator did not have testamentary intention because he was incompetent when he signed the document in question.	*Weselowski v. Weselowski*- 2003 MBQB 191
Articling student took notes of the client's instructions and how the testator wanted to dispose of her assets. The student then asked the client to endorse his notes, not as confirmation that they were accurate, but to avoid a possible fee dispute.	[no]- It was clear that there was no intention on part of articling student that his notes would ever be submitted to probate even after deceased affixed her signature. Evidence indicated that deceased did not consider her death to be imminent and that she expected that articling student would be returning with formal will well within her expected lifetime.	*Timm v. Rudolph, 2016 MBQB 123*
Saskatchewan		
the deceased had filled in and signed a printed will form with only dispositive provision stating "Whatever [B.G.] my daughter decides is O.K.'	[no]- In the instant case, the subject document does not manifest a true testamentary intention and therefore does not meet the threshold requirement of the section.	*Re Balfour Estate*, 1990 CarswellSask 102
a McDonalds napkin splitting the deceased's property evenly to his children.	[yes]- valid holograph under their substantial compliance provision (35.1). Justice Layh was persuaded by the propounders' explanation that the napkin was made at a time when Mr. Langan thought he was having a heart attack "a time when one's mind would reasonably turn to the question of estate planning".	*Gust v Langan, 2020 SKQB 42*
Alberta		
A five-page typed document entitled: "This Is the Last Will and Testament of me, Pamela Beverly McCarthy", signed and dated six weeks earlier.	[yes]- *The Alberta Court of Appeal ha*d concluded that the testamentary intention had clearly been met because the writing in question made *"it apparent on the face of the document that the testator intended, by signing, to give effect to the writing in the document as the testator's will."*	*Re McCarthy Estate 2021 ABCA 403*

The testator made changes to his previous will on two sticky notes, only four days before he died.	[yes] - The testator had previously executed a formal will in 1997, but his sticky notes of March 2018 were deemed to be not only valid changes to his will, but a complete and valid rewriting of his will.	*Re Dalla Lana Estate*, 2020 ABQB 135
Handwritten notes outlining instructions to solicitor	[no]- the court refused to validate the notes, even though the instructions prepared by the solicitor accurately reflected the testator's instructions, since the Alberta validating power does not permit validation if the document lacks the testator's signature.	*Woods V. Cannon 2014 ABQB 614*
Two notebooks containing handwritten notes. One fully in deceased's handwriting, the other with writing clearly not belonging to the deceased.	[yes] – the document fully in the Deceased's handwriting meets the requirements of a holographic Will. [no]- in its entirety it is not a valid testamentary document. There are three conditions that must be met before a handwritten portion of a larger document may be admitted for probate as a valid holographic will. The Deceased must have intended the document to have dispositive effect, any spurious writing or printing is superfluous or unessential and the holographic parts can stand by themselves without the spurious printing or writing.	*Baldwin v Van Hout, 2024 ABKB 220*
British Columbia		
A journal entry	[no]- The court found this did not represent a deliberate and final expression of testamentary intentions. A main factor in this decision was a subsequent note of Ms. Hadley's regarding her intention to prepare and execute a new Will shortly. This indicated that she did not consider herself having already done so by way of her journal entry.	*Re Hadley Estate* 2017 BCCA 311
Instructions over the telephone, reviewing the contents of the document over the phone with the drafting solicitor and agreeing thereafter to meet to execute the document.	[yes]- the court found that the fact that the Deceased only reviewed new will over telephone with counsel did not undermine testamentary intention. In agreeing to meet with his lawyer after reviewing new will by telephone, deceased demonstrated intention to execute new will.	*Re Gibb Estate 2021 BCSC 2461*
Gifts in will automatically revoked by separation (were these gifts still valid)	[yes]- There was evidence that the deceased still wanted to benefit her former spouse but did not realize that she needed to take further steps. The gifts to former spouse were fully effective.	*Re Jacobson, 2020 BCSC 1280*
Notation left on a computer. "*Get a will made out at some point. A 5-way assets split for remaining brother*	[yes]- In weighing all the evidence, the court was satisfied the document was a deliberate expression of the deceased's wishes as to the disposition of his property upon his death.	*Re Hubschi Estate, 2019 BCSC 2040*

and sisters. Greg, Annette or Trevor as executor".		
If testator lacked capacity	[no] the rules cannot be used to allow a document to be admitted to probate if it is substantively invalid, such as when the will-maker lacked testamentary capacity.	*Estate of Young*, 2015 BCSC 182
Draft will revokes earlier will	[lead to intestacy]- Court found that a draft will accurately reflected the deceased's ultimate wishes to revoke an earlier will.	*Cooper Estate*, 2024 BCSC 218
Ontario		
Unwitnessed, unsigned will	[yes]- the lawyer sent the Deceased the prepared Will by email. The Deceased merely made minor changes to it and returned her will to her lawyer by email. the lawyer replied to the Deceased, asking her to schedule an appointment to finalize the will. Fifteen days later, the Deceased died. The Will was declared to be the valid and fully effective will of the Deceased.	*Grattan v. Grattan* (Unreported)
A draft	[obiter comment that a draft is not a will under s.21.1] however this matter was not brought under s.21.1.	*White v. White* 2023 ONSC 7286
The lawyer did not sign the mother's will. Everyone else signed. The lawyer signed all the powers of attorney and the father's will	[yes]- Everyone intended and thought that all the documents were properly signed and witnessed. But through human error and oversight, one witness signature is missing on one will. No affidavits of execution were prepared. Both parents' wills were however stored in the lawyer's vault. The lawyer also billed the clients for services including signing the wills (plural).	*Vojska v. Ostrowski, 2023* ONSC 3894
Deceased prepared own will with no witness	[yes]- The deceased gave the will in a sealed envelope to his chosen executor. He did not have the will witnessed. He put a note to the executor in the envelope asking the executor to get the will witnessed. Justice Myers stated "I am satisfied that this document "records a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death. "just blew through the formalities".	*Cruz v. Public Guardian and Trustee*, 2023 ONSC 3629
Fill-in-the-blank style will in deceased's handwriting that was signed but not dated.	[yes]- The document names an Executrix, and an alternate. Specific bequests are set out and provision is made for the residue of the estate to be divided. The document also makes provisions for her dogs to be cared for.	*Groskopf v. Rogers* et al, 2023 ONSC 5312
s.19(1)(b) of the SLRA was used in this case but provides a potential limit to s.21.1(1)	Justice Chang stated the curative provision doesn't "provide the court with license to read into testamentary documents or writings intentions that are not already set out in them or that are not clearly inferable from admissible extrinsic evidence."	*Re Campbell Estate*, 2023 ONSC 4315

	Rather, the purpose of s.21.1(1) is to confer jurisdiction upon the court to deem valid a document or writing that failed to comply with the requirements of the SLRA, but that nonetheless set out a testator's intentions based on the reading of the document and the extrinsic evidence.	
A Will with only one whiteness's signature	[yes]- To determine if it is a valid Will. The court uses the two-part test from Cruz v Public Guardian. The document is authentic and sets out the testamentary intentions of the deceased.	*Marsden v. Hunt et al.*, 2024 ONSC 1711
A Will signed by two Witness who were not present for the Deceased's signature because the actual witness was a beneficiary	[yes]- the applicant was the only person to witness the signing of the Will and his affidavit evidence that the court is relying on states his presence. The applicant follows the rules set out in section 12(3) of the *SLRA.*	*Re: O'Neill Estate*, 2024 ONSC 2228
Contents of a notebook including photocopies of a prior Will with handwritten annotations	[yes]- the notebook was authentic and was crafted with testamentary capacity, without undue influence and had the circumstances been different he would have gone back to his solicitor to amend his Will.	*Salmon v. Rombough*, 2024 ONSC 1186 ("Salmon")
New Brunswick		
Instructions to solicitor but will not executed	[yes] - The New Brunswick courts validated a will for which the testator (who was in hospital with a terminal illness) had given instructions to a solicitor but which she was unable to execute before she died.	*Marsden et al. V. Talbot* 2018 NBCA 82
Unsigned copy of a will provided by the drafting lawyer	[yes]- The Deceased was diagnosed with cancer in 2007. She wished to make new will and explained changes she wanted to make to her will to common-law husband and showed him computer document explaining changes. The Deceased faxed the computer document to lawyer who was preparing new will. The draft was admitted to probate.	*Degrace, Re* 2012 NBBR 116
Handwritten document, unsigned, that cannot be located	[yes]- the Judge ordered that the note that is a 'recollection' of the missing handwritten note accurately reflected the missing document and is valid and effective.	*Furlotte v. McAllister* 2005 NBQB 310
Does attestation by a beneficiary fall within one of the formal requirements under 35.1	[not a valid will]- Noncompliance with s. 12(1) was not mere an irregularity or failure to comply with formal requirements of Act but was substantial , and the fundamental policy reasons for s. 12(1) of Act was to prevent coercion. The court found that Section 12(1) was immune from curative provisions of s. 35.1 of Act and as such, Section 35.1 could not revive something that was deemed void	*Sutherland v Sutherland Estate* 2015 NBBR 202
Nova Scotia		

Document not witnessed until after the fact	[yes]- There were no parties contesting writing or raising issue of suspicious circumstances and the revised will in this case was substantially similar to pre-existing will.	*Robitaille v. Robitaille Estate 2011 NSSC 203*
Photocopy of document headed 'last will and testament'	[no]- The vagueness concerning any bequest to his brother Bruce is not evidence of a settled testamentary intention, in this Court's view. There is no provision made for the residue of the Estate	*Mersey v. Mersey 2023 NSSC 421*
Properly executed type-written documents with substantial parts crossed out and handwritten amendments in pen.	[yes]- It was established that the handprinted changes in question were, more likely than not, made by the deceased and that the document in question does represent the deceased's fixed and final expression of intention as to the disposal of his assets upon death.	*Estate of Victor Sweeney* 2023 NSSC 339
Quebec		
Unsigned detailed and organized handwritten notes.	[no] The Court of Appeal held that the total absence of a signature is fatal. The signature is an essential requirement that must be respected since it is a clear expression of intent, consent, and solemnity.	*Gariépy (Succession de) c. Beauchemin*, 2006 QCCA 123
Unsigned note on the back of an invoice	[yes] The Court held that the very exceptional circumstances of the case permit derogation from general rule that the absence of a signature is fatal. The Court found that the act of placing the note on his lap prior to committing suicide was akin to signing the document and unequivocally expressing his final wishes.	*Succession de Garneau*, 2020 QCCS 4295