Law Society of Ontario | Barreau de l'Ontario

The Six-Minute Estates Lawyer 2019

CHAIRS

Ian Hull, C.S.
Hull & Hull LLP

Lisa Toner
Sorbara, Schumacher, McCann LLP

April 29, 2019

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Law Society | **Barreau**
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The Six-Minute Estates Lawyer 2019

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April 29, 2019
9:00 a.m. to 12:00 p.m.
Total CPD Hours = 2 h 30 m Substantive + 30 m Professionalism Ⓟ

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Agenda

9:00 a.m. – 9:05 a.m.	**Welcome and Opening Remarks** Ian Hull, C.S., *Hull & Hull LLP* Lisa Toner, *Sorbara, Schumacher, McCann LLP*
9:05 a.m. – 9:12 a.m.	**Rules of Conduct and Conflict Issues for Solicitors** (7 m Ⓟ) Suzana Popovic-Montag, TEP, *Hull & Hull LLP*
9:12 a.m. – 9:19 a.m.	**Joint Asset Planning** Clare Burns, *WeirFoulds LLP*

9:19 a.m. – 9:26 a.m.	**Common Issues on Applications for Certificates of Appointment and Recent Developments** Alison Minard, *McCarthy Tétrault LLP*
9:26 a.m. – 9:33 a.m.	**Unjust Enrichment – Update on the Caselaw *Moore* v. *Sweet*** Angelique Moss, *Casey & Moss LLP*
9:33 a.m. – 9:40 a.m.	**Question and Answer Session** (1 m Ⓟ)
9:40 a.m. – 9:47 a.m.	**Tips and Tools to Enhance an Estate Mediation** Kimberly Whaley, C.S., TEP, *WEL Partners*
9:47 a.m. – 9:54 a.m.	**In Terrorem Clauses** Holly LeValliant, *Eisen Law*
9:54 a.m. – 10:01 a.m.	**Appointments of Litigation Guardians** Susan Stamm, Counsel, Property Rights, Office of the Children's Lawyer, *Ministry of the Attorney General*
10:01 a.m. – 10:08 a.m.	**Taxation of Trusts Update** Kyle Lamothe, *Thorsteinssons LLP*
10:10 a.m. – 10:17 a.m.	**Calculating Dependant Relief Claims for Support** Carol Craig, *Nelligan O'Brien Payne LLP*
10:17 a.m. – 10:25 a.m.	**Question and Answer Session**

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10:52 a.m. – 10:59 a.m.	**Drafting Planning for Disabled Beneficiaries** (7 m Ⓟ) Jonathan Keslassy, *Keslassy Freedman Gelfand LLP*
10:59 a.m. – 11:06 a.m.	**Limitation Periods in Estates and Passing of Accounts Proceedings** Lisa Filgiano, *Miller Thomson LLP*
11:06 a.m. – 11:14 a.m.	**Estate Administration Tax Update and Practice Tips** (7 m Ⓟ) Jordan Atin, C.S., TEP, *Atin Professional Corporation*
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11:34 a.m. – 11:41 a.m.	**Corroboration Evidence in Estate Matters** Brendan Donovan, *Donovan Kochman LLP*

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TAB 1

The Six-Minute Estates Lawyer 2019

Rules of Conduct and Conflict Issues for Estates Lawyer

Written and presented by:
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April 29, 2019

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Rules of Conduct and Conflict Issues for Estates Lawyers

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Rules of Conduct and Conflict Issues for Estates Lawyers

Some professional conduct issues that lawyers may encounter are applicable to practitioners regardless of practice area, whereas others are unique to estates practitioners. The primary source of guidance for lawyers regarding their professional obligations is the Law Society of Ontario's *Rules of Professional Conduct*[1] ("**Rules of Professional Conduct**" or the "**Rules**"). This paper will refer to a number of the Rules and select case law that provides further guidance with respect to professional conduct and potential conflicts of interest.

Professional Conduct Considerations for Drafting Solicitors

Significant amendments to the Law Society's Rules of Professional Conduct were made in October of 2014. These changes reflected the contents of the *Model Code of Professional Conduct*, which was introduced in December of 2011 by the Federation of Law Societies of Canada (the "**Model Code**") to eliminate any significant interprovincial differences in rules of conduct for Canadian lawyers.

Amongst the most important changes adopted in the amended Ontario Rules were new standards with respect to conflicts of interest. Specifically, the amended Rules introduced provisions that addressed conflicts of interest within the practice of estate planning.

Receipt of Gifts or Other Benefits

In the context of estates, the Model Code eliminated uncertainty with respect to provisions that can be included within a Will to the benefit of a drafting solicitor. It advised as follows:

[1] Law Society of Ontario, *Rules of Professional Conduct* (Amendments current to April 2018) [**Rules of Professional Conduct**].

> Testamentary Instruments and Gifts
>
> 3.4-37 A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.
>
> 3.4-38 Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.
>
> 3.4-39 A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.[2]

The Model Code served as a guideline to promote uniformity in codes of conduct implemented by Law Societies throughout the country. Several other provinces, including British Columbia and Nova Scotia, adopted provisions identical to Rules 3.4-37 through 3.4-39, while Ontario opted to modify the proposed updates. The Rules of Professional Conduct were amended to include the following terms, which remain unchanged at the time of publication:

> Testamentary Instruments and Gifts
>
> 3.4-38 If a will contains a clause directing that the lawyer who drafted the will be retained to provide services in the administration of the client's estate, the lawyer should, before accepting that retainer, provide the trustees with advice, in writing, that the clause is a non-binding direction and the trustees can decide to retain other counsel.
>
> 3.4-39 Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.[3]

[2] Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Amendments current to March 2017), available at: https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf.

[3] Rules of Professional Conduct, *supra* note 1.

According to the report[4] of the Law Society committee responsible for these amendments, the Rules of Professional Conduct were updated in a way that reflects Ontario's unique practice environment. Rule 3.4-39 of the Model Code was excluded from the Ontario Rules altogether, as the Law Society of Upper Canada (as it then was) did not feel that this provision, and the resulting limitation of testamentary freedom, was necessary. Furthermore, the requirement that a Will not include a direction that the drafting solicitor is to be consulted for assistance in the administration of the estate was not included in the Rules of Professional Conduct. Instead, Rule 3.4-37 requires a lawyer who includes such a provision in a client's Will to advise an estate trustee that these provisions are not enforceable, and that the estate trustee is open to consult another lawyer instead.

While the Ontario Rules may inform the standard of care expected of a lawyer in the preparation of testamentary instruments, they do not in and of themselves alter the governing law in Ontario with respect to the validity of gifts. No statute in Ontario specifically bars the situation of a lawyer drafting a Will that leaves a bequest to that lawyer. If a Will is otherwise drawn in accordance with the formal requirements under the *Succession Law Reform Act*, a gift to the drafting lawyer, even if made in a manner inconsistent with the Rules of Professional Conduct, would likely stand.

It is unclear if, at a future date, the legislature will attempt to close this loophole and enact legislation specifically barring a testamentary gift to a drafting lawyer. At present, it appears that, notwithstanding the provisions of Rule 3.4-38, a bequest to a drafting lawyer (although exposing the lawyer to potential professional misconduct proceedings) may still be valid.

[4] "Proposed Amendments to the *Rules of Professional Conduct* Arising from Implementation of the Federation of Law Societies Model Code of Professional Conduct" Convocation – Professional Regulation Committee Report, *Law Society of Upper Canada*, available at: http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2013/convoct13_prcreportremodelcode.pdf.

Drafting Solicitors Acting as Estate Trustee

Clients often request that the lawyers who assist with their estate plan be appointed as their estate trustees. Due to the potential conflict of interest that arises when a drafting solicitor is appointed as estate trustee, it is already standard practice that lawyers send clients out for independent legal advice (or advise clients of such an option) before such an appointment is made within a Will.

The lawyers who are requested to act as estate trustees may be chosen out of convenience, familiarity with the testator's situation and/or assets, or due to affordability relative to that of any trust company that might otherwise be appointed. It is comforting to know that, despite changes to the *Rules of Professional Conduct* that may suggest otherwise, clients in Ontario are still able to select lawyers who specialize in estate planning and administration as their estate trustees.

The term "benefit" is not defined within the Rules of Professional Conduct and, depending on the interpretation of the term "benefit", Rule 3.4-38 may appear to preclude a solicitor from drafting a Will in which he or she is appointed as estate trustee.

In its September 2012 report,[5] the Trust and Estates Section of the Ontario Bar Association outlined their concerns with respect to the proposed amendment to the Rules of Professional Conduct and resulting restrictions of testamentary freedom. This issue was considered by the Professional Regulation Committee of the Law Society of Upper Canada before the introduction of Rule 3.4-38 was approved. At the Committee's meeting in October of 2013, it was stated that the amendment would not have the effect of preventing the appointment of drafting solicitors as estate trustees. A portion of the transcript from the meeting reads as follows:

[5] "Proposed Changes to the Rules of Professional Conduct Regarding Testamentary Documents" (2012) Ontario Bar Association, Trusts and Estates Section, available at: https://www.oba.org/CMSPages/GetFile.aspx?guid=13e588f4-18fc-421a-94b0-17f16bd60155.

> With respect to 3.4-38, the lawyer can't draft or cause to be drafted an instrument giving the lawyer or their associate a gift or benefit, including a testamentary gift. It's important that we not be doing the lawyering and be the beneficiaries of the gifts and benefits when we're doing the lawyering. That's contrary to the conflicts rule —
>
> … What the OBA was rightly concerned about is that testators not be deprived of their ability to appoint their lawyer as executor, if that's what they want to do, given the relationship of trust, and of course that's not the intent. An executorship is not a gift or a benefit. What I do want to say is there might be malignant circumstances where the lawyer has acted improperly and that would be a different matter.

Accordingly, despite some initial concern, the updates to the Rules of Professional Conduct have not had the effect of prohibiting the appointment of drafting solicitors as estate trustees. In the view of the Law Society, the appointment of a lawyer as estate trustee does not constitute a gift or a benefit under the Rules.

Storage of Original Estate Planning Documents

A lawyer's role may not necessarily end after estate planning documents have been finalized and executed. It is not unusual for lawyers to assist clients by storing their original estate planning documents at their office rather than returning the originals to clients for safekeeping.

The Law Society recognizes that retaining custody of original planning documents has the potential of imposing onerous obligations upon lawyers, and recommends that a careful risk analysis be performed before a lawyer undertakes to do so.[6] Generally, however, retaining a client's original document in itself does not impose any obligations upon a lawyer, other than the duties directly related to the storage and release of the document.[7]

[6] Guide to Retention and Destruction of Closed Client Files (2012) Law Society of Upper Canada, available at: http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147491048, at 33.

[7] Jennifer A Kosteva, "Where there's a Will, There's a…Duty?: A closer look at the safekeeping of clients' original estate planning documents" (2009) American Bar Association, available at: http://www.americanbar.org/content/dam/aba/publications/rpte_ereport/2009/april/te_kosteva.authcheckdam.pdf, at 2.

In Ontario, lawyers who are storing original estate planning documents should consider the requirements imposed by the Rules of Professional Conduct. Rule 3.5-2 specifies that lawyers who retain client documents should do so to the standard of a “prudent owner”.[8] This standard may be elevated because of the significance of the original documents. It is generally expected that a lawyer will store important client documents within waterproof, fireproof, and well-organized safes or cabinets.

If the drafting solicitor instead prefers to release the original documents to the client, information should be provided as to the importance of the originals and potential implications if the documents cannot be located after the testator's death, as well as options for safe storage.

Professional Conduct Considerations for Litigators in Respect of Capacity

The Rules of Professional Conduct directly address capacity issues and the obligations that a lawyer owes to individuals whose mental capacity may be in question.

Rule 3.2-9 provides that "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." The Rules demonstrate that there is a presumption of mental capacity to provide instructions, which is consistent with the provisions of the *Substitute Decisions Act, 1992.*[9]

Just because he or she suffers from some form of disability does not necessarily mean that the client cannot provide instructions. A number of factors should be considered in assessing whether the client is mentally capable of making a certain decision, keeping in mind the task, time, and situation specific nature of mental capacity.

[8] Rules of Professional Conduct, *supra* note 1.
[9] SO 1992, c 30, s 2.

The guidelines provided by the Rules of Professional Conduct apply regardless of the scope of a lawyer's retainer. In a retainer to provide independent legal advice, or in other limited retainer situations, capacity issues may make it especially difficult for a lawyer to fulfill the terms of the retainer in a competent manner. A lawyer who is asked to accept a limited retainer should carefully consider whether, in the circumstances, he or she will be able to provide services in compliance with the obligations under the Rules of Professional Conduct.[10]

If a client's disability renders them incapable in respect of providing instructions, his or her lawyer must ensure that the client's interests are not abandoned solely because of their inability to provide instructions and a termination of retainer on that basis.[11] It can be difficult to take steps to protect the interests of an individual who is incapable, and this is further complicated by the duty of confidentiality. Lawyers need to be very careful in disclosing any information obtained through the solicitor-client relationship. Each matter needs to be addressed delicately on a case-by-case basis. There is no one-size-fits-all solution or tool to assist in dealing with this challenge.

Common Sources of Conflict for Estates Lawyers

Certain scenarios that can be linked to potential conflicts of interest may arise more frequently within an estates practice than others. The Rules of Professional Conduct define a conflict of interest as follows:

> … the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.[12]

[10] Rules of Professional Conduct, *supra* note 1, r 3.2-1A.1, commentary para 5.2.
[11] *Ibid*, r 3.2-9, commentary para 3.
[12] *Ibid*, r 1.101.

Rule 3.4-1 explicitly states that, subject to certain exceptions, lawyers cannot act for a client where there is a conflict of interest.[13]

Joint Retainers

Often, a drafting solicitor may be jointly retained by a married couple for assistance in preparing "mirror wills", being those that provide for all estate assets to pass to the surviving spouse and, upon the death of the survivor, to be passed on to the same beneficiaries. A potential conflict issue can arise after mirror wills are prepared and one of the spouses contacts the lawyer, wanting to make a change to his or her Will in a manner adverse to the interests of his or her spouse.

Rule 3.4-5 provides further guidance on the obligations of a lawyer in the case of a joint retainer:

> Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that:
>
> (a) the lawyer has been asked to act for both or all of them;
>
> (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
>
> (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.[14]

While outlining the joint retainer rules to a client, it is important that the lawyer considers what would be done in the event that one spouse asks the lawyer to alter the terms of one of the mirror wills. While the lawyer could refuse to prepare an amended Will, the spouse making the request will most likely be able to find a lawyer who will be prepared to assist in amending the estate plan. Even if the lawyer declines the new retainer, he or she will still be faced with the dilemma of

[13] *Ibid*.
[14] *Ibid*.

whether or not to notify the other spouse of the request that one of the mirror wills be updated to his or her detriment. This in itself may give rise to a conflict of interest.

The commentary to Rule 3.4-5 of the Rules of Professional Conduct specifically contemplates such a scenario. Simply put, any subsequent communication to change the Will by one of the spouses would be “treated as a request for a new retainer and not as part of the joint retainer”. The lawyer would be bound by Rules 3.3-1 to 3.3-6 as they relate to confidentiality and would not be at liberty to disclose the subsequent communication to the other spouse. As such, the lawyer would have a duty to decline the new retainer unless the other spouse also consented to the change to the estate plan.[15]

In *Roth Estate v Juschka,*[16] a lawyer had assisted a family in implementing an estate freeze. The Ontario Court of Appeal suggested that disclosing to clients the problem of acting for both sides of a transaction (in this case, the transfer of shares); explaining the potential conflict; and obtaining the clients' consent to act for both sides (or, alternatively to recommend independent legal advice) constituted "the most basic obligations of a lawyer to his client".[17]

Sometimes, a future conflict of interest can be avoided if a lawyer explains in detail the nature of the joint retainer and the conflicts that may arise as a result in a manner consistent with the Rules of Professional Conduct.

Conflicts of interest in a joint retainer context may be especially likely when assisting clients who have remarried. For this reason, some estate planners will not act for both spouses in the situation of a second (or subsequent) marriage.

[15] *Ibid*, r 3.4-5, commentary para 2.
[16] 2016 ONCA 92.
[17] *Ibid*, at para 34.

Conflict Resulting from Appointment of Solicitor as Estate Trustee

The *Trustee Act* provides for two different options in the compensation of a trustee. An estate trustee can be provided with a "fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate" or the compensation may otherwise be "fixed by the instrument creating the trust" (in the case of an estate, the will).[18]

In the preparation of a Will that names the drafting solicitor as estate trustee, the lawyer may be in a position of conflict when advising the client as to the options in respect of testamentary clauses relating to compensation. For instance, if the lawyer wishes to be paid compensation in an amount calculated on the basis of his or her hourly rate and that amount is anticipated to be greater than compensation calculated on the typical fee scale, this may be adverse to the interest of the estate. In some circumstances, it may be advisable that the client obtain independent legal advice before entering into a compensation agreement, absent which the lawyer may be found to be in a conflict of interest.[19]

Conflicts Generally

While not directly estate-related, there have been and continue to be developments through the case law that assist in our understanding of conflicts of interest and best practices in order to prevent such conflicts, to the extent possible.

New commentary was added under Rules 3.4-1 and 3.4-2 to include a reference to the 2013 decision of the Supreme Court of Canada in *Canadian National Railway Co. v McKercher LLP,*[20] which refers to a "bright line rule". While its scope in respect of conflicts of interest is suggested to be limited,[21] the bright line rule can apply to unrelated work done by a lawyer for two clients if

[18] RSO 1990, c T.23, s 61.

[19] *Anderson v Law Society of Upper Canada*, 2010 ONLSAP 4, 2010 CarswellOnt 18800.

[20] [2013] 2 SCR 649.

[21] Rules of Professional Conduct, *supra* note 1, r 3.4-1, commentary paras 7-9.

the advancement of one client’s interests is adverse to the immediate legal interests of the other client. Even a “substantial risk of impairment” of the representation of a current client is noted to give rise to a position of conflict. In cases where there is actual impairment rather than mere risk, client consent to act in light of the conflict may not, as it normally does, allow a lawyer to act.

Duty of Confidentiality

A lawyer's duty of confidentiality is codified by Rule 3.3-1 of the Rules of Professional Conduct, which provides as follows:

> 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.[22]

Confidentiality in Estate Matters

The duty of confidentiality and privilege, which is owed to the deceased by an estate planning lawyer, is considered to survive the death of the client. This principle was confirmed by the Ontario District Court in *Hicks Estate v Hicks*, where it was held that "the mere fact of death" does not destroy privilege and that the duty of confidentiality, similarly, survives death. [23] The privilege owed to a client was considered to repose in the estate trustee of the deceased client's estate. The Court determined that it is the estate trustee alone who can waive privilege or direct disclosure of the contents of the lawyer's file.[24]

In the context of a Will challenge, it is important to remember that the authority of the estate trustee named in the testamentary documents of the deceased is in dispute. As such, he or she is not necessarily authorized to waive privilege on behalf of the deceased. Accordingly, it is generally

[22] *Supra* note 1.
[23] [1987] OJ No 1426 at para 14, 1987 CarswellOnt 367.
[24] *Ibid*, at para 15.

advisable not to produce the contents of one's file without the benefit of legal advice if not pursuant to a Court Order.

Conclusion

Especially within the context of an aging society, increasing rates of mental incapacity, and evolving family dynamics, it is increasingly important that estates solicitors take the time to familiarize themselves with the Rules of Professional Conduct and related commentary. While recent amendments to the Rules themselves may seem to be relatively minor in scope, keeping up to date can assist lawyers in providing the best possible representation to clients without exposing themselves to potential liability relating to misconduct and conflict issues.

TAB 2

The Six-Minute Estates Lawyer 2019

Traps for the Unwary: Joint Asset Planning

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April 29, 2019

Traps for the Unwary: Joint Asset Planning

by
Paul Conrod[1] and Clare E. Burns[2]

Since the advent of the estate administration tax in 1988,[3] much effort has been expended by solicitors on joint asset planning for purposes of avoiding the payment of the tax. The vogue for joint asset planning has been a boon to estate litigators who have spent many happy hours litigating the validity of the planning and the sufficiency (or negligence) of the advice given by the solicitors involved. The purpose of this paper is to lay out the traps for the unwary that joint asset planning presents.

Joint asset planning involves the transfer of a testator's asset(s) into joint tenancy ownership arrangements where the asset(s) are jointly held by the testator and the intended beneficiary or beneficiaries. It is a commonly used technique in estate planning for several reasons. First, it can be a tax-efficient means of disposing of a testator's assets, since the assets do not pass directly through the testator's estate. Instead, the intended beneficiary or beneficiaries obtain full ownership of the asset(s) upon the death of the testator by virtue of the right of survivorship. Second, joint asset planning can have the benefit of simplifying the administration of the estate. Finally, the testator can retain an ownership interest in the asset(s) during the testator's lifetime.

However, joint asset planning is not a panacea. There are potential risks and implications to this method of estate planning that a solicitor should consider and discuss with the client. As always, each client's circumstances are unique, and it is important to consider the effect that certain methods of estate planning may have based on the needs of the client and the client's beneficiaries, and the nature and value of the assets that comprise the client's estate.

Joint Ownership of Assets with Minors

Caution should be paid if joint asset planning is considered where the intended beneficiary is a minor. The testator risks losing the ability to freely encumber or dispose of the property during the testator's lifetime. Where a testator has transferred ownership of an asset into a joint tenancy with a minor, and the testator later wishes to encumber or dispose of the asset, the testator is required under section 59 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, as amended, to

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[3] *Estate Administration Tax Act*, 1988, S.O. 1998, c.347, Sched.

first obtain approval of the court. The testator must seek this approval on an application, on notice to the Children's Lawyer.

A testator may be significantly restricted in dealing with the asset because a court will not approve an encumbrance or disposition unless it is in the best interests of the minor. Section 59 requires the testator to show that the disposition, encumbrance, or sale is necessary or proper for the support or education of the minor, or will substantially benefit the minor. Even where a court does grant permission, it may place conditions on the disposition, encumbrance, or sale.

Before using joint asset planning where the intended beneficiary is a minor, it is important to discuss whether your client may want or need to deal with the asset, and whether the statutory restrictions may interfere with these intentions. On balance, it will only be in very unusual situation that clients will want to hold assets jointly with minors.

Cost Benefit Analysis Relative to Estate Administration Tax

A solicitor should not automatically assume that joint asset planning will result in cost savings for the estate. When considering whether to use this method of estate planning, the total cost of the transfer should be determined and weighed against any potential savings in estate administration tax gained by the transfer. Currently, estate administration tax is calculated at $5.00 per $1,000 of estate assets for the first $50,000 worth of assets, and $15.00 per $1,000 of estate assets thereafter. The value of the total estates is rounded up to the nearest $1,000 for the purposes of calculating the tax.[4] Significant costs may be incurred in effecting the transfer of the property, such as legal fees, title or land transfer taxes, and accounting fees. These costs may outweigh the tax savings.

Additionally, if there is a chance that the disposition may become contentious among the beneficiaries of the testator's estate, the savings in estate administration tax may also be outweighed by the risk of litigation. This kind of litigation often arises where a parent does not divide their estate equally among their children when the division of the estate is calculated inclusive of jointly held assets. If this is a client's plan, the costs of litigation would almost invariably be higher than any tax savings, and the asset would be tied up for an extended period of time as the litigation is resolved. Careful consideration, therefore, needs to be given to family dynamics when assessing the value of the potential avoidance of estate administration tax.

Triggering of a Disposition Under the *Income Tax Act*

Joint asset planning may also raise income tax consequences. At the time an asset is transferred into a joint tenancy, the disposition of the asset may trigger capital gains under Part I, Division B,

[4] *Estate Administration Tax Act*, 1988, S.O. 1998, c.347, Sched.

Subdivision C of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp), as amended (the "***ITA***"). This is because the *ITA* treats a gift of certain types of property, such as real estate, as a disposition at fair market value at the time of the disposition. This can apply to a gift to any person, whether or not the transferee is related to the transferor.

Such a transfer will likely trigger a capital gain, which, pursuant to section 40(1)(a)(i) of the *ITA*, is equal to the difference between the value for which the testator acquired the asset and the fair market value of the asset at the time of the transfer. Pursuant to section 38(a) of the *ITA*, this capital gain is taxable in the hands of the testator at a rate of 50%. Certain transfers may be exempt from capital gains taxation, such as if the asset is the testator's principal residence.

However, if the asset is transferred to the testator's spouse in joint tenancy with the testator, the spouse may obtain the benefit of a roll-over. The testator's spouse may be deemed to have acquired the property at the same value for which the testator originally acquired the property, and, accordingly, no capital gain arises. The roll-over does not result in a complete avoidance of capital gains tax, but is only a deferral. The testator's spouse would still be subject to capital gains tax if the spouse disposes of the property in the future.

There may also be tax consequences at the time of the testator's death. Under section 70(5) of the *ITA*, the death of the testator triggers a deemed disposition of the testator's capital property at fair market value, assessed at its value immediately before the testator's death. The *ITA* treats this deemed disposition as if the taxpayer received the proceeds immediately before death. Like the capital gains at the time of the transfer, the deemed disposition at death may also be subject to certain exceptions, such as the principal residence exception.

When considering using joint asset planning for an asset that would trigger capital gains at the time of the transfer and/or a deemed disposition at the time of death, it is important for a solicitor to determine if the effect of these income taxes outweighs any savings in estate administration taxes from the asset not passing to the beneficiary through the testator's estate.

Lack of Clarity as to Intent of the Testator

Another trap for the unwary solicitor engaged with joint asset planning is that there is often insufficient evidence preserved as to the testator's intent in relation to the transfer. Subsequent problems then arise if there are questions as to whether the testator intended for the transfer to be a gift to the transferee, or for the transferee to hold the asset in trust for the testator.

In the leading case of *Pecore v Pecore*,[5] the Supreme Court of Canada held that the presumption of advancement no longer applies to a gratuitous transfer from a parent to an adult child. Instead, such a transfer gives rise to the presumption of a resulting trust, such that the testator retains the beneficial interest in the asset even though legal title to the asset is held jointly by the testator and the transferee. It is presumed that an adult child, as a gratuitous transferee, holds the asset in trust for the testator and, upon the death of the testator, the testator's estate.

The effect, in an estates context, is that instead of the transferee child obtaining full ownership of the asset held jointly, the beneficial interest in the asset passes into the testator's estate and becomes an estate asset. This initially defeats an intention to transfer the asset into a joint tenancy.

The presumption of a resulting trust can be rebutted by the adult child with sufficient evidence to satisfy the court, on a balance of probabilities, that the testator intended the transfer to be a gift.[6] If there is insufficient evidence demonstrating that the testator intended the transfer to be a gift, the presumption of a resulting trust will apply. A solicitor using joint asset planning will, therefore, want to ensure that there is clear and convincing evidence that the transfer is intended to be a gift, by, for example, having their client execute a deed of gift, or by drafting a confirmation into the testator's will that the transfer was of the beneficial interest of the asset.

The presumption of advancement still applies where the transferee is a minor.[7] In such a case, the risk of the testator being found to have retained the beneficial interest in the property is reduced, though not eliminated, because the presumption of advancement can be rebutted. However, solicitors must also be mindful of the other concerns relating to holding property in joint tenancy with a minor, as discussed above.

Ineffective Creditor Protection

Sometimes, clients seek joint asset planning advice as a method of creditor protection. However, joint asset planning may also fail to protect assets from claims against the estate, including claims by creditors of the testator or the beneficiary and dependant's support claims.

Dependant's Support Claims

Joint asset planning may not protect the asset from dependant's support claims under the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, as amended (the "***SLRA***"). Section 72 of the *SLRA* deems certain transactions to be testamentary dispositions as of the date of the testator's

[5] *Pecore v Pecore*, 2007 SCC 17 [*Pecore*].
[6] *Ibid* at para 43.
[7] *Ibid* at para 40.

death, and deems the capital value of these transactions to be part of the net estate, for the purposes of dependant's support claims under Part V of the *SLRA*. Among these transactions include any disposition of property made by a deceased whereby the property is held by the testator and another as joint tenants at the date of the testator's death.[8]

Fraudulent Conveyances

A transfer of property by a testator into a joint tenancy may be void as a fraudulent conveyance. The combined effect of sections 2 through 4 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c F.29 is that a disposition of property may be void if it was made with the intent of evading creditors, unless the transferee paid good consideration and acted in good faith, i.e. did not share the transferor's intent to evade creditors.

For example, in *Bank of Montreal v Bray*,[9] the Ontario Court of Appeal held that where a disposition of an asset into a joint tenancy prior to death meets the requirements for a fraudulent conveyance (above), the joint tenancy is severed and the right of survivorship is lost. The beneficiary becomes a tenant in common, and the testator's share becomes part of the estate and is available to the creditors of the estate.[10]

Exposure to Transferee's Creditors

Of further concern is the fact is that when a testator transfers their interest in an asset into joint ownership with an intended beneficiary, the asset is exposed to current or future creditors of the person added to title. Assets held in joint tenancy may be seized or foreclosed upon by the creditors of the intended beneficiary. A solicitor should advise a client of this risk so that a testator can assess this risk by discussion it with the proposed joint tenant.

Risk of Litigation

Similarly, a solicitor considering employing joint asset planning should determine whether ownership of the asset(s) in joint tenancy conflicts with any of the testator's pre-existing contractual obligations in relation to the asset(s), or any other restrictions on the testator's ability to dispose of the asset(s). For example, a testator may have pre-existing obligations to maintain majority ownership of business assets pursuant to a contract, such as a franchise agreement or financing arrangement. Transferring the asset(s) into a joint tenancy would dilute the testator's

[8] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s.72(1)(d).
[9] *Bank of Montreal v Bray* (1997), 153 DLR (4th) 490 (ON CA).
[10] *Ibid* at paras 26-28.

ownership of the asset(s) and result in a potential breach of contract. This may expose the testator or the testator’s estate to unwanted litigation.

Unilateral Dispositions or Transactions

Solicitors considering using joint asset planning should also be aware of the possibility of severance of the joint tenancy. In *Hansen Estate v Hansen*, the Ontario Court of Appeal stated that a joint tenancy can be severed in three ways: (1) unilaterally acting on one’s own share, such as selling or encumbering it; (2) a mutual agreement between the co-owners to sever the joint tenancy; and (3) any course of dealing sufficient to indicate that the interests of all owners were mutually treated as a tenancy in common.[11]

Of particular concern is the first manner of severance. The transferee may sever the joint tenancy unilaterally, converting it into a tenancy in common. This could occur during the client’s lifetime and could result, for example, in the sale of the tenant in common’s interest without the consent of the client.

Conclusion

Depending on the client and the asset, joint asset planning may be a valuable planning tool. It is important to consider the potential risks, the overall cost of the transfer, and the needs of the client to determine whether it is appropriate means of providing for beneficiaries. A wise solicitor will enumerate these risks in writing to their client as a matter of defensive practice. This is particularly important because issues related to this planning usually arise after the client’s death. In those circumstances, the reporting letter is inevitably the solicitor’s best, and sometimes only. defence to an allegation of negligence.

[11] *Hansen Estate v Hansen*, 2012 ONCA 112 at para 34.

Legislation Cited

***Children's Law Reform Act*, R.S.O. 1990, c. C.12**

Court order re property of child

59 (1) Upon application by a child's parent or by any other person, on notice to the Children's Lawyer, the Superior Court of Justice by order may require or approve, or both,

(a) the disposition or encumbrance of all or part of the interest of the child in land;

(b) the sale of the interest of the child in personal property; or

(c) the payment of all or part of any money belonging to the child or of the income from any property belonging to the child, or both.

Criteria

(2) An order shall be made under subsection (1) only where the Court is of the opinion that the disposition, encumbrance, sale or payment is necessary or proper for the support or education of the child or will substantially benefit the child.

Conditions

(3) An order under subsection (1) may be made subject to such conditions as the Court considers appropriate.

Limitation

(4) The Court shall not require or approve a disposition or encumbrance of the interest of a child in land contrary to a term of the instrument by which the child acquired the interest.

Execution of documents

(5) The Court, where it makes an order under subsection (1), may order that the child or another person named in the order execute any documents necessary to carry out the disposition, encumbrance, sale or payment.

Directions

(6) The Court by order may give such directions as it considers necessary for the carrying out of an order made under subsection (1).

Validity of documents

(7) Every document executed in accordance with an order under this section is as effectual as if the child by whom it was executed was eighteen years of age or, if executed by another person in accordance with the order, as if the child had executed it and had been eighteen years of age at the time.

Liability

(8) No person incurs or shall be deemed to incur liability by making a payment in accordance with an order under clause (1) (c).

*Fraudulent Conveyances Act***, R.S.O. 1990, c. F.29**

Where conveyances void as against creditors

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns. R.S.O. 1990, c. F.29, s. 2.

Where s. 2 does not apply

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section. R.S.O. 1990, c. F.29, s. 3.

Where s. 2 applies

4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser.

*Income Tax Act***, R.S.C., 1985, c. 1 (5th supp)**

Taxable Capital Gains and Allowable Capital Losses

Taxable capital gain and allowable capital loss

38 For the purposes of this Act,

(a) subject to paragraphs (a.1) to (a.3), a taxpayer’s taxable capital gain for a taxation year from the disposition of any property is ½ of the taxpayer’s capital gain for the year from the disposition of the property;

General Rules

40 (1) Except as otherwise expressly provided in this Part

(a) a taxpayer's gain for a taxation year from the disposition of any property is the amount, if any, by which

> **(i)** if the property was disposed of in the year, the amount, if any, by which the taxpayer's proceeds of disposition exceed the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition […]

Rules Relating to Computation of Income

Capital property of a deceased taxpayer

70 (5) Where in a taxation year a taxpayer dies,

(a) the taxpayer shall be deemed to have, immediately before the taxpayer's death, disposed of each capital property of the taxpayer and received proceeds of disposition therefor equal to the fair market value of the property immediately before the death;

(b) any person who as a consequence of the taxpayer's death acquires any property that is deemed by paragraph 70(5)(a) to have been disposed of by the taxpayer shall be deemed to have acquired it at the time of the death at a cost equal to its fair market value immediately before the death;

(c) where any depreciable property of the taxpayer of a prescribed class that is deemed by paragraph 70(5)(a) to have been disposed of is acquired by any person as a consequence of the taxpayer's death (other than where the taxpayer's proceeds of disposition of the property under paragraph 70(5)(a) are redetermined under subsection 13(21.1)) and the amount that was the capital cost to the taxpayer of the property exceeds the amount determined under paragraph 70(5)(b) to be the cost to the person thereof, for the purposes of sections 13 and 20 and any regulations made for the purpose of paragraph 20(1)(a),

> **(i)** the capital cost to the person of the property shall be deemed to be the amount that was the capital cost to the taxpayer of the property, and
>
> **(ii)** the excess shall be deemed to have been allowed to the person in respect of the property under regulations made for the purpose of paragraph 20(1)(a) in computing income for taxation years that ended before the person acquired the property; and

(d) where a property of the taxpayer that was deemed by paragraph 70(5)(a) to have been disposed of is acquired by any person as a consequence of the taxpayer's death and the taxpayer's proceeds of disposition of the property under paragraph 70(5)(a) are redetermined under subsection 13(21.1), notwithstanding paragraph 70(5)(b),

(i) where the property was depreciable property of a prescribed class and the amount that was the capital cost to the taxpayer of the property exceeds the amount so redetermined under subsection 13(21.1), for the purposes of sections 13 and 20 and any regulations made for the purpose of paragraph 20(1)(a),

> **(A)** its capital cost to the person shall be deemed to be the amount that was its capital cost to the taxpayer, and
>
> **(B)** the excess shall be deemed to have been allowed to the person in respect of the property under regulations made for the purpose of paragraph 20(1)(a) in computing income for taxation years that ended before the person acquired the property, and

(ii) where the property is land (other than land to which subparagraph 70(5)(d)(i) applies), its cost to the person shall be deemed to be the amount that was the taxpayer's proceeds of disposition of the land as redetermined under subsection 13(21.1).

***Succession Law Reform Act*, R.S.O. 1990, c. S.26**

Value of certain transactions deemed part of estate

72 (1) Subject to section 71, for the purpose of this Part, the capital value of the following transactions effected by a deceased before his or her death, whether benefitting his or her dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate, and being available to be charged for payment by an order under clause 63 (2) (f),

[…]

(d) any disposition of property made by a deceased whereby property is held at the date of his or her death by the deceased and another as joint tenants;

[…]

Idem

(2) The capital value of the transactions referred to in clauses (1) (b), (c) and (d) shall be deemed to be included in the net estate of the deceased to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held as joint tenants was furnished by the deceased.

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TAB 3

The Six-Minute Estates Lawyer 2019

Common Issues on Applications for Certificates of Appointment and Recent Developments

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April 29, 2019

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Common Issues on Applications for Certificates of Appointment and Recent Developments

Six Minute Estates Lawyer
April 29, 2019

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McCarthy Tétrault LLP

1. Introduction

In Ontario, Certificates of Appointment of Estate Trustee are hard-won. The application process is finicky and unforgiving, and even seasoned estates lawyers encounter issues from time to time. The first portion of this paper sets out a brief summary of recent developments relating to applications for Certificates of Appointment of Estate Trustee. The second portion of this paper highlights common issues relating to applications for Certificates of Appointment of Estate Trustee, and suggests best practices for navigating these issues along the way.

2. Recent Developments

(a) New Court Forms

On December 21, 2018, the application forms for Certificates of Appointment of Estate Trustee were amended, and the amendments came into force on January 1, 2019. A spokesperson from the Ministry of the Attorney General confirmed that court staff would accept the earlier versions of the forms until March 1, 2019.[1] Accordingly, earlier versions of the forms are no longer being accepted. The same spokesperson confirmed that pre-formatted fillable versions of the new forms would be posted online. However, as of April, 2019, only Word versions of the new forms are currently accessible online. While pre-formatted fillable versions of the new forms are available through licensed estate practice management software, the author is aware of at least one circumstances in which a form generated through such software was rejected for

[1] Kaufman, Jacob, "Changes in the Estates World in 2019", All about Estates January 2, 2019.

failure to comply with the requirement that the font size on Court forms be at least 12 point or 10 pitch.[2]

The new application forms for Certificates of Appointment of Estate Trustee are similar to their previous versions, but set out a more comprehensive list of the kinds of assets that pass outside of an estate and can therefore be excluded from a calculation of the value of estate assets for purposes of applying for a Certificate of Appointment of Estate Trustee. In addition, the new application form for a Certificate of Appointment of Estate Trustee Without a Will requires the applicant to provide the current address of each former legally married spouse of the deceased. Compliance with this additional requirement will be challenging in many cases because spouses often become estranged upon marriage breakdown, in which case contact information may not be known or even ascertainable (if, for example, the former spouse subsequently undergoes a name change). In addition, the motivation for the inclusion of this additional requirement is unclear, since no contact information for any other potential dependant of the deceased is required to be listed on the form, and the notice requirements have not changed to include service of a former spouse.

(b) New Court Fees

Currently, Ontario Estate Administration Tax[3] ("EAT") is levied at the rate of $5 per $1,000 (or part thereof) for the first $50,000 of estate value and $15 per $1,000 (or part thereof) for the estate value in excess of $50,000.[4] The 2019 Ontario Budget announced a proposed elimination of EAT on the first $50,000 of the value of an estate for applications for Certificates of Appointment of Estate Trustee filed on or after January 1, 2020. The remaining value of an estate would be taxed as usual, at a rate of 1.5%. The proposed adjustment to the calculation of EAT amounts to a maximum tax savings of $250 for each estate.

[2] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 4.01.

[3] Estate Administration Tax is sometimes referred to as 'probate tax' or "probate fees".

[4] *Estate Administration Tax Act*, 1998 SO 1998, c 34 Sched, s 2(6).

(c) Certificate of Appointment of Estate Trustee and Multiple Wills

As virtually every Ontario estates lawyer is no doubt aware, the autumn of 2018 was a time of uncertainty for estates lawyers and their clients. The uncertainty was brought about by the decision of Justice Dunphy of the Superior Court of Justice in *Milne Estate (Re)*.[5] In that decision, Justice Dunphy directed the Registrar to reject two substantially similar applications for Certificate of Appointment of Estate Trustee with a Will Limited to the Assets Referred to in the Will on the basis that the Wills, each of which contained a basket clause (referred to in that decision as an allocation clause), were invalid because they failed to describe with certainty any property that was subject to them.

The decision sent ripples across the estates bar, not only because of the uncertainty the decision introduced in relation to the ability to obtain a limited grants of probate for wills containing a basket clause (thus defeating the use of multiple wills as a probate planning strategy), but also because of his characterization of such wills as invalid. A month later, in *Panda Estate (Re)*,[6] Justice Penny referred directly to *Re Milne*, and declined to follow it, despite the similar facts in each case. In *Re Panda*, Justice Penny held, *inter alia*, that the three trust certainties were not required to be met in order to determine the validity of a will for purposes of issuing a Certificate of Appointment of Estate Trustee. On appeal, the Divisional Court in *Re Milne* cited the decision in *Re Panda*, agreeing that a will is not a trust and that the role of the court on an application for Certificate of Appointment of Estate Trustee with a Will is to determine whether the document presented to the Court is the testator's last will.

As a result, it appears to be settled that a Certificate of Appointment of Estate Trustee with a Will Limited to the Assets Referred can be issued in respect of a will that contains a basket clause.

[5] 2018 ONSC 4174 [*Re Milne*], reversed in 2019 ONSC 579 (Div Ct).

[6] 2018 ONSC 6734 [*Re Panda*].

3. Common Issues with Applications for Certificates of Appointment

Despite the frequency with which Certificates of Appointment of Estate Trustee are sought in Ontario, it is not uncommon for Courts to send applications back for correction. Toronto Courts in particular are notorious for their unforgiving treatment of irregular applications. The Ministry of the Attorney General has prepared a non-exhaustive list of errors that appear in applications for Certificates of Appointment of Estate Trustee.[7] While this list is a useful starting place for practitioners who are not yet acquainted with the stringent requirements of the application process, navigating issues not addressed in that list can be challenging, and can cause the application process to become a matter of trial and error. The next portion of this paper serves to highlight common issues that arise in the course of applying for Certificates of Appointment of Estate Trustee and provide suggestions regarding best practices.

(a) Timing of Application

Estate trustees and their advisors are frequently faced with the question of whether to ascertain final date of death values for all estate assets before making an application for Certificate of Appointment of Estate Trustee, or whether to submit an application based on estimated asset values, accompanied by an undertaking to provide final values and additional EAT (where applicable) at a later date.

The most common approach is to ascertain final date of death values for all estate assets before filing the Certificate application, which typically minimizes legal fees and generally permits the estate administration to proceed in a methodical manner. However, in Ontario, and in Toronto in particular, wait-times for processing of Certificate applications can be very long, and where filing is delayed because final date of death values cannot be expeditiously ascertained, an already protracted process will be further delayed. This may negatively impact the value of the estate if estate assets cannot be accessed and effectively managed while the application is pending (as is often the case). For example, financial institutions generally do not

[7] Ministry of the Attorney General (Ontario), "Avoid Common Errors in Applying for a Certificate of Appointment of Estate Trustee", https://www.attorneygeneral.jus.gov.on.ca/english/estates/avoiding_common_errors.html.

take instructions regarding investment decisions from the estate trustee until a Certificate is issued, and fluctuations in the stock market while an application is pending could cause portfolio assets held in an estate to decrease in the intervening period, which would frustrate the duty of the estate trustee to preserve and optimize the value of estate assets.

If, instead, the estate trustee wishes to file an application for Certificate of Appointment of Estate Trustee based on estimated asset values and include in the application a personal undertaking from the estate trustee applicant to pay all additional EAT once final values have been ascertained for the estate assets, a Certificate will likely be issued more expediently. This may be beneficial where it is necessary to liquidate or otherwise manage estate assets quickly (for example, to take advantage of favourable selling conditions). However, because an Estate Information Return is required to be filed within ninety days after the issuance of a Certificate,[8] the deadline for the return may occur before final values are available for the estate. In such circumstances, the estate trustee would be bound to prepare and submit an Estate Information Return based on interim values and then, upon ascertaining final values, file an amended Estate Information Return. Accordingly, this approach gives rise to additional legal expense and complexity.

A determination of whether to file an application for Certificate of Appointment of Estate Trustee before or after obtaining final date of death values for all estate assets is therefore dependent on the facts and the objectives and priorities of the estate trustee.

(b) Estates with Foreign Elements: Where to Originate Probate Proceedings?

Where an estate comprises property in multiple jurisdictions, one question that frequently arises is where to originate probate proceedings.

As a general rule, probate should originate in the jurisdiction of domicile of the deceased. Accordingly, where a deceased dies domiciled in Ontario with foreign assets, if a Certificate of Appointment of Estate Trustee is required for the administration of Ontario assets, ‘probate’

[8] *Estate Administration Tax Regulations*, O Reg 310/14, s 3(1).

proceedings should typically originate in Ontario by way of an application for Certificate of Appointment of Estate Trustee.

One possible exception arises where a deceased dies domiciled in Ontario, but an Ontario Certificate is not required for the administration of the Ontario assets. In such circumstances, probate proceedings may originate in the foreign jurisdiction in which estate assets are located, without the involvement of Ontario courts. If the deceased's will does not comply with the succession law of that foreign jurisdiction, or the deceased dies intestate, the foreign court may require, among other things, evidence of the law of domicile (Ontario) confirming that the will is valid. This evidence would generally be provided by an affidavit from counsel in the jurisdiction of domicile.

Another possible exception to the general rule that probate should originate in the jurisdiction of domicile of the deceased arises where a deceased dies domiciled in Ontario but with only a foreign-made will. In such circumstances, it may be possible to originate the probate process in the jurisdiction in which the will was made. The estate trustee named in the foreign grant can then apply for a Confirmation by Resealing of Appointment of Estate Trustee (if the foreign jurisdiction is a commonwealth jurisdiction) or a Certificate of Ancillary Appointment of Estate Trustee (if the foreign jurisdiction is not a commonwealth jurisdiction). The EAT payable in conjunction with an application for Confirmation by Resealing or for a Certificate of Ancillary Appointment is calculated based on the value of estate assets in Ontario rather than on worldwide estate assets.[9]

Where a deceased dies domiciled outside Ontario but owning Ontario assets for which a Certificate of Appointment of Estate Trustee is required, probate proceedings can originate either in Ontario or in the jurisdiction of domicile of the deceased. However, if a grant is required for administration of estate assets in the deceased's jurisdiction of domicile, it is more appropriate, and more administratively straightforward, to originate the probate process in that foreign jurisdiction. In addition, once a foreign grant has been issued, as noted above, EAT

[9] *Estates Act*, R.S.O. 1990, c. E.21 [*Estates Act*].

payable in conjunction with an application for Confirmation by Resealing or for a Certificate of Ancillary Appointment is limited to the value of estate assets in Ontario. Accordingly, it is typically better to originate probate proceedings in the jurisdiction of domicile and, once the authority of the legal representative of the estate has been recognized in the foreign jurisdiction, the representative can confirm their authority in the Ontario courts by way of a Confirmation of Resealing or Certificate of Ancillary Appointment. [10]

(c) Grants and Certificates of Succession

Generally speaking, probate of a will should be granted only once. In the decision of the Ontario Superior Court of Justice in *Applegath Estate (Re)*,[11] the deceased died leaving a will in New Mexico where the deceased's wife applied for an obtained informal probate. As certain estate assets had Ontario *situs*, one of the beneficiaries of the estate applied to the Ontario Superior Court of Justice for a Certificate of Appointment of Estate Trustee with a Will. The application included a renunciation from the executor appointed pursuant to the New Mexico grant. The Court rejected the application, finding that in such circumstances there were two options. If the current executor was no longer capable of administering the estate, then a replacement personal representative should be appointed in New Mexico and that person could then apply for an ancillary appointment in Ontario. If, however, the current executor wished to continue to act in New Mexico but did not want to administer the Ontario *situs* assets, she could apply for an Ancillary Appointment in Ontario of a Nominee appointed by her for the sole purpose of dealing with estate assets in Ontario, provided she filed persuasive evidence explaining why she could not make the appointment in her own name. In that decision, the Court held that:

> It would not be appropriate for an Ontario court to "re-grant" probate in the present case. Here, one would have expected the personal representative of [the deceased] recognized by the New Mexico court to have applied for an ancillary appointment in Ontario.[12]

[10] *Estates Act*, *supra*, note 9.

[11] 2014 ONSC 2942.

[12] *Ibid*, at para. 10.

However, there may be circumstances in which it is necessary to obtain more than one court-issued document in respect of the same estate. For example, courts in many civil law jurisdictions (*e.g.*, Germany, Austria, Argentina) frequently issue grants or certificates confirming the identity of the beneficiaries and their proportionate entitlements to an estate without naming a legal representative to administer the estate. This can occur irrespective of whether the deceased has a will because, in many cases, wills in these jurisdictions do not name an executor.

Where a foreign court issues a grant or certificate that does not name an estate trustee or other legal representative to administer the estate and there are estate assets in Ontario which require a Certificate of Appointment of Estate Trustee for the management thereof, a legal representative will need to be appointed in respect of the estate by way of an Ontario Certificate. This can be achieved by two distinct procedures. The first option, only available if there is a will, would be for the person(s) named in the Certificate as beneficially entitled to the estate to make an application for Ancillary Appointment of Estate Trustee. While this approach generally requires the applicant to appear before a judge, if the application is successful, the EAT payable in respect of such an application would be limited to the value of estate assets in Ontario.

The second option would be for the person wishing to act as estate trustee to make an application for a Certificate of Appointment of Estate Trustee. Such an application would generally be accompanied by the foreign grant or certificate and an affidavit from counsel in the foreign jurisdiction explaining the purpose of the grant or certificate and confirming that no legal representative has been appointed in respect of the estate. The author is aware of at least one such application having been made successfully over the counter and another upon appearing before a Judge. The EAT payable in respect of such an application is discussed in the next section.

(d) EAT Payable on Application for Certificate of Foreign Domiciled Deceased

Where a Certificate of Appointment of Estate Trustee (rather than Confirmation of Resealing or Certificate of Ancillary Appointment) is required to administer the estate of a deceased dies domiciled outside Ontario, the estates bar appears to be divided on the question of whether EAT is payable on the deceased's worldwide estate or merely on estate assets located in Ontario. Subsection 32(3) of the *Estates Act*,[13] states as follows:

> Where the application or grant is limited to part only of the property of the deceased, it is sufficient to set forth in the statement of value only the property and value thereof intended to be affected by such application or grant.

Some estates practitioners view this provision as relating solely to an Application for Certificate of Appointment of Estate Trustee with a Will Limited to the Assets Referred to in the Will, and view the rule in subsection 32(2) of the *Estates Act*,[14] which requires EAT to be paid on the total value of all the property that belonged to the deceased at the time of his death, as applying in respect of all other applications for Certificate of Appointment of Estate Trustee.

However, other estates practitioners are of the view that, where a deceased dies domiciled outside Ontario, subsection 32(3) applies to limit the application of EAT payable to Ontario *situs* assets even where the application is for a standard Certificate of Appointment of Estate Trustee not limited to the assets referred to in the Will. This is because an Ontario Certificate will not generally be of any force or effect in administering assets of the deceased in their jurisdiction of domicile and, accordingly, an Ontario-issued Certificate of Appointment would be limited to "part only of the property of the deceased". The author is aware of at least one circumstance in which the Court agreed that EAT payable in connection with an application for Certificate of Appointment of Estate Trustee (with or without) a Will in respect of a deceased domiciled outside Ontario should be limited to the estate assets in Ontario.

[13] *Supra*, note 9.

[14] *Ibid*.

4. Conclusion

As is clear from the discussion above, when applying for a Certificate of Appointment of Estate Trustee, it is crucial to stay up-to-date regarding recent developments and to stay well-informed of best practices regarding the application process. It is the author's hope that the discussion above can serve as resource in this regard.

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TAB 4

The Six-Minute Estates Lawyer 2019

The Sweet Spot: Unjust Enrichment & Beneficiary Designations in *Moore v. Sweet*

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April 29, 2019

THE SWEET SPOT:
UNJUST ENRICHMENT & BENEFICIARY DESIGNATIONS IN *MOORE V. SWEET*

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The relatively straightforward facts of *Moore v. Sweet*[1] belie a decision that grapples with the law of unjust enrichment. The Supreme Court of Canada divided 7-2 in its decision in favour of Michelle Moore. The SCC decision overturned the Ontario Court of Appeal's decision in favour of Risa Sweet, and restored the application judge's decision in favour of Michelle. The dissenting voices at both the Court of Appeal and SCC level signal that, despite the long-established test for determining whether a plaintiff has a claim in unjust enrichment, the application of the test can render strikingly different results. What is required in order for there to be a benefit received by one party and a corresponding deprivation suffered by the other party, for instance? What is a "juristic reason" that will defeat a claim for unjust enrichment? These are some of the questions that the SCC answered. The end result was an expansive approach to unjust enrichment. The flip side of this expansive view is that it may open the door to more estate litigation.

FACTS:

Michelle Moore and Lawrence Moore married in 1979 and had three children together. In 1985, Lawrence bought a term life insurance policy with a coverage amount of $250,000. He designated

[1] *Moore v. Sweet* 2018 SCC 52 (CanLII) ("*Moore v. Sweet*")

Michelle as the beneficiary. The annual premium of $507.50 was paid out of Michelle and Lawrence's joint bank account.

In 1999, after approximately 20 years of marriage, Michelle and Lawrence separated. Their marriage breakdown was related to Lawrence's struggles with chronic pain, and his alcohol and substance abuse issues. These issues contributed to financial difficulties, which burdened the couple. Between 1999 and 2000, Lawrence lost his driver's license and his job. For the rest of his life Lawrence's source of income was a long-term disability pension. He and Michelle had disputes about Lawrence's payment of child support. The Family Responsibility Office at one point began garnishing his disability payment.

Soon after their separation, Michelle and Lawrence entered into an oral agreement whereby Michelle would pay the premiums on the life insurance policy and, in exchange, she would be entitled to the proceeds of the policy on Lawrence's death. The effect of the agreement was that Michelle was to remain on the policy as designated beneficiary. In accordance with the agreement, Michelle paid the annual premiums on the policy and continued to do so until Lawrence's death.

Shortly after Lawrence's separation from Michelle, he began living with Risa Sweet, whom he had met while both were seeking treatment at an addiction treatment centre. At the time of the application hearing, Risa was disabled, suffered from chronic pain, and required the use of a walker.

A few months after he and Risa began cohabiting, Lawrence signed a change of beneficiary form on the life insurance policy, which had the effect of removing Michelle's designation and designating Risa as the irrevocable beneficiary. Risa's explanation as to why Lawrence changed the policy designation from Michelle's name to her name was that he did not want her to worry about her expenses, and wanted her to be able to continue living in the same home after his death.

In 2002, Lawrence and Michelle entered into a formal separation agreement. While the agreement dealt with a number of issues between them, it made no mention of the life insurance policy. They finalized their divorce a year later.

Lawrence died in 2013. His estate was insolvent. At the time of his death, Risa was his common law spouse.

A couple of weeks after Lawrence's death, the life insurance company informed Michelle that she was not the beneficiary of the policy. She had no prior knowledge of this fact. At the time of his death, she had paid all of the premiums for the policy following her and Lawrence's separation (approximately $7,000).

APPLICABLE LEGISLATION:

Part V of the *Insurance Act*, R.S.O. 1990, c. I.8, sets out a comprehensive scheme that governs the rights and obligations of parties to a life insurance policy. It applies to all life insurance contracts "[d]espite any agreement, condition or stipulation to the contrary" (s. 172(1)), which means that the parties cannot contract out of its provisions.

The *Insurance Act* deals with the designation of beneficiaries. A "beneficiary" of a life insurance policy is defined as "a person, other than the insured or the insured's personal representative, to whom or for whose benefit insurance money is made payable in a contract or by a declaration" (s. 171(1)). A beneficiary designation identifies the intended recipient of the proceeds under the life insurance policy upon the death of the insured person, in accordance with the terms of the policy.

There are two types of beneficiary designations: *revocable* and *irrevocable*.

A revocable beneficiary designation is one that can be altered or revoked by the insured without the beneficiary's knowledge or consent (s. 190(1) and (2)).

An irrevocable beneficiary designation can be altered or revoked only if the designated beneficiary consents (s. 191(1)). An irrevocable beneficiary has a "statutory right to remain as the named beneficiary entitled to receive the insurance monies unless he or she consents to being removed".[2] As the SCC stated in this case, there is one situation where insurance money can be clawed back from a beneficiary, regardless of whether his or her designation is irrevocable: to satisfy a support claim brought by a dependant against the estate of the insured person (*Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 58 and 72(1)(f)).[3]

[2] *Moore v. Sweet* citing *Moore v Sweet*, 2017 ONCA 182, 134 O.R. (3d) 721, at para. 82)

[3] No such claim was been brought in this case.

LITIGATION HISTORY:

Michelle commenced an application seeking the opinion, advice and direction of the court as to her entitlement to the proceeds of the policy. The life insurance company paid the proceeds of the policy into court pending the resolution of the dispute.

Ontario Superior Court of Justice (Wilton-Siegel J.) — 2015 ONSC 3914

The application judge held that Risa had been unjustly enriched at Michelle's expense, and therefore impressed the proceeds of the policy with a constructive trust in Michelle's favour. He found that Michelle and Lawrence "each had an equitable interest in the proceeds of the Policy from the time that it was taken out" and that their oral agreement had effectively resulted in the "equitable assignment" to Michelle of Lawrence's interest in the policy. This equitable interest "took the form of a right to determine the beneficiary of the Policy" (para. 18).

In terms of Michelle's unjust enrichment claim, the application judge found Risa had been enriched by virtue of her valid designation as irrevocable beneficiary, and Michelle had suffered a corresponding deprivation to the extent that she paid the premiums and to the extent that the proceeds had been payable to Risa, notwithstanding the prior equitable assignment of the policy to Michelle. The application judge held that Risa's designation as beneficiary under the policy did not constitute a juristic reason that entitled her to retain the proceeds. Risa's entitlement to the proceeds would not have been possible if Michelle had not performed her obligations under the oral agreement. Also, the application judge held that the oral agreement itself amounted to an equitable assignment of the proceeds to Michelle.

Ontario Court of Appeal (Strathy C.J.O. and Blair J.A., Lauwers J.A. dissenting) — 2017 ONCA 182, 134 O.R. (3d) 721

The Ontario Court of Appeal allowed Risa's appeal, and set aside the judgment of the application judge. It ordered that the $7,000 Michelle had paid in policy premiums be paid out of court to her and that the balance of the insurance proceeds be paid to Risa.

Blair J.A., writing for himself and for Strathy C.J.O., held that it was not open to the application judge to find that the oral agreement amounted to an equitable assignment, since the doctrine of equitable assignment had not been placed in issue by the parties before him.

In terms of the unjust enrichment claim, Blair J.A. accepted the application judge's finding that Risa was enriched. But he found that there was a juristic reason justifying Risa's receipt of the life insurance proceeds. Specifically, Blair J.A. held that the application judge had erred in his approach to the juristic reason element of the unjust enrichment framework — first, by failing to recognize the significance of Risa's designation as an *irrevocable* beneficiary, and second, by failing to apply the two-stage analysis mandated by this Court in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629. In Blair J.A.'s view, "the existence of the statutory regime relating to revocable and irrevocable beneficiaries . . . falls into an existing recognized category of juristic reason", constituting "both a disposition of law and a statutory obligation" (para. 99).

Blair J.A. declined to decide whether a constructive trust can be imposed only to remedy unjust enrichment and wrongful acts, or whether a constructive trust can also be based on the concept of "good conscience". In the circumstances of this case, there was nothing that put it in some "good conscience" category beyond what was captured by unjust enrichment and wrongful act.

Court of Appeal Dissent – Lauwers J.A.

In dissent, Lauwers J.A. held that the appeal should be dismissed. He agreed with the majority that the application judge had erred in relying on the equitable assignment doctrine. Where he disagreed with the majority was with respect to the disposition of Michelle's unjust enrichment claim and the remedy of constructive trust. He would therefore have dismissed the appeal.

Lauwers J.A. noted that there are 4 ways by which a constructive trust may be imposed: (1) as a remedy for unjust enrichment; (2) for wrongful acts; (3) in circumstances where its availability has long been recognized; and (4) otherwise where good conscience requires it. The *Soulos* court, according to Lauwers J.A., anticipated that the law of remedial trusts would continue to develop in a way that accommodates the changing needs and mores of society.

On the issue of unjust enrichment, Lauwers J.A. found that Michelle had established each of the required elements of the test, and therefore that a constructive trust should be imposed over the entire proceeds in her favour. He disagreed that the applicable *Insurance Act* provisions provided a juristic reason for Risa to keep the proceeds.

SCC DECISION:

The issues which were addressed by the SCC were the following:

A. Has Michelle made out a claim in unjust enrichment by establishing:

   (1) Risa's enrichment and her own corresponding deprivation; and

(2) the absence of any juristic reason for Risa's enrichment at her expense?

B. If so, is a constructive trust the appropriate remedy?

Majority Decision:

The majority of the Supreme Court allowed the appeal.[4] Writing for the majority, Côté J. found that Risa was enriched, Michelle was correspondingly deprived and that both the enrichment and the deprivation occurred in the absence of a juristic reason. A remedial constructive trust was imposed.

The Court found that a constructive trust is an equitable remedy that may be imposed at the court's discretion. It requires a proper equitable basis, such as a claim in unjust enrichment.

The Court began with a brief discussion with respect to the doctrine of unjust enrichment. The doctrine of unjust enrichment applies when a defendant receives a benefit from a plaintiff in circumstances where it would be "against all conscience" for him or her to retain that benefit. In such a case, the defendant will be obliged to restore that benefit to the plaintiff. The Court quoted McLachlin J. in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788 as follows: "At the heart of the doctrine of unjust enrichment . . . lies the notion of restoration of a benefit which justice does not permit one to retain."[5]

[4] Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Martin JJ.
[5] *Moore v. Sweet,* at para 35

The Court then went on to note that, historically, restitution was available only with respect to certain "categories of recovery" , such as where a plaintiff conferred a benefit on a defendant by mistake, under compulsion, out of necessity, as a result of a failed or ineffective transaction, or at the defendant's request.[6] However, later in the 20th century, the common principles underlying those distinct categories began to be recognized; and courts began developing a principled framework for analysing unjust enrichment.

Under this principled framework, a plaintiff will succeed with an unjust enrichment claim if s/he shows the following:

1. that the defendant was enriched;

2. that the plaintiff suffered a corresponding deprivation; and

3. that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason.

1. *Was the Defendant (Risa Sweet) Enriched?*

The parties in *Moore v. Sweet* did not dispute the first element of the test, namely that Risa was enriched by $250,000, by virtue of being the irrevocable designated beneficiary of Lawrence's life insurance policy.

[6] *Moore v. Sweet* at para 36

However, the parties disagreed as to whether Michelle suffered a corresponding deprivation and as to whether this deprivation occurred in the absence of a juristic reason.

2. Did the Plaintiff (Michelle Moore) Suffer A Corresponding Deprivation?

The Court clarified that the second element of the test (i.e. the corresponding deprivation) focuses on what the plaintiff *actually lost*, and on whether that loss *corresponds to the defendant's enrichment.* There must be some causal connection between the plaintiff's loss and the defendant's gain. Was the defendant enriched *at the plaintiff's expense?*

The Court also held that the concept of deprivation, or loss, is not limited to out-of-pocket expenses, or that which was taken from the plaintiff. The concept of loss "also captures a benefit that was never in the plaintiff's possession but that the court finds *would* have accrued for his or her benefit had it not been received by the defendant instead" (*Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, at para. 30).[7] In either case, the result is the same: the defendant becomes richer and the plaintiff becomes poorer. As well, the corresponding deprivation element does not require that the disputed benefit be conferred directly by the plaintiff on the defendant.

Here, the Court found that Michelle was deprived of the right to receive the entirety of the policy proceeds (for a value of $250,000) and that the necessary correspondence existed between her deprivation and Risa's gain.

[7] *Moore v. Sweet* at para 44.

With respect to the extent of Michelle's deprivation, the Court held that the quantification of her loss was not simply her out-of-pocket expenses (i.e. the $7,000 she paid in premiums). Those payments were made in accordance with the oral agreement she had with Lawrence which provided that she pay the premiums in exchange for the right to receive the policy proceeds from the insurer upon Lawrence's death. Lawrence breached this contract by naming Risa the irrevocable beneficiary of the policy. Had Lawrence held up his end of the agreement with Michelle, "the right to payment of the policy proceeds would have accrued to Michelle".[8] She stood "deprived of the very thing for which she paid — that is, the right to claim the $250,000 in proceeds."[9]

The Court was careful to specify the importance of the oral agreement to Michelle's recovery of the entire policy proceeds. Indeed, the court distinguished the present case from cases where the plaintiff has a notion or belief that s/he ought to have been designated as a beneficiary, but does not have any legal or equitable right to be treated as a recipient of the proceeds. In such cases, the Court held that it "will likely be impossible to find either that the right to receive that insurance money was ever held by the plaintiff or that it would have accrued to him or her. "In such cases", the majority held, "the properly designated beneficiary is not enriched at the expense of a plaintiff who had no claim to the insurance money in the first place — the result being that the plaintiff will not have suffered a corresponding deprivation to the full extent of the insurance proceeds (*Love v. Love*, 2013 SKCA 31 (CanLII), 359 D.L.R. (4th) 504, at para. 42)."[10]

[8] *Moore v. Sweet* at para. 46
[9] *Moore v. Sweet* at para. 46
[10] *Moore v. Sweet* at para. 47

The Court also found that Risa's enrichment came at Michelle's expense. Michelle's payment of the premiums allowed Risa to receive the policy and Risa was entitled to the policy as she was the irrevocable beneficiary. It was not simply the case that Risa gained a benefit with a value equal to the amount of Michelle's loss. Indeed, the Court explained that Risa gained the exact benefit that Michelle lost: namely, the right to receive the proceeds of Lawrence's life insurance policy.[11]

The Court therefore found that there was requisite correspondence between the deprivation of the plaintiff (Michelle) and the benefit received by the defendant (Risa).

3. *Is There An Absence of Any Juristic Reason For The Plaintiff's Deprivation and the Defendant's Enrichment?*

The Court then turned to the third element of the test: the absence of any juristic reason. In order to succeed with her claim, Michelle was required to show that there was no justification in law or equity for the fact that Risa was enriched at her expense.

The Court stressed that an understanding of juristic reason "is crucial for the purposes of the present appeal."[12] Juristic reason, the Court explained, is essentially concerned with the justification for the defendant's retention of the benefit conferred on him or her at the plaintiff's expense. If such a justification exists, then the defendant will be justified in keeping the benefit, and the plaintiff's claim in unjust enrichment will fail. At its core, the doctrine of unjust

[11] *Moore v. Sweet* at para. 50 and 51
[12] *Moore v. Sweet* at para. 55

enrichment "is concerned with reversing transfers of benefits that occur without any legal or equitable basis."[13]

The Court reviewed the two-stage "juristic reason" analysis formulated by Iacobucci J. in *Garland*. The first stage requires that the plaintiff show that the defendant's retention of the benefit cannot be justified on the basis of any of the "established" categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations.[14] If any of these categories applies, the plaintiff's claim must fail since the defendant will be justified in retaining the benefit.

For example, a plaintiff will be denied recovery if s/he conferred a benefit on a defendant as a gift, as there is nothing unjust about a defendant retaining a gift of money that was made to him or her by the plaintiff, though the plaintiff would suffer a deprivation as a result.

As well, the Court explained that a plaintiff's claim will necessarily fail if a legislative enactment provides a reason for the enrichment and corresponding deprivation,[15] so as to preclude recovery in unjust enrichment. For instance, payment of taxes pursuant to the legislation may be considered to be unjust, but payment does not give rise to unjust enrichment.

If the plaintiff is successful at the first stage of the test, *Garland* provides that the plaintiff has established a *prima facie* case. The second stage of the test is then considered. At this stage, the

[13] *Moore v. Sweet* at para. 55.

[14] *Moore v. Sweet* at para. 56.

[15] Risa's counsel relied, as will be seen later in this paper, on the *Insurance Act* as providing a juristic reason for Michelle's deprivation.

defendant has an opportunity to rebut the plaintiff's *prima facie* case by showing that there is some *residual reason* to deny recovery.[16] The defendant bears the burden of demonstrating why s/he should be entitled to retain the benefit. In deciding whether the defendant should be able to retain the benefit, the court should have regard to two considerations: (1) the parties' reasonable expectations and (2) public policy.[17]

In this case, with respect to the first stage of the *Garland* test, the Court found that a beneficiary designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* did not provide a juristic reason for Risa's enrichment *at Michelle's expense*. There was nothing in the *Insurance Act* which the Court read as ousting the common law or equitable rights that persons other than the designated beneficiary may have in policy proceeds. The Court distinguished the present case with other cases where recovery was denied because the legislation in question expressly or implicitly required the transfer of wealth between the plaintiff and the defendant, and therefore justified the defendant's retention of the benefit received at the plaintiff's expense. In those cases, a juristic reason was established.

Notably, the Court went on to state that the legislature is presumed not to depart from prevailing law without expressing its intention to do so with "*irresistible clearness"*.[18] The *Insurance Act* provides for a mechanism for designating beneficiaries, but the Court found that there was nothing in the *Insurance Act* that operated with "*the necessary irresistible clearness*" to preclude the existence of contractual or equitable rights in those proceeds once they have been paid to the named

[16] *Moore v. Sweet* at para 58.
[17] Ibid.
[18] *Moore v. Sweet* at para. 70.

beneficiary.[19] The Court also found that the *Insurance Act* provisions applicable to irrevocable beneficiary designations do not require that a beneficiary keep the proceeds as against a plaintiff in an unjust enrichment claim.

Accordingly, the Court held that an irrevocable designation under the *Insurance Act* could not constitute a juristic reason for Risa's enrichment and Michelle's deprivation. The Court held that the *Insurance Act* does not foreclose a third party who stands deprived of his or her contractual entitlement to claim insurance proceeds from asserting an unjust enrichment claim against the designated beneficiary. Nor does the *Insurance Act* preclude the imposition of a constructive trust. Therefore, no established category of juristic reason was determined to apply.

The Court held that, as Michelle had successfully demonstrated that no category of juristic reason applies, a *prima facie* case for unjust enrichment had been established. The analysis then proceeded to the second stage, where the defendant (Risa) must establish some "residual reason" why the enrichment should be retained. This is where considerations such as the parties' reasonable expectations and moral and policy-based arguments come into play.

With respect to the parties' reasonable expectations, the Court found that it was clear that both parties expected to receive the life insurance proceeds. Michelle expected to receive the proceeds because of her oral agreement with Lawrence and her payment of the premiums. Risa expected to receive the proceeds as she had been validly designated. However, the Court found that Risa's expectation could not take precedence over Michelle's prior contractual right to remain the

[19] Ibid.

designated beneficiary in exchange for paying the premiums. The fact that the agreement was not in writing did not undermine Michelle’s expectation, and did not serve as a public policy reason for Risa to retain the proceeds. This was not a case where there was uncertainty about what the contracting parties agreed to – it was clear (and undisputed in the record) that Michelle and Lawrence had an agreement that she pay the premiums in exchange for being the designated beneficiary. Furthermore, the Court held that it would be bad policy to ignore the fact that Michelle “was effectively tricked” by Lawrence into paying premiums to benefit some other person.

4. *Remedy*

Having determined that Michelle had proven the elements of unjust enrichment, the Court discussed the two possible remedies available: personal or proprietary. The default remedy for unjust enrichment is personal, i.e. a debt or monetary obligation. However, the Court held that a proprietary remedy is available in certain cases. The most important proprietary remedy for unjust enrichment is the constructive trust. Disputed property will be impressed with a constructive trust only in cases where the plaintiff can establish that (1) a personal remedy would be inadequate; and that (2) there is a link between the plaintiff’s contributions and the disputed property.

The Court found that a personal remedy is usually adequate in cases where the property at stake is money. However, in this case, the disputed insurance money had already been paid into court, and it was readily available to be impressed with a constructive trust. Moreover, the Court noted that because Michelle’s payment of the policy proceeds had permitted Risa to be entitled to the policy, it was appropriate to impose a constructive trust in Michelle’s favour to the full extent of the proceeds.

The Court therefore allowed the appeal and ordered that the proceeds of the policy, with accrued interest, be impressed with a constructive trust in favour of Michelle, and that the funds be paid out of court for her benefit.

Dissenting Minority (Gascon and Rowe JJ.):

Gascon and Rowe JJ. dissented. They held that there was no basis to impose a constructive trust. They agreed with Blair J.A. that Michelle had not established that a "good conscience" constructive trust should be imposed.

They also agreed with Blair J.A. that Michelle failed to establish a claim in unjust enrichment. Michelle only asserted contractual rights to the proceeds of the policy. She did not have a proprietary or equitable interest in the proceeds. There was no correspondence between Michelle's failed contractual expectations and Risa's enrichment.

Specifically, the minority held that Risa's enrichment was not *at the expense of* Michelle. For instance, had Lawrence's estate had assets, Risa would have retained her enrichment — the insurance proceeds — and Michelle would have suffered no deprivation, as she would have been able to assert a claim for breach of contract as against Lawrence's estate that was worth the equivalent of the proceeds. The minority reasoned that there could not be correspondence between Michelle's deprivation and Risa's benefit if the enrichment and the deprivation could, in theory, co-exist. Risa's enrichment was not *at the expense of* Michelle. What Risa received (a statutory entitlement to proceeds) was different from Michelle's deprivation (the inability to enforce her contractual rights).

The dissent also addressed the majority's comments regarding the fact that Michelle paid for the premiums on the policy and that the policy would not exist but for her doing so. The minority held that this did not inform whether her deprivation corresponded to Risa's enrichment. Regardless, even if Michelle's premium payments could generate sufficient correspondence, Michelle's deprivation would be limited to the premiums she had paid, not to her contractual expectations.

With respect to the third element required to prove unjust enrichment (absence of a juristic reason), the minority found that the *Insurance Act* provides clear juristic reason for Risa's enrichment.

The *Insurance Act* explicitly protects irrevocable beneficiaries from the claims of the deceased's creditors. The minority held that the *Insurance Act* precludes the existence of contractual rights in those insurance proceeds and that this was done with "irresistible clarity".

The minority noted that, consistent with the scheme set out in the *Insurance Act*, courts have declined to order restitution of insurance proceeds where plaintiffs pay the policy premiums under the mistaken belief that they are the named beneficiary.

Even if the *Insurance Act* did not establish a juristic reason for Risa's enrichment, the minority held that there are good policy reasons which should prevent Michelle from receiving the proceeds. If Risa only has the right to receive – but not retain – the proceeds, this would open up irrevocable beneficiary designations to challenges by an insured's creditors. This would create uncertainty, and is a situation the legislature wished to avoid. Whether or not these creditors would ultimately be successful in their claims for unjust enrichment, it would nonetheless be an invitation to collect on the insured's policy proceeds and tie up the proceeds in potentially protracted and expensive litigation. The minority found that this would be contrary to the intention of the *Insurance Act*. Designated beneficiaries would be vulnerable not only to creditors, but also to those who have sustained the policy for any period.

Therefore, notwithstanding the minority's finding that there is no correspondence between Michelle's deprivation and Risa's enrichment, there was also a juristic reason for the transfer to Risa.   The minority would have dismissed the appeal.

COMMENT:

As can be seen, the majority and the minority dissent of the SCC differed on the application of the second two elements of the unjust enrichment test. The majority found that there was an enrichment and a corresponding deprivation, whereas the dissent did not. Likewise, the majority found that there was no juristic reason for Michelle's deprivation and Risa's enrichment, whereas the dissent found that there was a juristic reason.

The theoretical situation posited by the dissent to make its point about correspondence has a certain appeal– namely, that there is no correspondence between Michelle's loss and Risa's gain because, had Lawrence's estate had assets, Michelle could have brought her breach of contract claim against his estate and recovered her loss from the assets of his estate **and** Risa could have simultaneously received the proceeds of the policy from the insurer. The dissent questions how Michelle's loss and Risa's gain can therefore have the necessary correspondence. Simply put, if both Risa and Michelle could have received $250,000, how can it follow that Michelle's loss and Risa's gain are really connected? Risa's gain does not necessarily have to result in Michelle's loss.

When viewed from the perspective of this hypothetical, it seems at first glance that the necessary correspondence does not exist. The problem, in this author's respectful view, is that this hypothetical scenario changes the very crux of the relationship between the parties. Michelle's loss and Risa's gain are not connected – unless and until Lawrence's estate is insolvent. At that moment, Michelle's cannot recover from Lawrence's estate through breach of contract. The claim against his estate would be futile. She will suffer a deprivation – the loss of the $250,000 that she stood to gain through paying the premiums – and Risa will be enriched by the same amount.

The second substantive point on which the majority and dissent differed was with respect to the application of the juristic reason test. As set out above, the majority found that there was no juristic reason for the deprivation, as the *Insurance Act* did not provide a juristic reason for Risa's enrichment *at Michelle's expense*. The legislation in question did not expressly or implicitly require the transfer of wealth between Michelle and Risa, which would have justified Risa's retention of the policy proceeds at Michelle's expense. If the legislature wanted to oust Michelle's right to pursuing an equitable remedy, it would have had to have done so with "*irresistible clearness.*" The dissent disagreed with this approach, and pointed out that the *Insurance Act* protects irrevocable beneficiaries from the claims of the deceased's creditors; it thereby precludes the existence of contractual rights in those insurance proceeds. The dissent held that this was done with "irresistible clarity" by the legislature.

Here too, in the author's view, the majority's analysis is correct. The *Insurance Act* provisions at stake deal with the insurer's requirement to pay out to the designated beneficiary and provide a certain certainty to the insurer (absent any claim made against the proceeds) that it is paying out to the correct individual. Nowhere does the *Insurance Act* preclude or prevent a claim made by another person, as against the beneficiary of the life insurance policy, to those policy proceeds. While it is true that, vis-à-vis the insurer, the question of who has been paying the premiums on the policy has no bearing on payment to the designated beneficiary, the *Insurance Act* is silent on the question of whether some other person is entitled to bring a claim for an interest in the proceeds.

The dissent also provided policy reasons as to why Michelle's claim for unjust enrichment should not succeed, namely, that designated beneficiaries would be vulnerable to creditors, along with anyone who has paid for policy premiums for a period of time. Whether or not the claims would be successful, the dissent warns that allowing for unjust enrichment claims in these circumstances will potentially result in protracted litigation. This would be contrary to what the legislature intended with respect to the *Insurance Act* (to provide a source of money to designated beneficiaries that is shielded from claims by creditors).

Are the dissent's reasons convincing? Does the decision open the door to claims by anyone who has paid for policy premiums for a period of time? The majority was careful to state that an unjust enrichment claim is unlikely to be successful in situations where the claimant pays the premium in the mistaken belief that s/he is the beneficiary of the life insurance policy, but has no contract with the deceased with respect to her designation as a beneficiary. Similarly, it is hard to foresee how a creditor of a deceased's estate would be able to successfully assert an unjust enrichment claim for payment of the proceeds of a policy, absent any further connection between the claimant and the policy. Of course, that does not foreclose the possibility that such claims would be advanced. It is possible, then, that the decision will yield more estate litigation.

That brings the discussion to a final point: what, if anything, can be done by designated beneficiaries to ensure that they receive the policy proceeds which they bargained for? Even if Michelle had been named as an irrevocable beneficiary, it is possible that Risa could have brought a claim against the proceeds for dependant's support, pursuant to the *Succession Law Reform Act*. Section 72 of that Act permits life insurance proceeds owned by a deceased which pass by way of beneficiary designation are available to satisfy a dependant's support claim.[20] To avoid this possibility, Michelle could have required that the ownership of the policy be transferred into her name. The downside to this approach is that, if she pre-deceased Lawrence, the policy would terminate. This might not be the desired result in the event that the purpose of the policy was to secure child support payments. An alternative approach would be to name a trustee of the policy, or to have ownership of the policy joint with right of survivorship with Lawrence.

From Risa's perspective, what could she have done differently to ensure that the policy was paid out to her as the irrevocable beneficiary? Apart from the previously-mentioned possibility that the asset will be "clawed back" pursuant to section 72 of the SLRA to satisfy a dependant's support claim, it appears the SCC has left open the door for ex-spouses who have a prior agreement with the deceased to be designated as beneficiary. At best, irrevocable beneficiaries in such situations should try to ensure that the policy owner has not already pledged the policy to someone else. To that end, the irrevocable beneficiary would be wise to ask questions about who is paying the

[20] See for instance the ONCA's decision in *Dagg v. Cameron Estate (2017) ONCA 366*. However, note that in that case, Brown J.A. found that where a payor is subject to a court order that requires her/him to name a support recipient as an irrevocable beneficiary of an insurance policy, that portion of the insurance proceeds needed to satisfy support payments is not subject to the "clawback" sections of the *SLRA* *(i.e. section 72)*

premiums on the policy of insurance. If it’s not the owner of the policy who’s paying, who’s paying, and why? That irrevocable beneficiary designation may not be so secure, after all.

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TAB 5

The Six-Minute Estates Lawyer 2019

Tips and Tools to Enhance an Estate Mediation

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April 29, 2019

WEL PARTNERS

WHALEY ESTATE LITIGATION PARTNERS

TIPS AND TOOLS
TO ENHANCE AN ESTATE MEDIATION

By
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Law Society of Ontario
Six-Minute Estates Lawyer

April 29, 2019

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1. INTRODUCTION

Estate litigation involves some of the most emotionally fraught disputes before our courts. Litigating parties, or persons who find themselves in a dispute at the pre-litigation stage, are often grieving the loss of a loved one, or perhaps trying to remedy an abuse by a fiduciary, and opposing parties are often people that are closely related, either through blood or marriage. Unlike corporate/commercial disputes, where there is more likely to be little or no personal connection, estate disputes are often impacted by emotion and, hence, lack of objectivity in decision making ability. Long, often life-time-held, family resentments, feelings of inequality, inadequacy, competition among siblings, prove to be a certain recipe for intractable disputes. The “real” cause or root of the disagreement may not be clear on the surface, or even related to what is plead in the court documents.

Most notably, the person at the heart of the dispute, the testator, is no longer available for clarification or guidance or perhaps may be incapable of meaningful participation. Many times, the disputing parties are only connected through the deceased person and would not otherwise wish to have anything to do with the other.

For these reasons, estate disputes often benefit from mediation, a form of alternative dispute resolution. Mediation is a highly effective, successful, and often less costly (though in itself not inexpensive), alternative or addition to the adversarial litigation process. Estate mediation is “interest-based” as it explores solutions that meet the needs and interests of the parties, rather than “rights-based” litigation which focuses solely on the parties’ rights, or, rules and the law.

There are also many benefits to conducting a mediation *before* the adversarial process begins, including that it is private (as opposed to the public court system), the parties may be able to preserve the relationships, there is a better chance of success in finding a mediated solution, and mediation is less costly. It is easily apparent that a mediated settlement is a better solution in most situations.

Some tips and steps that lawyers can consider to improve the chances of a successful mediation will be considered within.

2. TO MEDIATE OR NOT TO MEDIATE?

Whether or not to mediate is an easy question to answer if you practice in Toronto, Ottawa, or Essex County (Windsor area). Pursuant to Rule 75.1.02(1)(a) of the *Rules of Civil Procedure*, estates disputes are subject to **mandatory mediation** in those areas unless such requirement is waived by the Court. Mandatory mediations are governed by Rule 75.1 which sets out the procedure, attendance, confidentiality, remedy for non-compliance, etc.

Rule 75.1.02 (1)(b) provides that mandatory mediation applies to the following disputes:

- contested applications of passing of accounts;
- formal proof of testamentary instruments;
- objections to issuing a certificate of appointment;
- claims against an estate;
- proceedings under Part V of the *Succession Law Reform Act*;
- proceedings under the *Substitute Decisions Act*;
- proceedings under the *Absentees Act*, the *Charities Accounting Act*,
- the *Estates Act*, the *Trustee Act* or the *Variation of Trusts Act*;
- applications under Rule 14.05(3) whether the matters at issue relate to an estate or trust; and
- proceedings under s.5(2) of the *Family Law Act*.

Courts will only dispense with mandatory mediation where there is a clear reason. In the Toronto decision, *Sheard Estate* 2013 ONSC 7729, the court dismissed a motion for an order dispensing with mandatory mediation in a contested passing of accounts dispute. The beneficiaries of the estate (the grandchildren of the deceased) argued that as their primary complaint was over estate trustee compensation, the "quarrel was not really among family members, and thus is less amenable to mediation". They also argued that mediation should be dispensed with as the amount in dispute was "small". Justice Mesbur disagreed, noting that:

> Mediation is helpful in narrowing issues, focusing cases, and, where possible settling them. Mediation is useful in every kind of litigation before our courts. Its efficacy is not limited to "family relationship" disputes… I hardly view [$100,000.00] as a "small" amount.[1]

The grandchildren also argued that settlement had already been explored and failed. Justice Mesbur also rejected this argument:

> Often, parties need an independent, third party to help them see past their respective positions and arrive at a resolution that is in the interests of all, without expending further resources. The parties have not had the benefit of this kind of third party intervention. It is extremely beneficial. It could resolve this case.[2]

Justice Mesbur concluded that there was no reason for her to exercise her discretion to dispense with mediation.

Importantly, it should be noted that as of January 1, 2016, Rule 75.06(3.1) provides the Courts with the power to *order* parties to a mediation, on their own initiative, and without the consent of the parties, even in jurisdictions where the mandatory mediation rules do not apply. Court-ordered mediations are governed under Rule 75.2.

At the time of writing, there was only one reported decision, *Horbaczyyk v Horbacczyk* 2017 ONSC 6666, where a Court ordered mediation pursuant to section 75.06(3.1). In that case the challenger of a Will sought relief directing the parties to participate in mediation, however, he failed to request that relief in his motion for directions. Justice Emery made the following comment: "*Fortunately, Rule 75.06(3.1) provides that the Court may order that a mediation session take place under Rule 75.2, with power to give the necessary directions. Therefore, this Court makes an order that the parties attend a mediation*". The decision does not mention whether the propounder of the Will consented or objected to participating in a mediation.

When not subject to the mandatory mediation rules, or a mediation order, there are several reasons why counsel would choose to mediate. As with most litigation, but ever more so in estate litigation, the "real" dispute may have nothing to do with the legal issues involved. Litigation may, but not always, result in a clear winner and a loser; however, it

[1] *Sheard Estate*, 2013 ONSC 7729 at paras 40-41.
[2] *Sheard Estate*, 2013 ONSC 7729 at para 43.

may not fix or even address any underlying problems. Often estate disputes arise from a misunderstanding of intent of the opposing party, conflicting expectations, or resistance to change. There is a high success rate in general with mediation in estate disputes as the parties must focus on the real issues involved and are encouraged to find a practical outcome.

Some of the benefits of mediating an estate dispute are:

- Mediation is strictly confidential and subject to settlement privilege;
- Privacy in a digital era where court decisions are more public than ever, given the accessibility of cases through CanLII and information that be posted on the internet and social media;
- As there is no clear winner and loser, everyone involved in a mediated settlement can control the mediation process and take ownership of the outcome, and therefore there is a greater likelihood of compliance;
- Both sides can tell their story and hear the details of the opposing view, which may be therapeutic for all involved;
- A mediation is time limited, as opposed to litigation which can be time consuming and can take years to determine given the intents of the parties adverse in interest and the court scheduling and back-log;
- A mediation will occur in a neutral space with less pressure than a formal courtroom;
- Mediation is less expensive and faster than going to court; and
- Mediation can facilitate communication, listening and understanding.

There is little downside to mediation if you approach it with the right attitude and preparedness. Mediation gives parties a chance to ‘hit the pause button’ and step outside of the litigation which can be traumatic for individuals who may still be bereaving the loss of a loved one.

While most estate disputes will benefit from a mediation, a mediation may not be appropriate in some situations. For example, where there is a history of documented physical violence between the parties, having the parties attend a mediation in person may not be appropriate. If this situation arises in a mandatory mediation jurisdiction, you will need to seek a court order excusing the parties from mediation under Rule 75.1.04.

3. CONSIDER THE TIMING OF THE MEDIATION

The timing of a mediation can be strategic. It is often not worthwhile to conduct a mediation unless and until all of the relevant documents are exchanged, reviewed, or otherwise ordered (by way of a court order for disclosure), and the documents circulated amongst the parties.

For example, Will challenges are heavily document and fact driven. After obtaining the relevant solicitor records, financial records, and medical records, a mediation session can be, and most often is, conducted without having to conduct expensive examinations-for-discovery, or cross-examination.

If it is your intention to proceed in this manner, it might be wise to seek an Order Giving Directions stating specifically that the mediation be conducted prior to examinations-for-discovery or cross-examinations. Insisting that examinations be conducted prior to attending a mediation session is in many circumstances cost prohibitive, and unnecessary, and often more appropriate to other civil litigation matters. Avoid the fight if possible and seek and clarify your Orders so expectations are set from the outset.

4. CHOOSE THE "RIGHT" MEDIATOR

For mandatory mediations, Rule 75.1.07(1) provides that a mediator must be chosen within thirty days of the court providing directions for the mandatory mediation session. The mediator may be chosen or assigned from the list for the county or chosen by consent if not listed (see Rule 75.1.06(1)(a-c).

Court ordered mediations are governed by Rule 75.2. Rule 75.2.04 requires a court-ordered mediation to be conducted by a "person agreed to by the designated parties". If they have not chosen a mediator within 30 days after the order directing the mediation, the Court shall on motion assign a mediator (with the mediator's prior consent).

It is important to choose the right mediator for the job depending on the issues and personalities. While some believe that anyone can mediate an estate dispute regardless of whether they have mediation training, it is important to consider the complexity of the estate litigation matter and the type of assets and interests involved. Estate litigation is a unique area of the law with unique concerns. The types of issues mediated in the area of estates include: Will, estate and trust challenges; dependant support claims; family law act elections, passing of account applications by fiduciaries including attorney, guardian, trustee and estate trustee; power of attorney litigation; trust variations/interpretations, rectification/variation/interpretation applications, guardianships for property or for personal care; elder law issues and elder abuse; capacity proceedings; end-of-life disputes, trustee and fiduciary litigation; and the tax considerations and consequences arising in the estate. Complex estate disputes often involve family businesses, corporate documents, shareholder agreements, complicated valuations etc. Often the estate dispute will touch on more than one of the above issues. Therefore, it is important to choose a mediator who understands and is knowledgeable about the area of law which predominates the subject matter of the proceeding and reflects the dollar value attributed to the matter.

Choosing a mediator who is a specialist in estates and trust litigation will aid in getting the parties to a mutually agreeable resolution of all of the issues.

Counsel should also consider the "style" of the mediation that the proposed mediator will conduct. The two main styles of mediation are *facilitative* and *evaluative*.

A ***facilitative*** mediator is a neutral person who assists the parties in taking ownership of the issues and solving the dispute amongst themselves. The role of the facilitative mediator is to be in charge of and manage the process and guide the parties to a mutually agreeable resolution by facilitating discussions, asking open questions, communicating settlement offers, and digging into the real issues below the surface. Both parties are involved in the mediation's outcome, unlike a judicial outcome where the decision is ultimately in the hands of a third party decision maker. In mediation, the clients should have the major influence on the decisions made, rather than the parties' lawyers.

One of the benefits of a facilitative mediation is that it empowers parties and helps parties to take responsibility for their own disputes and resolution. Occasionally however, such an approach may not work and more so, where there is a clear power imbalance between the parties. Facilitative mediations may be more time consuming as they are dedicated to getting to the underlying issues.

An ***evaluative*** mediator will give an evaluation of the strengths of the parties' cases. This type of mediation however will be concerned more with the legal rights of the parties rather than their underlying interests and may not solve the real issues. The mediator will evaluate the parties' legal rights and positions, may push and/or urge the sides to a settlement, develop and/or propose the basis for settlement, predict an outcome in court and educate each party on their strengths and weaknesses. For an evaluative mediation to work, the mediator should have substantive expertise in the subject matter. It is in this way that consideration of a mediator with particular experience will benefit disputing parties in this area. In evaluative mediations careful managing such that there is not an appearance of winner and a loser is important to the process, especially where the mediator concludes that one party has the stronger case. This approach demands clients be prepared for possible negative feedback on their legal position

In many situations there is room for both approaches. For example, parties could have the mediator start out as facilitative but at the end of the day, or when the parties request, provide an opinion on, or evaluate, the legal rights of the parties and the process.

Some examples of types of mediators include, lawyers, retired judges, social workers, elder law experts, etc.

5. SPEND TIME ON THE MEDIATION BRIEF

Use the mediation brief as a tool to assist in settling the matter. Tell your client's story in a compelling and persuasive way. This is your chance to convince the other side why they should settle. Spend time on the mediation brief, don't just cut and paste the pleadings or notice of application. You want to get the mediator up to speed as much as possible and give them the information that they need to assist in settling the matter. However, there is no need for the mediation brief to be a lengthy document. Briefs can, and should be, clear and concise.

Rule 75.01.08 provides that a mediation brief (statement of issues) is required for all mandatory mediations and must be provided to all parties and the mediator at least seven days before the mediation. Form 75.1C outlines what should be included in a mediation brief (statement of issues) however, it can be modified. Form 75.1C sets out three sections: 1) Factual and Legal Issues in Dispute, 2) Party's Positions and Interests (what the party hopes to achieve) and 3) Attached Documents.

A well-written and fulsome brief will assist in achieving a successful mediation. You may consider adding a short "Overview" that talks about the theory of your case that highlights the main issue(s) that need to be settled, why your client has the better case, the status of the litigation and any outstanding offers to settle.

Consider also including a family tree, explaining the relationships and any estrangements or difficulties that might exist so the mediator will have an insight into the family dynamics.

Try to be careful of your tone. You are trying to settle this matter not ignite the emotions of the parties even more. You must show that your client has a good, strong, case but there is no need for inflammatory language.

For the "Facts" section consider including a chronology chart if several events have occurred and are important to the narrative.

It is important to include all of the relevant and key documents to the issues that need to be settled. See the next section, "Obtain Required Documents & Expert Reports" below for more information.

6. OBTAIN REQUIRED DOCUMENTS & EXPERT REPORTS

Have all documents you need to make informed decisions about the legal issues in dispute and that are required to reach a possible settlement. Consider including the following documents:

- The testamentary documents (wills, codicils)
- A chart or list of the estate assets and liabilities, including a list of jointly held assets and any assets that passed outside of the estate (s.72 assets). Include any account opening documents for joint accounts. Include insurance designations for any insurance policies.
- Relevant marriage contracts or separation agreements.
- In a will challenge scenario, consider including the drafting solicitor’s notes.
- If capacity is an issue, include any medical records, and/or consider obtaining an expert report.
- If there is a family business involved, it may help to have an organizational chart including the business structure, shareholder interests, etc.
- If it is a dispute over a passing of accounts application, obtain and understand the vouchers.
- Obtain real estate valuations in advance if real property at issue.
- If it is a dependant’s support claim, seek an expert report on life style analysis.

These are just some of the relevant documents you should consider including. The documents you choose will depend on the specific legal issues in dispute. Consider including only the “key” documents, there is no need to include the entire file.

7. PREPARE YOUR CLIENT

Mediation will work when all parties are prepared and understand the goal of mediation. A settlement should be reached on full knowledge, and transparency ensuring the best forum for understanding the issues involved, rather than having one party left in the dark about an aspect of the dispute.

Lawyers should prepare their clients for the process, underscore the importance of confidentiality, explaining that this is a chance to step away from the adversarial process. Clients should be prepared to be respectful of the process, to disengage the anger and entrenched views, depart from using blaming language and adopt neutral language, all with a view to compromise and brokering a deal that can be managed. No person will leave with everything they want, nor will any party be completely satisfied with the process.

Your client should be as prepared for the day of mediation, as for a day of discovery. The day of mediation may be the first time that opposing counsel will meet your clients. A properly prepared and presented client may cause opposing counsel to re-evaluate their case, and sometimes re-evaluate what their clients have been saying about your client.

The client should be familiar with the process of a mediation: What will happen? Why will that happen? When will that happen? etc.

Explain the confidential nature of the mediation. Rule 75.1.11 and Rule 75.2.08 (for court-ordered mediations) state that “All communications at a mediation session and the mediator’s notes and records shall be deemed to be without prejudice settlement discussions.”

Often estate mediations will take a full day. The client should be prepared to spend significant time at the mediation.

Explain the mediation retainer to your client, the costs of the mediator, and how the mediator will be paid.

Sometimes in estate mediation there are non-parties who may have influence over whether a settlement will happen or not (other family members, spouses, etc.). Consider having them attend the mediation with your client. If they cannot attend and your client won’t settle without conferring with them first, have them ready by phone, at least.

Explain the negotiation process. Prepare your client for the likelihood that an opening offer from the other side will not be close to what they are expecting. Manage client expectations and advise them up front on what they may realistically expect to achieve (even if they may not want to hear the answer).

Sometimes estate mediations fall apart over what seems to be inexpensive or insignificant items. Often it is the emotional connection to those items that stops the parties from letting go. Consider preparing a list, ahead of time, of the items the client really wants and have a conversation with the client about the realistic expectations of them receiving those items and an accurate value for those items (not what the client *thinks* they must be worth).

Counsel should also prepare themselves for mediation as though they were preparing for trial or for discovery. Since mediation usually occurs early in the litigation, sometimes counsel have not fully researched the nature and extent of the client's case, in the same way that they would have done by discovery or trial.

On the other hand, counsel should be aware of the risk that a mediation may be a 'fishing expedition' for the opposing party, and in that event, will likely not result in a settlement.

8. PREPARE DRAFT MINUTES AND RELEASES

Before the day of mediation, you should have a discussion with your client about the first offer they are prepared to make. Give your client a frank assessment of their case and its strengths and weaknesses. If possible, you should meet with your client in advance of the mediation to have this discussion and to review the mediation briefs.

Prepare ahead of time a shell or skeleton set of Minutes of Settlement and Releases. Having the style of cause, court file number, correct parties, recitals, etc. will save a substantial amount of time for the day of mediation. Since these mediations tend to go into the evening, a shell or skeleton of these documents will assist in making sure all protections are set out in your settlement agreement.

9. PREPARE FOR THE DAY OF MEDIATION

First and foremost, ensure all parties will be in attendance. A mediation will be less likely to succeed if the parties who can consent to settlement are not present.

Consider what non-parties should attend as well, either as support for the parties, or to "approve" the settlement if the actual party will be relying on the non-party's input, opinion, and advice.

Consider the utility of a social worker if it will help with any non-legal issues that need to be mediated as well.

If possible, agree to the format of the mediation ahead of time with other counsel and perhaps in consultation in advance with the mediator. Considerations:

- Should there be a plenary session?
- Should any of the non-parties be present in plenary or not?
- Will counsel be expected to give opening statements? Etc.

The format will often depend on the relationships between the parties, number of parties, and counsel or mediator preferences.

Contact any experts or accountants so they are available via phone if any questions may come up. Structuring a settlement may require tax advice. Do not forget that settlement may have tax consequences and clients need to understand the actual value they are receiving or paying. Having an accountant available to explain this to your clients is helpful. In other words, consider all the tools you need in advance to increase the likelihood of a successful mediation: real estate valuations, business valuations, etc.

If older adults are involved in the mediation and need accessible accommodation, make sure the venue provides what they need and ensure plenty of food and water are available.

10. SETTLEMENT CONSIDERATIONS

You will have prepared your draft or skeleton Minutes of Settlement and Releases. Have them available on your laptop, ready to edit and finalize.

When coming to a settlement, try to calculate the "real" value the client will be receiving or paying. This will include any tax consequences and should also consider any legal fees and expert fees that need to be paid. As counsel, you should be prepared with that information, including up to date dockets and any disbursements owing.

Settlement agreements must be prepared by the parties or their counsel and should not be prepared by, or witnessed by, the mediator. The mediator will remain neutral, is not an advisor and cannot become a witness.

Make note if any of the parties are "under disability" pursuant to Rule 7.01(1) of the *Rules of Civil Procedure* (includes a minor or an individual who is mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992*). All claims involving persons under a disability require judicial approval of any settlement.

11. POTENTIAL OUTCOME OF SETTLEMENT AND NEXT STEPS

If the Parties are successful in attaining a mediated settlement with Minutes of Settlement drafted and executed, the agreement is a legally binding contract.

Rule 75.1.12 (4) of the *Rules of Civil Procedure*, provides that if the settlement agreement resolves all the issues in dispute, the party with carriage of the mediation shall file a notice to that effect with the court, (a) in the case of an unconditional agreement, within 10 days after the agreement is signed; (b) in the case of a conditional agreement, within 10 days after the condition is satisfied, though in Estate Mediation practically speaking, often times no notice is ever filed.

The benefits of a legally binding contract include the ability to enforce the agreement before a court.

12. CONCLUSION

Obviously, there is no guarantee that an estate dispute will be settled at a mediation. However, if counsel and clients put in the effort and necessary preparation before and during a mediation session, the chances of a successfully mediated outcome increases substantially.

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, Whaley Estate Litigation Partners, April 2019

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TAB 6

The Six-Minute Estates Lawyer 2019

No-Contest Clauses and the *In Terrorem* Doctrine

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No-Contest Clauses and the *In Terrorem* Doctrine

By Joshua Cohen and Holly LeValliant

Introduction

"*In terrorem*" literally means "in fear" or "as a warning". In law, it refers to a testamentary conditional gift where the condition is a "mere" threat without any consequence. If the condition is found to be *in terrorem*, it may be invalid and unenforceable. Most often, this issue arises in the context of no-contest clauses in wills. Some no-contest clauses can be valid. Some are not.

It should be noted that the phrase "*in terrorem* clause" is sometimes colloquially used interchangeably with "no-contest clause". For the purposes of this paper, "*in terrorem*" is used to refer to those that are rendered invalid at law.

In terrorem clauses should be discussed in conjunction with conditional gifts. Conditional gifts are often found in wills, whereby the beneficiary is expected to comply with a condition or otherwise forfeit their respective gift. A common condition (and the one most relevant to this discussion) is the no-contest clause, where the testator makes a gift to beneficiary conditional upon that beneficiary not commencing litigation in connection to the validity of the will. No-contest conditions, or, clauses, if drafted appropriately, can be valid and enforceable. However, one such way to invalidate a no-contest clause is to establish that it is *in terrorem*.

When is a No-Contest Clause Void for Being a Mere Threat?

In English law, only two types of testamentary conditions are limited by the *in terrorem* rule: conditions in restraint of marriage and conditions forbidding a beneficiary from contesting the will (i.e. the no-contest clause). Ontario adheres to English jurisprudence.

In *Kent v McKay* (1982), 139 DLR (3d) 318, [1982] 6 WWR 165, 38 BCLR 216 (*"Kent v. McKay"*), the court held that for the *in terrorem* doctrine to apply, three criteria had to be satisfied:

1. The legacy must comprise personal property or a mixture of real and personal property;
2. The condition must be in restraint of marriage or one which forbids challenges to the will; and
3. The threat must be "idle"; that is to say that the recipient of the gift must be prevented from undertaking what the condition prohibits. Thus a forfeiture that provides for a divesture without providing for a gift over on the breaching of the condition is void.

In *Bellinger v Nuytten Estate*, the court elaborated on the third criterion noted-above, namely the presence of a 'mere threat'. The court held that "the gift must be accompanied by an effective gift over which vests in the recipient on the condition being breached. If there is no gift over, then the condition will be treated as merely *in terrorem*, that is a mere threat, and will be found to be void. And nothing short of a positive direction of a gift over, of vesting in another, even in the case where the forfeited legacy falls in the residue, will suffice. There must be an express disposition made of what is to be forfeited."

In *Kathleen Budai v. Susan Milton*, 2014 ONSC 5530 (*"Budai"*), the Ontario Court of Justice affirmed that in order for the *in terrorem* doctrine to apply, the three requirements from *Kent v McKay* must be met. In *Budai*, there was no gift over. This rendered the no-contest clause void.

What Triggers a No-Contest Clause?

It is worth examining what exactly is or isn't considered "contesting the will". A no-contest clause restricting a beneficiary from seeking direction from the court with respect to the interpretation of a will is void for being contrary to public policy. In *Harrison v Harrison*, the court held that a beneficiary had not forfeited his gift where he had commenced a proceeding for construction of the will and not to modify or change the will. Therefore, an application for construction or interpretation of the will should not trigger a no-contest clause. As further discussed below, restricting a beneficiary from seeking an interpretation or construction of a will is contrary to public policy.

Additionally, a clause preventing a claim for dependant's support (a statutory benefit under the *Succession Law reform Act*) is void for being contrary to public policy, as was held by the court in *Kent v McKay*.

Key Takeaways Thus Far

In very concise terms, the law can be summarized as follows:

1. No-contest clauses in wills, generally speaking, are valid and enforceable;
2. A no-contest clause is void if found to be *in terrorem*, in which the three criteria enumerated in *Kent v McKay* must be satisfied; and
3. A no-contest clause, even if not found to be *in terrorem*, may be void for being contrary to public policy. Specifically, jurisprudence has held that a clause cannot limit applications for judicial guidance/direction with respect to interpretation of a will or for dependant's support.

Where Are We Today? *Mawhinney v Scobie*, 2019 ABCA 76

The Alberta Court of Appeal recently considered these issues in the context of *Mawhinney v Scobie*, 2019 ABCA 76 ("*Mawhinney*").

James Carl Anderson ("JC") passed away on September 3, 2015, leaving three adult children and his fiancée Karen Mawhinney ("Ms. Mawhinney"). Ms. Mawhinney claims that JC made four separate wills. Under all of these wills, she was a beneficiary, sharing equally with the adult children from the residue of the estate. Thereafter, JC prepared a codicil altering the distribution scheme and departing from the previous four wills. In accordance with same, a new and final will was prepared (the "Last Will"), leaving Ms. Mawhinney a specific bequest, being a parcel of property in Alberta. However, she was no longer a residual beneficiary (the residue was left to the three adult children). The Last Will contained a no-contest clause in paragraph 21, which states:

> 21. If any beneficiary of this my Will challenges the validity of this my Will or any Codicil hereto or commences litigation in connection with any provision of my Will of any Codicil hereto, other than for:
>
> (a) Any necessary judicial interpretation or for the assistance of the court in the course of administration of my estate; or
>
> (b) Seeking to enforce or obtain any rights or benefits conferred by the laws of the Province of Alberta;
>
> Then such beneficiary shall absolutely forfeit and lose all entitlement to benefits or to any gift to him or her hereunder, and every such benefit or gift so forfeited shall fall into the residue of my estate an the residue of my estate shall be distributed as if such beneficiary had predeceased me and left no issue surviving me.

The personal representatives of JC's estate obtained a grant of probate in common form of the Last Will. Ms. Mawhinney alleged that JC's health had deteriorated in the months preceding his death, such that there were "suspicious circumstances" surrounding the execution of the Last Will. She applied for directions as to whether an application under rule 75(1)(a) of the Alberta *Surrogate Rules* would trigger the no-contest clause. Rule 75(1)(a) stipulates that a person interested in the estate may apply to the court to obtain formal proof of a will, whether or not an application for a grant of probate has been made. Ms. Mawhinney sought a declaration from the court that such an application would not constitute a challenge to the validity of the Last Will, and would not trigger the no-contest clause.

The *Surrogate Rules* involves a two-stage process. Firstly, the applicant must adduce evidence of suspicious circumstances (a testator is presumed to be capable). If successful, the burden then shifts to the propounder of the will to prove the will in solemn form.

The lower court found that an application under rule 75 of the *Surrogate Rules* would fall under one of the enumerated exceptions listed in the no-contest clause, namely, paragraph 21(b), which provides for "seeking to enforce or obtain any rights or benefits conferred by the law of the Province of Alberta." The court noted that the *Surrogate Rules* form part of the laws of the Province of Alberta.

The lower court also noted if JC wanted to preclude an application under the *Surrogate Rules*, he should have said so explicitly in the no contest clause.

The decision was appealed. The question before the Alberta Court of Appeal was whether an application brought by a beneficiary to obtain formal proof of a will amounts to a challenge to the will that would trigger the no contest clause. More specifically, is the exception under paragraph 21(b) of the last Will restricted to applications for dependant's relief, or is it broad enough to include an application under rule 75 raising suspicious circumstances?

Mawhinney: The Majority

The Court of Appeal in reviewing this made the following findings:

1. Interpretation of the *Surrogate Rules* is a question of law, and, as such, is reviewed on the standard of correctness. There is no meaningful factual matrix to assist with the interpretation of the Last Will, and specifically, the no-contest clause;
2. Paragraph 21(b) of the Last Will is not broad enough to include an application under rule 75 raising suspicious circumstances;
3. Rule 75 merely provides the procedure to be followed to facilitate a challenge to the will. While the rule may form part of the laws of Alberta, the rule does not confer any right or benefit on the applicant, save for a procedural right to challenge the will. Both the common law exception, and its formulation in paragraph 21(b), contemplate a party being able to make a claim from the estate for a substantive benefit or right created by the statute that the testator did not provide for;
4. The very essence of an application raising suspicious circumstances is to challenge the validity of the will. If Ms. Mawhinney is permitted to bring such an application, then she will be doing exactly what the no-contest clause was intended to prohibit;
5. The no-contest clause does not, technically speaking, prohibit an outright challenge to the validity of a will. If the challenge is successful, the will as well as the no-contest clause will be invalid. The effect of the no-contest clause is to test the fortitude of a potential challenger to the validity of the will and how strongly they believe they can successfully challenge the will. The clause is designed to discourage litigation, not prohibit it.

Mawhinney: The Dissent

Justice O'Ferrall wrote a dissenting opinion. He would have held that the no-contest clause did not apply to an application to have the Last Will proven in solemn form. His reasons can be summarized as follows:

1. The modern approach to interpreting a will is contextual and includes consideration of surrounding circumstances; it is a question of mixed fact and law. The majority in this case concluded that the applicable standard of review is correctness. Justice O'Ferrall disagreed, and held that a deferential standard was more appropriate in this case. The court at first instance interpreted the Last Will in light of surrounding circumstances in an attempt to give effect to the testator's wishes when he prepared his Last Will;
2. The court at first instance acknowledged that an application raising suspicious circumstances might constitute a "challenge to the validity of the will". However, pursuant to paragraph 21(b) of the contest clause, an exception is provided when a beneficiary is seeking to enforce a right conferred on him/her by statute. In the lower court's view, an application under the *Surrogate Rules* is a right conferred by law in Alberta, and, as such, would not trigger the no-contest clause. Justice O'Ferrall believed that this was a reasonable interpretation of the no-contest clause;
3. The language in the no-contest clause does not suggest that the "right" specified under paragraph 21(b) should be narrowly construed so as to be limited to a purely substantive right;
4. A beneficiary's right to make an application under the *Surrogate Rules* is not merely procedural in nature. There is a substantive component to such a right. The application would be the first step towards invalidating the will, which, if found to be the case, could drastically change the substantive outcome;
5. The moment the testator includes exceptions in the no-contest clause, they must be interpreted in accordance with the testator's inferred/imputed intentions. The testator could have excluded the right conferred by the *Surrogate Rules* from the exception noted in paragraph 21(b).

Conclusions

In the past thirty years, the law pertaining to the *in terrorem* doctrine has remained essentially the same. A simple gift over has been found to be sufficient to circumvent the rule. *Mahwhinney v Scobie* perhaps opens the door to further challenges to no-contest clauses on the basis of public policy.

To date, restrictions on seeking the guidance and direction of the Court and restrictions on commencing a dependant's support application have been held to be invalid on the basis that they are contrary to public policy. *Mahwhinney* involved an application raising suspicious circumstances. If successful, the Last Will in question would not have been null and void; rather, the burden would have shifted to the propounder of the Will to prove same in solemn form. Nevertheless, the Majority held that such an application fell outside the enumerated exception to the no-contest clause, and as such, the bequest must be forfeited.

It is important to remember that if a will challenge succeeds, the entire will, including the no-contest clause will be invalid as well.

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TAB 7

The Six-Minute Estates Lawyer 2019

Litigation Guardians for Minor Children

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cpd

Litigation Guardians for Minor Children

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A. Introduction

Minor children and incompetent adults cannot sue or be sued without a litigation guardian. While the comments in my paper may have general applicability to incompetent adults, as the Office of the Children's Lawyer's work is limited to minor children, they are the focus of this paper.

The paper commences with a historical overview, and then addresses current practice in Ontario.

B. Litigation Guardian History

1. Roman Law: tutela and cura

Litigation guardians can be traced back to Ancient Rome where the law of guardianship originated. The first legislation on Roman private law, the 449 BC Roman Twelve Tables, provided that a child's father or paternal relative should protect the child's person and property.[2] When the father died and there was no one to care for the child, a guardian would step in and assume control as an extension of the paternal power.[3] Guardianship applied to all minors *sui juris* (not under paternal power), whether they had property or not.[4]

In Roman times, two kinds of guardians existed: tutors and curators. Tutorship, or *tutela*, was concerned with women (*tutela mulierum*) and children below the age of puberty (*tutela impuberum*).[5] Curatorship, or *cura*, was concerned with incapacitated adults and minors who were *sui juris* (between the ages of 14 and 25).[6] The tutor was appointed to protect the person and property, while the curator protected property only.[7]

[1] I am grateful for the assistance of Arielle Di Iulio, student-at-law, Office of the Children's Lawyer.

[2] Antonio Buti, *The Early History of the Law of Guardianship of Children: From Rome to the Tenures Abolition Act 1660*, 7 U.W. Sydney L. Rev. 91 (2003) at p. 92. Also available at: http://classic.austlii.edu.au/au/journals/UWSLawRw/2003/5.html

[3] Charles P. Sherman, *Debt of the Modern Law of Guardianship to Roman Law*, 12 Mich. L. Rev. 124 (1913-1914) at p. 124. Also available at: http://digitalcommons.law.yale.edu/fss_papers/4438

[4] Buti p.92

[5] Sherman p.124 Adolf Berger. *Encyclopedic Dictionary of Roman Law* (1953) at p. 662

[6] Sherman p.124

[7] Buti p.92

The *Praetor* at Rome and the *Praeses* in the provinces had supervisory jurisdiction over guardians.[8] Guardianship was treated as a public office and a public charge (*munus publicum*) which a person could not evade without legal excuse, such as poverty, ill-health, or illiteracy. Guardians were required to give security for the faithful performance of their duties. They were also required to make an inventory of the ward's property and to render a final account of their administration of the estate at the end of the guardianship. The guardian would be personally liable at Roman Law for fraud, neglect, or waste of the ward's property. If liable, they could be removed from office and/or forced to pay a fine or restitution to the ward.[12]

2. Medieval England: nature, nurture, chivalry, and socage

Medieval jurists drew heavily from Roman law to shape the English common law of guardianship. In Feudal England, there were four main kinds of guardianship that existed as common law: nature, nurture, chivalry and socage.[13] Guardianship by nature and guardianship by nurture were held by the child's parents during their lifetime.[14] Guardianship by chivalry and guardianship by socage arose upon the father's death, and were thus largely determined by the way land was held and inherited in England.[15]

Under the feudal land-holding system, the King owned all land. He parceled the land out to barons, along with the right to derive income from the land, in exchange for the promise of future military service.[16] The barons divvied the land to lesser lords and commoners, and these tenants acquired lifelong use of the land. When the tenant died, his heir could pay "relief" to the lord to assume the deceased's tenure and possession of the land.[17] When the deceased left an infant heir, however, the deceased's type of tenure determined how land would be inherited. In feudal England, there were two types of tenure: military tenure and socage tenure.[18] Military tenure gave rise to guardianship in chivalry and socage tenure to guardianship in socage.

a. Guardianship in chivalry

Military tenants originally held land in exchange for the performance of the obligation to fight in or otherwise support a lord's military campaigns, referred to as military or "knight

[8] Buti p.94

[12] Sherman pp.124-126; Buti pp. 92-94

[13] Buti p.97 Katherine Hunt Federle & Danielle Gadomski, *The Curious Case of the Guardian Ad Litem*, 36 U. Dayton L. Rev. 337 (2011) at p. 341

[14] Buti p.100-101

[15] Federle p.340

[16] Buti p.97

[17] John Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins*, 14 Oxford J. Legal Stud. 159 (1994) at p. 163

[18] Seymour p.163; Buti 97

service".[19] When a military tenant left an infant heir, the lord acquired wardship of both the person and property of the heir under guardianship of chivalry, which lasted until the heir turned 21 for males and 16 for females (or 14 if she married).[20]

This guardianship was not concerned with the welfare of the infant heirs; rather, it treated them as an adjunct to the land and a proprietary right to be exploited.[21] The guardian's only duties were to provide for the heir's bare maintenance and not to commit waste. In return, the guardian was granted proprietary and pecuniary rights, including: the right to take rents and profits of the land for his own use[22], and the right to auction off the ward's marriage to the highest bidder. There was no obligation to account to the infant heirs.[23] By the 13th century the obligation of military service had disappeared but military tenure remained until the 17th century presumably because of the benefits it conferred on lords.[24]

b. Guardianship in socage

Socage tenants held land in exchange for agricultural services or rent monies. When a socage tenant died leaving an infant heir, the heir was placed under "the nearest relation to whom the land could not descend".[25] Socage guardianship lasted until the heir attained the age of 14.[26] Guardianship typically went to the mother first and if she was unable or could inherit, then to the next of kin.[27] This guardianship applied to both person and property and was fiduciary in nature. Unlike military guardianship, guardians in socage could not take the profits of the land for their own use and were obligated to account to the infant heirs.[28] Indeed, at age 14 the ward could demand that the guardian deliver the estate and account for all the rents and profits received during the wardship, including the price of any marriage that was entered into.[29]

c. Guardian ad litem

The guardians in chivalry and socage were obligated to vindicate the legal rights of the ward and could sue on behalf of the ward.[30] However, the English law of guardianship was mostly concerned with minors who had property, and permanent guardians were

[19] Seymour p.163
[20] Buti p.97; Seymour p.163
[21] Buti p.97
[22] Seymour p.163; Buti p. 98
[23] Buti p. 98
[24] Seymour p.163
[25] Seymour p.164; Buti p.99
[26] Federle p.340
[27] Buti p.99
[28] Seymour p.164; Buti p.98
[29] Buti p.100
[30] Federale, p.345

only appointed for minors with rights in a decedent's estate.[31] Since all children had rights but lacked the legal capacity to enforce them on their own, a *guardian ad litem* was needed. The courts appointed this guardian to act legally for a child who had no guardian, if the infant wished to sue or was being sued and needed representation in court.[32] The power and duties of such a guardian were limited to the conduct or defence of the suit.[33] At common law, infants were required to sue and defend by guardian but after the enactment of the *Statute of Westminster* in 1275, they also had the option to sue by *prochein amy* or "next friend". Both a guardian ad litem and *prochein amy* were Court-appointed.[34]

3. Tenures Abolition Act 1660 and the Court of Chancery

In the 16th and 17th centuries, the law of guardianship experienced major developments. In 1535, the *Statute of Uses* was enacted to rein in feudal tenants' application of the "use" – a device used to ensure that land did not descend directly to infant heirs, thereby avoiding feudal incidents of wardship, marriage, and relief. The *Statute of Uses* ensured that infant heirs acquired possession of their lands and the King could again claim feudal revenues. To enforce the King's revived feudal prerogatives the Court of Wards was established in 1540. Later named the Court of Wards and Liveries, this court operated in tandem with the Court of Chancery. The former enforced the incidents of military tenures on the King's behalf while the latter addressed all remaining wardship matters.[35]

In 1660, the Court of Wards and Liveries was abolished by the *Tenures Abolition Act 1660*, along with military tenures and all their burdensome incidents. Thus, property-based guardianship in chivalry was eliminated and all tenures were effectively converted to socage tenures.[36] With the abolition of feudal tenure, the law moved away from property-oriented conceptions of guardianship and towards a notion of guardianship which involved a fiduciary relationship.[37] With this shift, it also expanded its jurisdiction to embrace children of the poor.[38]

The *Tenures Abolition Act 1660* was the first act to codify the English law of guardians.[39] It gave fathers the power to appoint a guardian for the infant by deed or by

[31] Federle, p.340
[32] Buti p.103
[33] Buti 104
[34] William Macpherson. *Treatise on the Law Relating to Infants* (1842), p. 353
[35] Seymour, pp 164, 169
[36] Seymour p.164; Federle, p.341; Buti p.104
[37] Seymour, p.165
[38] Seymour P.176
[39] M. V. Ostrowski; G. Steele; J. Laker; T. Plaxton, *Testamentary Custody and Guardianship*, 54 Advocate (Vancouver) 863 (1996) at p. 864

will.[40] Under the act, a father could appoint a guardian until the infant attained the age of 21, which extended the period of minority and Chancery's jurisdiction in guardianship matters.[41] Testamentary guardianship superseded all other forms of guardianship, including that of the mother.[42] However, there was increasing intervention of the Court of Chancery in guardianship matters[43] and by the 18th century, a testamentary guardian was subject to the jurisdiction of the Court.[44] The Court could appoint guardians and would intervene to protect the best interests of the child, even if it meant overriding a parents' wishes and exercise of their powers.[45]

When the *Supreme Court of Judicature Act 1873* was passed, all Divisions of the High Court could exercise the jurisdiction of the Court of Chancery.[46] Thus, the King's *parens patriae* jurisdiction over guardianship of minors was delegated from the Court of Chancery to the Superior courts, where it remains in Canada today.[47]

C. Litigation Guardians in Ontario

The procedural framework for litigation guardians is rule 7 of the *Rules of Civil Procedure*. Rule 7 provides a procedural code, providing protections and court involvement at various stages in litigation, to ensure that the rights and interests of minors are protected. It serves as a codification of the court's *parens patriae* jurisdiction.

1. The minor applicant

Any person who is not under disability may act as litigation guardian for a minor plaintiff or applicant: rule 7.02(1). No motion for court appointment is necessary. The proposed litigation guardian for a minor child must file an affidavit deposing to the facts set out in rule 7.02(2), namely, that the proposed litigation guardian:

(a) consents to act as litigation guardian in the proceeding;
(b) confirms that he or she has given written authority to a named lawyer to act in the proceeding;
(c) the minor's date of birth;
(d) confirms whether the litigation guardian and minor are ordinarily resident in Ontario;
(e) sets out his or her relationship with the minor child;
(f) confirms that he or she has no interest adverse to that of the minor child; and

[40] Federle p.341' Buti p.104; Seymour, p.164
[41] Seymour, p.164
[42] Federle p.341; Buti p.104
[43] Federle, p.342
[44] Seymour, p.175
[45] Federle, p.342; Seymour, p.175
[46] Seymour P.178
[47] Ostrowski, p.864

(g) confirms that he or she has been informed of potential personal liability for costs awarded against him or her or against the minor child.[48]

Where a minor applicant is represented by a litigation guardian (e.g., in a dependant's support application), it is not necessary to serve the Children's Lawyer with the application, unless there are other minors with interests in the estate or trust, or if the minor is otherwise a beneficiary of the estate: rule 16.02(1)(j).

The Children's Lawyer is litigation guardian of last resort for minor applicants. She will only commence a proceeding on behalf of a minor applicant where there is no other person who is able to act for the minor applicant. Requests for commencement of proceedings by the Children's Lawyer should be made in writing and should include all relevant information, such as names and dates of birth of the minor, facts and documents, and information why nobody else is able to act for the child.

2. The minor respondent

The Children's Lawyer must be served on behalf of minor beneficiaries in all estates and trusts proceedings where beneficiaries or persons appearing to have a financial interest must be served:

- Notice of an application for a certificate of appointment of an estate trustee with or without a will (rules 74.04(4) and 74.5(3));
- Application to pass accounts (rule 74.18(3.1)); and
- Application or motion for directions (rule 75.06(2)).

The Children's Lawyer is required to act as a respondent minor child's litigation guardian in estate and trust matters unless the court orders otherwise: rules 7.03(2) and 16.02(1)(j)). Common examples are applications for the advice and directions of the court, applications to interpret wills or trusts, applications to remove or replace estate trustees, will challenge litigation, and applications concerning the estate administration.

Where a dependant support claim is made against an estate, all beneficiaries must be served: s. 63(5) of the *Succession Law Reform Act*[49]. The Children's Lawyer is served on behalf of minor beneficiaries of the estate and may participate in the litigation.

A person not under disability who wishes to act as litigation guardian for a minor respondent or defendant must move to be appointed by the court: rule 7.03(4). As noted above, under rule 7.03(2) the court may make an order replacing the Children's Lawyer as litigation guardian for a minor respondent or defendant in an estate or trust matter.

[48] The Children's Lawyer and the Public Guardian and Trustee are exempt from the affidavit requirement: rule 7.02(2).

[49] R.S.O. 1990, c. S.26

To obtain such an order, a motion under rule 7.03(4) should be brought on notice to the Children's Lawyer. To avoid the cost of an opposed motion, it is a good idea for a person who wishes to replace the Children's Lawyer to contact our Office to discuss the proposed replacement in advance of the motion.

3. Representation by a Lawyer

Litigation guardians cannot act without a lawyer.

As noted above, the litigation guardian affidavit (rule 7.02(2)) that must be filed with the court when commencing a proceeding on behalf of a minor applicant (except the Public Guardian and Trustee and the Children's Lawyer) includes the sworn statement that he or she "confirms that he or she has given written authority to a named lawyer to act in the proceeding". Rule 7.05(3) reiterates that all litigation guardians, other that the Children's Lawyer and Public Guardian and Trustee (both of whom are lawyers with Offices staffed by lawyers), must be represented by a lawyer, and must instruct the lawyer in the proceedings.

Rule 15.01(1) further confirms that "a party to a proceeding who is under disability or acts in a representative capacity shall be represented by a lawyer." The constitutionality of the requirement of legal representation of litigation guardians was upheld in *Re Weidenfeld*[50].

A litigation guardian who is a lawyer cannot also be the lawyer for the litigation guardian[51].

4. Powers and Duties of a Litigation Guardian

Rule 7.05 codifies the powers and duties of a litigation guardian. The litigation guardian has power to make any decision in the conduct of the litigation but is required to "diligenty attend to the interests of the person under disability" and take steps to protect that person's interests in litigation. A litigation guardian stands in a fiduciary relationship with a minor child.

5. Costs

A litigation guardian, like any other party, may recover his or her costs of litigation if successful. When acting as litigation guardian, the Children's Lawyer is entitled to recover costs on the same basis as other litigation guardians (s. 89(4), *Courts of Justice Act* [52]).

[50] [2007] O.J. No. 4485 (S.C.J.)
[51] Swan v. TDSB 2017 ONSC 5212
[52] R.S.O. 1990, c. C.43

If not successful, a litigation guardian may be personally liable for costs awarded against him or her, or against the minor child. The spectre of a cost award against a litigation guardian can derail and complicate litigation. A litigation guardian may commence a proceeding on behalf of a minor but may discover, over the course of litigation, that the outcome is less than certain. As costs escalate, he or she may reconsider his decision to act as a litigation guardian. Accordingly, counsel to the litigation guardian should review this aspect of the role at the outset of the litigation.

Rule 57.06(1) specifically authorizes the court to order a successful party to pay all or part of the costs of the litigation guardian for an unsuccessful respondent. However, the court may limit the liability of a successful party to pay the costs of a litigation guardian to the extent that the successful party is able to recover the costs from the party liable for the successful party's costs.

Courts tend not to order costs against a minor child personally and instead order them against the litigation guardian for the minor.[54] However, a litigation guardian who has been ordered to pay costs is entitled to recover them from the minor for who he or she has acted pursuant to rule 57.06(2). It is my view, that a litigation guardian must seek judicial approval for indemnification of costs from a minor child's own property (especially if that litigation guardian is also guardian of the child's property or holds the child's property as trustee or estate trustee).

Finally, security for costs can be awarded against a litigation guardian. The Children's Lawyer is never required to post security for costs (s. 89(5), *Courts of Justice Act*).

6. Removal or Replacement of Litigation Guardians

When a minor for whom a litigation guardian has been acting reaches the age of majority, the minor or the litigation guardian may obtain an Order to Continue authorizing the minor to continue the proceeding without the litigation guardian: rule 7.06(1)(a).

A litigation guardian may also be removed under rule 7.06(2) if they are not acting in the best interests of the minor. In these cases, notice of a motion to remove a litigation guardian must be served on the Children's Lawyer and if granted, the court may substitute the Children's Lawyer as litigation guardian. For example, the court may substitute the Children's Lawyer as litigation guardian where the litigation guardian is no longer represented by counsel and is unwilling or unable to retain counsel as required by rule 7.05(3).

[54] *Hoang v. Vicentini*, 2016 ONCA 723 (CanLII) at paras 90-92 – the Ontario Court of Appeal varied the trial judge's order to exclude the minor plaintiffs in their personal capacity from the cost award and instead ordered payment by the litigation guardian personally and in her capacity as a litigation guardian.

Replacement of a litigation guardian may also arise from a motion to dismiss an action for delay under rule 24.02. Counsel for a defendant may bring a motion to dismiss an action where it has not been pursued by the minor plaintiff's litigation guardian in a timely manner. If necessary, the litigation guardian may be removed and replaced by the Children's Lawyer who will represent the minor in the action.[56]

7. Default and Discontinuance

A minor child can only be noted in default with leave of a judge, following service on the Children's Lawyer. Similarly, proceedings cannot be discontinued without leave and notice to the Children's Lawyer (rules 7.07 and 7.07.1).

8. Minors who are interested in the estate but not named as parties

Where a third party commences litigation against an estate, the estate trustee has authority to settle such claims, and the Children's Lawyer need not be served with the claim. The estate trustee has a duty to protect the estate property and act in the best interests of all beneficiaries. However, as the Children's Lawyer may take a position about the settlement in the context of a passing of accounts application, some estate trustees seek the Children's Lawyer's position before settling.

The Children's Lawyer may provide a comfort letter to the Estate Trustee that the settlement would not be challenged by the Children's Lawyer if the estate trustee were to bring an application to pass his or her accounts. The letter would not bind the minor child. If the Estate Trustee wants to ensure the minor is bound to the settlement, he or she must obtain judicial approval of the settlement, or pass his or her accounts.

Rule 7.04(2) permits the court to appoint the Children's Lawyer or another person to act for a non-party minor, if the court is of the opinion that the minor requires separate representation.

9. Representation orders

A Judge may make an order appointing one or more persons to represent "any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served": sub-rule 10.01(1). The purpose of a representation order is to bind the interest of the unborn and unascertained persons in the litigation and to ensure that their interests are not overlooked: sub-rule 10.01(2).

[56] Linda Waxman and Marion Jacko, "The Role of the Children's Lawyer in Civil Litigation". Presentation to Howie, Sacks & Henry LLP, Toronto, Ontario (Wednesday, March 28, 2012).

Sub-rule 10.01(1) sets out the types of proceedings in which a representation order may be made, which include proceedings involving the interpretation of a will, approvals under the *Variation of Trusts Act*, R.S.O. 1990, c. V.1, as well as “any other matter where it appears necessary or desirable to make [a representation order]” (sub-rule 10.01(1)(f)).

The Children’s Lawyer is regularly appointed to act as representative for the unborn or unascertained interest under a representation order.

Sub-rule 74.04(5) requires that notice of an application for a certificate of appointment of estate trustee with a will be served on the OCL where there may be unborn or unascertained beneficiaries. Notwithstanding service under this rule, a representation order must still be obtained in order to bind the interests of the unborn and unascertained in litigation.

10. Settlement on behalf of minor, unborn or unascertained beneficiaries

Only an order of the court can bind a minor or unborn beneficiary or an unascertained class of beneficiaries.

In order to settle litigation in an estate in which a minor has an interest, judicial approval of the settlement must be obtained by bringing a motion or application pursuant to rule 7.08. Any party may bring the motion. The required supporting materials are set out in rule 7.08(4).

Similarly, if a representation order is made appointing the Children’s Lawyer or other person to represent the interests of unborn or unascertained persons, a settlement must be judicially approved: rule 10.01(3).

In essence, the materials must show the court why the settlement should be approved on behalf of the minor child.

If a minor is represented by a litigation guardian other than the Children’s Lawyer in litigation that has settled, the motion for judicial approval of the settlement does not need to be served on the Children’s Lawyer unless the Judge makes an endorsement pursuant to rule 7.08(5) directing the Children’s Lawyer to provide a written report regarding the settlement.

11. Payment of a minor’s funds

Where a minor’s total interest in an estate or trust does not exceed $10,000.00, the minor’s interest may be paid to his or her custodian, who can provide a release to the estate trustee. The custodian has the same responsibility as a guardian of property in respect of the minor’s property: s. 51(4), *Children’s Law Reform Act,* R.S.O. 1990, c.C.12 *(“CLRA”)*

If the will does not contain trust terms or the funds are payable under an intestate estate, the funds must be paid to the Accountant of the Superior Court of Justice to the credit of the minor or to a court-appointed guardian of property.

Money payable to a minor pursuant to an order or settlement may not be paid to a parent or a litigation guardian, unless a judge orders otherwise: rule 7.09. Should a judge exercise discretion to order otherwise, in the case of a minor, it must be in accordance with the guardianship provisions of the *CLRA*.

Pursuant to subsection 51(2) of the *CLRA*, if a sum owed to a child is the subject of a judgment or order and is not to be paid into court, there must be a guardian of property appointed to receive the funds. A sum owed to a child under a judgment or order cannot be paid to a parent, even if it does not exceed $10,000.00.

An application to be appointed guardian of a minor’s property is brought on notice to the Children’s Lawyer. Evidence should be filed addressing the criteria the court will use to decide the application; see section 49 of the *CLRA*.

12. Summary

Before acting for a litigation guardian, a lawyer should carefully review rule 7 and ensure that the litigation guardian understands his or her role and responsibilities, and potential exposure to costs. Signing the litigation guardian affidavit should not be a *pro forma* exercise.

Similarly, parties should be live to the fact that the court’s protection is engaged to protect the child when the litigation comes to an end, either by settlement or discontinuance.

Additional information

Additional information about the Children’s Lawyer’s role in civil litigation and estates and trusts matters may be found on the FAQ page of the OCL’s website: http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/faq/civil_litigation_estates_and_trusts.asp

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TAB 8

The Six-Minute Estates Lawyer 2019

Taxation of Trusts Update

Kyle Lamothe
Thorsteinssons LLP

April 29, 2019

Taxation of Trusts Update – 2019 Six-Minute Estates Lawyer

Date: April 8, 2019

Author: Kyle B. Lamothe, Partner, *Thorsteinssons LLP*

This paper provides a brief outline of four areas of recent change for the taxation of trusts: (A) Amendments to the tax on split income rules; (B) "Prescribed rate trust" planning; (C) Trust reporting requirements; and (D) Post-mortem pipeline planning, particularly with non-resident beneficiaries.

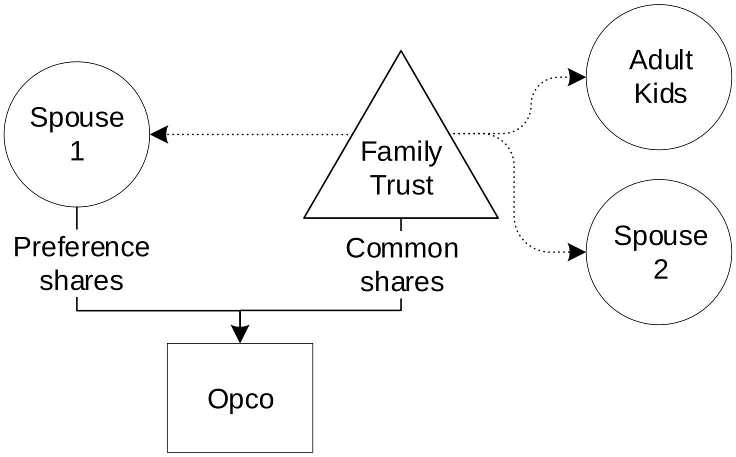
A. AMENDMENTS TO THE TAX ON SPLIT INCOME RULES

Until 2018, the tax on split income ("TOSI Rules"), also known as the "kiddie tax", applied only to certain types of income, including taxable dividends paid by a private corporation and received by individuals under the age of 18 at the end of a particular year allocated by a trust, and certain other income allocated by a trust. The effect of the TOSI Rules is to subject the income to the top marginal tax rate (against which only limited credits and deductions are available). However, because these rules did not generally apply to adults, many opportunities to split income were available.

In general terms, "income splitting" refers to tax plans that distribute income amongst family members to take advantage of each's marginal tax rates, tax credits and deductions. Typically, income splitting strategies divert income from a family member taxed at a higher marginal rate to a family member in a lower tax bracket so that the family pays an overall lower effective tax rate.

Several strategies have been common for years, utilized by small and medium-sized private businesses. For many families, income splitting with adult children has been the best method of funding post-secondary education. In other situations, income splitting structures are used to support adult children financially, or for adult children to financially support elderly parents.

Inter vivos trusts were a useful tool to achieve these tax planning goals as they allowed a closely-held corporation to pay dividends to family members without those family members directly owning shares of the corporation. The below diagram shows a typical "frozen" structure that allows for the corporation to declare dividends on its common shares, which the family trust then allocates to a spouse who is not engaged in the business and adult children:



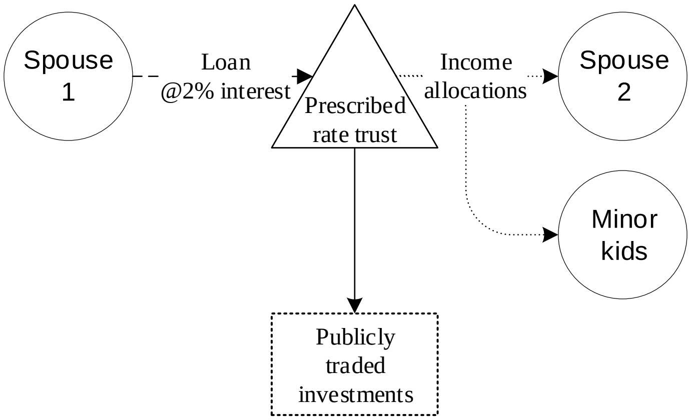
The TOSI Rules are now substantially revised to limit the opportunities to split income with adults. Beginning in the 2018 taxation year, the amended TOSI Rules can apply to any Canadian resident (minor or adult) who receives income from a private business in which a related individual participates or owns an interest in, including dividends and capital gains from a private corporation allocated by a trust.

For an adult, the TOSI Rules will apply the top marginal rate tax to income that exceeds what is considered a "reasonable amount" in the circumstances, unless a blanket exception is available. Many specific exceptions are available; however, the important definition of "excluded shares" is unavailable where the shares are held by a family trust.

In light of the amended TOSI rules, many existing strategies and structures will be ineffective to split income and will require review by a tax professional before allocations are made, particularly where the income derives from shares of a private corporation. However, some strategies remain if carefully implemented.

B. “PRESCRIBED RATE TRUST” PLANNING

One opportunity to split income through a trust that remains is the so-called “prescribed rate trust” planning. This strategy has received renewed attention since early 2018, and in many cases is combined with planning to extract retained earnings from a corporation at capital gains rates. In brief, the structure involves a family member loaning an amount to a trust of which his or her family are beneficiaries and charging interest of at least the prescribed rate (2% as of the time of writing). The trust can then invest the capital of that loan in a portfolio of marketable securities. After paying the interest to the family member (which the trust must pay on or before January 30 of the following calendar year), the trust can allocate its remaining income to the family members including minors, who then include the amounts in their income. The below diagram shows this structure:



If properly structured and administered, the attribution rules should not apply to any income, gain or loss arising in the trust because of the commercial loan exceptions (subsections 56(4.2) and 74.5(2) of the *Income Tax Act* (Canada) (the “Tax Act”)). Further, provided the trust does not engage in a “business” itself and generally restricts its investments to publicly-traded securities (shares listed on a designated stock exchange or shares of mutual fund corporations are specifically excluded), the TOSI Rules should not apply. In other words, the beneficiaries of the trust, including minors, should realize the income at their marginal tax rates.

C. TRUST REPORTING REQUIREMENTS

Currently, many *inter vivos* trusts do not file income tax returns for each taxation year because of exemptions provided by the administrative policy of the Canada Revenue Agency ("CRA"). In general terms, a family trust might not file a tax return unless it receives and allocates income to a beneficiary in a year.

On July 27, 2018, the Department of Finance released proposed legislation that makes the CRA policy obsolete, and includes new and expanded filing and reporting obligations for trusts. Express trusts resident in Canada will be required to file a tax return annually regardless of whether tax is payable or whether income has been distributed, unless specifically exempted. Trusts will also be required to identify all trustees, beneficiaries, settlors and protectors on their tax returns. New penalties will be introduced for failure to file a return with the additional information.

It is intended that the new reporting requirements will apply to returns required to be filed for the 2021 taxation year and subsequent taxation years. As of the date of this paper, the proposed legislation has not been enacted.

D. POST-MORTEM PIPELINE UPDATES

A "post-mortem pipeline" transaction is a series of transactions implemented to avoid the double taxation that may arise in circumstances where a taxpayer held shares of a private Canadian corporation as capital property at the time of his or her death. The CRA has continued to release positive rulings that it will not apply a series of anti-avoidance provisions to these types of transactions, provided that the steps are carefully scheduled over (somewhat arbitrary) periods.

In 2018, the Department of Finance amended an anti-avoidance rule in section 212.1 of the Tax Act which formerly applied only to non-residents of Canada. The rule now applies on a "look-through" basis to Canadian-resident trusts where one or more of the beneficiaries of the trust are non-residents. All domestic trusts with non-resident beneficiaries, including estates, testamentary trusts, *inter vivos* trusts, and life-interest trusts (alter ego, spousal, joint spousal and common law), must now be mindful of its effect when undertaking routine tax planning transactions.

The amendments to section 212.1 of the Tax Act, as currently drafted, cause particular issues for implementing a post-mortem pipeline where an estate or testamentary trust has one or more non-resident beneficiaries. Absent very careful planning, double taxation can result. The author[1] has had conversations with the Department of Finance regarding this issue. It appears that the application of the rules in the estate and family trust context may have been unintended. Further, it appears that the rules contain an oversight which leads to the potential for double taxation in the post-mortem pipeline context. It is hoped that the issue is resolved with a future amendment to the Tax Act.

[1] Myself and my partner Alex Demner, Thorsteinssons LLP Vancouver, have sent communications to the Department of Finance to outline the issue. Please contact the author for a copy of our recent article for the *Tax for the Owner-Manager* publication, which provides a more detailed discussion.

TAB 9

The Six-Minute Estates Lawyer 2019

Quantifying Dependant Support: No Easy Answer

Written and presented by:
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April 29, 2019

Quantifying Dependant Support: No Easy Answer

By Carol Craig and Rebekah Schultz

Section 62(1) of the *Succession Law Reform Act* ("*SLRA*") identifies 19 factors the court shall consider when determining the amount and duration of a dependant support award.[1] Based on a sample analysis of 10 dependant support cases, it appears that the court does not follow a specific or consistent analysis when determining the quantum of dependant support. The court typically does not assess all 19 factors listed in the *SLRA*, and often gives more weight to certain factors depending on the facts of each case.

Methodology

There are countless Ontario dependant support cases with varying awards.[2] The 10 sample cases were selected at random to illustrate how the courts have applied the section 62 factors and to try to determine which factors were likely to increase or decrease the quantum of support awarded. On average, the court refers to 7.6 factors to determine the quantum and duration of dependant support. The court only referred to all 19 factors in one case: *Morassut v Jaczynski Estate*.[3]

Factors that increase the quantum of dependant support

The s. 62 *SLRA* factors that appear to increase the quantum of support that the court will award are:

i. s. 62(1)(a): the dependant's current assets and means;

[1] *Succession Law Reform Act*, RSO 1990, c S.26, s 62.

[2] Brian A. Schnurr, *Estate Litigation*, 2nd ed (Toronto, 1994, loose-leaf) at ch 4.

[3] 2013 ONSC 2856.

ii. s. 62 (1)(b): the dependant's assets and means in the future;

iii. s. 62 (1)(c): the dependant's capacity to contribute to their own support;

iv. s. 62(1)(d): the dependant's age and physical and mental health;

v. s. 61(1)(g): the dependant's relationship with the deceased; and

vi. s. 61(1)(o): claims other persons may have as a dependant against the estate.

i. s. 62(1)(a): the dependant's current assets and means

In all 10 of the dependant support cases analyzed, the court considered the dependant's assets and needs. Typically, where the defendant was living below the poverty line or relying on some form of government assistance (i.e. CPP disability benefit, unemployment benefits, etc.), the court awarded a higher quantum of dependant support.[4]

In *Borman v Borman Estate,* the applicant, the former wife of the deceased, sought dependant support.[5] The applicant and deceased were married for 38 years, before their divorce in 2010. Since 2014, the applicant had been unable to work due to significant health issues.[6] Prior to 2014, the applicant only earned a modest income ranging from approximately $6,000.00/year to $14,000/year.[7] At the time of the application, the applicant was living on CPP Disability Benefits totalling $1000/month. The court concluded that the applicant lived "well below the poverty line and often [used] the food bank".[8] As such, this was a significant factor in

[4] *Gefen v Gefen,* 2015 ONSC 7577 at para 10; *Bormans v Bormans Estate,* 2016 ONSC 428 at para 13; *Grofun v Vanderispaillie Estate,* 2000 CarswellOnt 1006 at para 23.
[5] *Borman v Borman Estate,* 2016 ONSC 428 at para 1.
[6] *Ibid.,* at para 13.
[7] *Ibid.,* at para 13.
[8] *Ibid.,* at para 13.

the court's decision to award the applicant a lump sum amount of $40,000.00 in dependant support.[9]

ii. *s. 62 (1)(b): the dependant's assets and means in the future*

In 6 of the 10 cases analyzed, the court assessed the dependant's assets and means in the future. Typically, the court discussed whether the dependant was in good health and could provide for themselves in the future. Where the dependant suffered from disability or illness, the court was more likely to award a higher quantum of dependant support.[10] If the dependant was disabled and also had to support children of the deceased, the court would award an even higher quantum of support.[11] However, where the dependant did not suffer from a sickness or disability, the court awarded much lower support or dismissed the application for dependant support entirely.[12]

In *Dagg v Cameron Estate,* the court awarded a higher quantum of dependant support because the applicant was disabled and had children with the deceased. [13] The dependant was the deceased's wife. Prior to the deceased's death, the applicant was in a tragic car accident that made her unable to care for herself. The couple's two children were also injured in the same car accident. The court stated the following about the applicant's ability to have means in the future:

> "The likelihood that she will have significant assets and means in the foreseeable future is not strong given the injuries she suffered […].[14]

[9] *Borman v Borman Estate,* 2016 ONSC 428 at para 42.

[10] *Gefen v Gefen,* 2015 ONSC 7577 at para 30; *Bormans v Bormans Estate,* 2016 ONSC 428 at para 13; *Morassaut v Kacynski Estate,* 2013 ONSC 5856 at para 69.

[11] *Dagg v Cameron Estate*, 2016 ONSC 1125 at para 38.

[12] *Romero v Naglic Estate*, 2009 CarswellOnt 3193 at para 35; *Perkovic v Marion Estate*, 2008 CarswellOnt 5931.

[13] *Dagg v Cameron Estate,* 2016 ONSC 1125 at para 54.

[14] *Ibid.,* at paras 37-38.

Consequently, the court awarded the dependant a lump sum of $35,000, plus interim child support of $1250.00/month, and interim spousal support of $1000.00/month.[15]

iii. *s. 62 (1)(c): the dependant's capacity to contribute to their own support*

In 6 of the 10 cases analyzed, the court discussed the dependant's capacity to contribute to their own support. Like the factors listed above, where the dependant had an illness or sickness, the court awarded a higher quantum of dependant support recognizing that the dependent would have difficulty contributing to their own support.[16]

In *Gefen v Gefen Estate*, the applicant was the deceased's son who suffered from polio and had persistent and continuous health concerns.[17] The court concluded that the applicant did not have the means to contribute to his own support because, among other things, he had only worked at the family carpet store for 18 years.[18] The court was concerned because the applicant had never worked with an "arm's length employer".[19] Consequently, the applicant was awarded $5000.00/month in temporary support given his "own limited ability to contribute to his own needs", as well as a $5000.00 lump sum amount for his pressing medical and dental needs.[20]

iv. *s. 62(1)(d): the dependant's age and physical and mental health*

In 8 of the 10 cases analyzed, the court assessed the dependant's age and physical and mental health. Where the applicant suffered from any physical or mental health concerns, the court

[15] *Dagg v Cameron Estate*, 2016 ONSC 1125 at para 54.
[16] *Gefen v Gefen*, 2015 ONSC 7577 at para 30; *Bornmans v Bormans Estate*, 2016 ONSC 428 at para 13; *Morassaut v Kacynski Estate*, 2013 ONSC 5856 at para 69.
[17] *Gefen v Gefen*, 2015 ONSC 7577 at para 30.
[18] *Ibid.*, at para 30.
[19] *Ibid.*, at para 7.
[20] *Ibid.*, at paras 41-43.

awarded a higher quantum of dependant support. Additionally, the court was likely to award a larger quantum of dependant support if the dependant was older and/or likely going to retire.[21]

For example, in *Batchelor v Looney*, the applicant was the deceased's former wife. She was 70 years of age at the time of the application, had multiple health issues including arthritis, and knee and hip replacements and was likely going to retire in 6-12 months after the application.[22] The Respondents, the deceased's daughters, argued that the estate should be divided in three parts, with one third being invested and given to the applicant upon her retirement. If one-third of the estate was invested for 6-12 months, the court estimated that the applicant would only receive $850/month in dependant support.[23] The court determined that $850/month did not "constitute adequate support, nor did it make sense given the Applicant's age and expenses".[24] The court also made the following additional comments:

> While Nancy is employed at the present time, her working days are numbered by her various health issues and after she ceases employment, she will have very limited means to support herself. Furthermore, the suggestion that if the "allowance" of $850 per month was inadequate, Nancy could bring a motion to request a change in the monthly payment is inappropriate. At her stage of life, Nancy is entitled to certainty in terms of her financial well-being. Further litigation is to be avoided; I note that this litigation has been unpleasant and protracted.[25]

Consequently, the court awarded the applicant $450,000 to enable her to live a "comfortable lifestyle and take care of her medical needs".[26]

[21] *Batchelor v Looney*, 2015 ONSC 6784 at para 64.
[22] *Ibid.*, at para 64.
[23] *Ibid.*, at para 77.
[24] *Ibid.*, at para 77.
[25] *Ibid.*, at para 77.
[26] *Ibid.*, at para 81.

In *Cummings v Cummings,* the applicants were the deceased's children.[27] One child, Paul, was 28 years old and suffered from a neuromuscular condition.[28] The second child, Elizabeth was 23 years old and had no significant health problems.[29] The court awarded a lump sum of $250,000.00 in dependant support to the children. However, Elizabeth was only entitled to $10,000.00 of the lump sum amount, while Paul was entitled to $240,000.00 in dependant support due to his health condition.[30]

v. *s. 61(1)(g): the dependant's relationship with the deceased*

In 7 of the 10 cases analyzed, the court assessed the dependant's relationship with the deceased, specifically the proximity and duration of their relationship. It appears that the court is more likely to award a higher quantum of dependant support where the applicant and deceased were married or in a common-law relationship for a lengthy period.[31]

In *Carnevale v Topham Estate,* the court only referred to four s. 62 *SLRA* factors to determine that the applicant was entitled to dependant support. In a very brief decision, the court assessed the dependant's current assets and means (s. 62(1)(a)), the dependant's age (s.62(1)(d)), whether the dependant contributed to the deceased's welfare (s. 62(1)(h)), and, perhaps most importantly, the dependant's relationship with the deceased (s. 62(1)(g)). The court stated outright that the applicant was entitled to support because she had cohabited with the deceased for 34 years:

[27] 2003 CarswellOnt 571.

[28] *Cummings v Cummings,* 2003 CarswellOnt 571 at para 29.

[29] *Ibid.,* at para 32.

[30] *Ibid.,* at para 32.

[31] *Gefen v Gefen*, 2015 ONSC 7577 at para 46; *Bormans v Bormans Estate*, 2016 ONSC 428 at para 32; [31] *Dagg v Cameron Estate*, 2016 ONSC 1125 at para 40; *Batchelor v Looney*, 2015 ONSC 6784 at para 59; *Carnevale v Topham Estate*, 2012 ONSC 4178 at para 1.

> Ms. Carnevale and Mr. Allen Topham cohabited for approximately 34 years. I am satisfied Mr. Topham has not made adequate provision for Ms. Carnivale's proper support.[32]

As such, the court awarded $1600/month in dependant support and $19,200.00 in support arrears to the applicant.[33] It should be noted that the court awarded this quantum of dependant support even though it found that the applicant had overstated her needs and provided inaccurate financial statements.[34]

vi. *s. 61(1)(o): claims other persons may have as a dependant against the estate*

The court is mindful of the size of the estate and the estate's ability to provide dependant support. In 5 of the 10 cases analyzed, the court assessed the claims that any other person might have as a dependant. If the deceased had no other support claims, the court was more inclined to order a higher quantum of dependant support.[35]

In *Morassut v Jaczynski Estate,* the dependant, Danny, was the deceased's common law spouse.[36] The deceased had one adult daughter, Aneta, from a prior relationship. The court determined that the deceased had a "legal and moral" obligation to take care of the dependent and awarded a very high quantum of support. The court awarded Danny ownership of a summer home, $100,000/year in support, and $50,000 every five years for a new car.[37] Prior to awarding support, the court reiterated three times that the deceased did not have other claims by other dependants. First, the court made a very brief statement that "[n]o other person has any claims against [the deceased's] estate as a dependant." Second, the court explained why the deceased

[32] *Carnevale v Topham Estate*, 2012 ONSC 4178 at para 1.
[33] *Carnevale v Topham Estate*, 2012 ONSC 4178.
[34] *Ibid.*, at para 2.
[35] *Bormans v Bormans Estate,* 2016 ONSC 428 at para 26; *Cummings v Cummings,* 2003 CarswellOnt 571 at para 49; *Batchelor v Looney,* 2015 ONSC 6784 at para 72; *Morassaut v Kacynski Estate*, 2013 ONSC 5856 at para 69.
[36] 2013 ONSC 2856 at para 1; As previously stated, this was the only case where the court identified and discussed every s. 62 *SLRA* factor.
[37] *Morassut v Jaczynski Estate,* 2013 ONSC 2856.

did not have any other legal obligation to provide for a dependant. The court clarified that the only other person who could have a dependant claim was the deceased's daughter, Aneta.[38] However, Aneta could not make a dependant support claim because she had received $3,000,000.00 from the deceased outside of the will.[39] Finally, the court stated that as "[the deceased] failed to make adequate provision for Danny's proper support, and as her only dependant at the date of her death, he [was] entitled to support within the provisions of the SLRA" [emphasis added].[40]

Factors that decrease the quantum of dependant support

Many of the same factors that can increase the quantum of dependant support awarded can also decrease the quantum of dependant support. The following three factors appear to result in a decrease of the quantum of the dependant support award:

i. s. 62 (1)(c): the dependant's capacity to contribute to their own support;

ii. s. 62(1)(d): the dependant's age and physical and mental health; and

iii. s. 62(1)(e): the dependant's needs (i.e. standard of living).

i. s. 62 (1)(c): the dependant's capacity to contribute to their own support

The court will decrease the quantum of dependant support if the applicant can contribute to their own support.[41]

[38] *Morassut v Jaczynski Estate*, 2013 ONSC 2856 at para 95.
[39] *Ibid.*, at para 95.
[40] *Ibid.*, at para 98.
[41] *Romero v Naglic Estate*, 2009 CarswellOnt 3193 at para 60.

In *Romero v Naglic Estate,* the applicant was the deceased's common-law partner for 15 years.[42] The parties had a long romantic relationship, and there was evidence that the applicant contributed to the deceased's business (a s. 62 factor, specifically s.62(1)(i)). Despite this, the court was hesitant to award support as the applicant "has not suggested that he suffers from any infirmity to prevent him from working".[43] Justice Brown stated the following:

> *Further, Mr. Romero's evidence does not clearly, or adequately, explain why he has been unable to obtain employment given his experience in the bar and restaurant business. I am not convinced that Mr. Romero is unable to earn substantial support for himself […]*[44]

This was one of the reasons why the court only awarded the applicant $1500/month in dependant support for one year.[45]

ii. *s. 62(1)(d): the dependant's age and physical and mental health*

If the applicant is younger and does not suffer from major health concerns, the court is less inclined to award a large quantum of dependant support.[46]

In *Grolun v Vanderispailloe Estate,* the court awarded the applicant only $400/month in ongoing dependant support. The applicant was the deceased's wife. At the time of the application she was 53 years old and there was only "some" evidence that she had difficulty with her hips and was suffering from diabetes.[47] The court ultimately awarded a lesser quantum of dependant support because the applicant could earn a livelihood given her age and capacity.[48]

[42] *Romero v Naglic Estate*, 2009 CarswellOnt 3193 at para 2.
[43] *Ibid.*, at para 35.
[44] *Ibid.*, at para 63.
[45] *Ibid.*, at para 69.
[46] *Ibid.*, at para 35.
[47] *Ibid.*, at para 22.
[48] *Ibid.*, at para 23.

iii. *s. 62(1)(e): the dependant's needs (i.e. standard of living).*

Finally, the court will also decrease the quantum of dependant support if there is a lack of evidence regarding the applicant's standard of living. Once again, in *Romero v Naglic Estate* the court was more inclined to award a lower quantum of dependant support because the court did not have enough information about the applicant's standard of living. Specifically, the court stated that *"[t]he absence of such necessary evidence from Mr. Romero about his income, net worth and expenses poses a serious obstacle to his claim for interim support*".[49]

The SSAG and calculating dependant support

In *Matthews v Matthews Estate***,** the court held that the *Spousal Support Advisory Guidelines* ("SSAG") are irrelevant for calculating or quantifying dependant support entitlement because:

> *[…] [the] guidelines are based on income sharing and the formulas in the Advisory Guidelines generate ranges of outcomes rather than precise figures for amount and duration.[...*[50]

However, two years later in *Quinn v Carrigan***,** the Divisional Court overturned the decision in *Matthews* and held that the SSAG can be relevant for quantifying dependant support claims.[51] The Divisional Court held that the "SSAG is one measure of an obligation the deceased owed to his or her spouse prior to death, something to be taken into account in determining what provision should be made for the spouse after death" [emphasis added].[52] There are, however, factors that the court should consider when using the SSAG to quantify dependant support:

[49] *Romero v Naglic Estate*, 2009 CarswellOnt 3193 at para 62.
[50] *Matthews v Matthews Estate*, 2012 ONSC 933 at para 52.
[51] *Quinn v Carrigan*, 2014 ONSC 5682 at para 129.
[52] *Ibid.*, at para 129.

- The SSAG presumes an income split between the testator and spouse because both spouses need to be supported by income. However, in the estates' context, the deceased does not need money;
- A SSAG award is open to variation if the payor's circumstances change. However, in the estates' context the spouse no longer has changing circumstances, which militates in favour of awarding a higher quantum award;
- The SSAG may yield an outcome that is out of proportion with the ability of the estate to provide support because it is based on the testator's income at the time of death.[53]

The court has since upheld the principle in *Quinn* that the SSAG can be used to quantify dependant support claims. In *Charles v Junior and Estate***,** the court stated the following:

> In *Quinn v. Carrigan*, 2014 ONSC 5682 (Ont. Div. Ct.), the Divisional Court recognized that the legal entitlement of an applicant to support immediately prior to the testator's death is a relevant consideration. The court in *Quinn* further held that the guidance provided by the *Spousal Support Advisory Guidelines* was an acceptable way to determine the amount of any legal entitlement to support for this purpose. The court explained that the obligation to pay spousal support follows a determination of the parties' respective incomes, with the higher earning spouse having the obligation to pay support to the spouse earning a lesser amount (at para. 129).[54]

Conclusion

Ontario courts do not follow a consistent analysis to determine the quantum of dependant support that should be awarded. The court seldom addresses all 19 factors set out in section 62(1) of the *SLRA*. Not surprisingly, many factors that increase the quantum can decrease the quantum of dependant support. As such, while there is no specified method to determine the quantum of

[53] *Quinn v Carrigan*, 2014 ONSC 5682 at paras 125-130; Brian A. Schnurr "Cummings v Cummings: The Moral Obligation of the Testator to a Dependant", Estate Litigation, 2nd Edition.
[54] *Charles v Junior and Estate,* 2018 ONSC 7327 at para 25.

dependant support, the factors listed in section 62(1) of the *SLRA* and the SSAG are beneficial tools that can assist counsel in estimating the quantum of dependant support the court will award.

TAB 10

The Six-Minute Estates Lawyer 2019

Voluntary Disclosure in Estate Matters – Canada Revenue Agency Forms

Submitted by:
Paul Taylor
Borden Ladner Gervais LLP

April 29, 2019

Canada Revenue Agency   Agence du revenu du Canada

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Canada Revenue Agency Stamp
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Voluntary Disclosures Program (VDP) Application

Use this form to make an application to correct inaccurate or incomplete information, or to disclose information not previously reported on a tax return. For more information on the Voluntary Disclosures Program (VDP), go to canada.ca/taxes-voluntary-disclosures. Also see Information Circular IC00-1R6 - Voluntary Disclosures Program and GST/HST Memorandum 16-5 - Voluntary Disclosures Program.

This form has seven sections. Sections 1, 2, and 7 are mandatory. Complete sections 3, 4, 5, and 6 as applicable to your disclosure.

If you need a Business Number or a Program Account and don’t have one, we encourage you to visit canada.ca/en/services/taxes/business-number.html to get one before sending us this application.

Applications relating to income tax disclosures may fall into the general or limited program. If accepted under the general program, these applications will be eligible for penalty relief and partial interest relief. If accepted under the limited program, these applications will be eligible for reduced relief. For more information, go to Information Circular IC00-1R6.

Applications related to GST/HST may fall into the wash transaction, general, or limited program. If accepted under the wash transaction program, these applications will be eligible for 100% relief. Applications accepted under the general program will be eligible for penalty relief and partial interest relief, whereas those accepted under the limited program will be eligible for reduced relief. For more information, go to GST/HST Memorandum 16-5.

On this form, the term “taxpayer” includes an individual, an employer, a corporation, a partnership, a trust, or a Goods and Services Tax/Harmonized Sales Tax (GST/HST) registrant/claimant.

In “Section 1 – Part A – Taxpayer” check all of the appropriate boxes applicable to your disclosure.

Section 1 – Taxpayer and authorized representative

Section 1 – Part A – Taxpayer

□ Individual	First name	Last name	Social insurance number
□ Employer	Employer name		Account number R P
□ Corporation	Corporation name		Business number
□ Partnership	Partnership name		Account number R Z
□ Trust	Trust name		Account number T – –
□ GST/HST registrant/claimant	Registrant/claimant name		Account number R T
□ Non-resident	Non-resident account holder name		Non-resident account number N R –
□ Other	Name		Account number

Section 1 – Part B – Taxpayer's mailing address address and phone number

Address			City
Province or State	Postal or ZIP code	Country	Telephone number

Section 1 – Part C – Taxpayer's authorized representative (information on the person authorized to act on your behalf)

Legal name of authorized person or representative					
Address				City	
Province or State	Postal or ZIP code	Country	Telephone number	Extension	Fax number

If you have any of the following items on file with the Canada Revenue Agency (CRA), if you attached any, or if you have recently authorized a representative online, please tick the related box(es). For more information on authorizing a representative online go to canada.ca/taxes-representative-authorization.	Letter of authorization	□ On file with CRA	□ Attached	
	RC59 (update access required)	□ On file with CRA	□ Attached	□ Authorized Online
	T1013 (level 2 authorization is required)	□ On file with CRA	□ Attached	□ Authorized Online

Section 2 – Required information from all applicants

To assist us in determining if your application is accepted under the wash transaction program, general program or limited program, please give a detailed description of your circumstances and facts. State how you obtained the income or asset, when you became aware of the error or omission, reporting history for the income or asset, an explanation as to why the income or asset was not reported, and any steps taken to prevent or correct the error or omission. If necessary, attach a separate sheet.

In order for your application to be considered under the program, your application must meet the following five conditions:

For more information on completing this section, go to Information Circular IC00-1R6 and GST Memorandum 16-5.

1. Past due

Note: Applications that only include information that is less than one year or one reporting period (GST/HST) past due, will not be accepted.

Is the disclosed information at least one year past the due date for filing, or include information that relates to a taxation year that is more than one year past due for filing (not applicable for a GST/HST registrant or claimant)? □ Yes □ No

For GST/HST registrant/claimant only, is the disclosed information at least one reporting period past the due date for filing, or include information that relates to a taxation period that is more than one reporting period past due for filing? □ N/A □ Yes □ No

2. Penalty

Does the disclosure involve the application, or potential application of a penalty (not applicable for GST/HST registrant/claimant)? □ Yes □ No

For GST/HST registrant/claimant only, does the disclosure involve the application or potential application of a penalty or interest? □ N/A □ Yes □ No

3. Voluntary

Did you receive a letter containing an invitation for you to participate in the VDP? □ Yes □ No

Are you aware of an enforcement action against you with respect to the information being disclosed on this application? □ Yes □ No

Are you aware of an enforcement action against a person associated with you, or related to you (this includes, but is not restricted to, corporations, shareholders, spouses and partners), or against a third party, where the purpose and impact of the enforcement action against the third party is sufficiently related to this application? □ Yes □ No

A VDP application will not qualify for relief if CRA has already received information regarding your, or those related to you, potential involvement in tax non-compliance (for example, a leak of offshore banking or other information that names the taxpayer). For more information concerning an enforcement action, see paragraph 30 of Information Circular – IC00-1R6 and paragraph 31 of GST/HST Memorandum 16-5.

4. Complete

Ensure that all relevant issues, accounts, years and documentation (i.e. returns, amended returns, information returns, adjustment requests, etc.) have been included with the application. Is this application complete? □ Yes □ No

If you do not have the supporting documentation for all years since the creation of the account, you must make all reasonable efforts to estimate the pre-tax earnings which includes a breakdown as to how the estimated income amount was calculated. Is an estimate of income being provided with this application? □ Yes □ No

For more information concerning a complete application, see paragraphs 32-34 of Information Circular – IC00-1R6 and paragraphs 29-32 of GST/HST Memorandum 16-5.

5. Payment

Is there a payment or proof of payment attached? □ Yes □ No

To make your payment, or to get more information about the payment methods available to you, go to canada.ca/payments.

Select the appropriate box □ Bank teller receipt □ Online payment receipt □ Cheque □ Payment not required – no taxes owing

□ Select this box to request a payment arrangement

Amount of payment ____________________

Note: When a taxpayer cannot make payment of the estimated tax owing at the time of filing the VDP application, they may request to be considered for a payment arrangement subject to approval from CRA Collections officials. The taxpayer will have to make full disclosure and provide evidence of income, expenses, assets, and liabilities supporting the inability to make payment of the estimated tax owing. In some cases the payment arrangement will need to be supported by adequate security.

Other required information

Have you received assistance from an advisor regarding the non-compliance subject matter disclosed on this application (as per paragraph 44 of Information Circular IC00-1R6 or paragraph 47 of GST/HST Memorandum 16-5)? □ Yes □ No

If yes, provide the name of the advisor.

Section 3 – GST/HST, Domestic, Foreign and Non-Resident Information Return(s) (complete if applicable)

For each information return you are disclosing, please tick the appropriate box and enter the information:

Information return # 1

Indicate the type of information return **attached**. ______________________

Indicate the tax year(s) the information returns are attributable to. ______________________

If applicable, did the asset reported on the information return generate income? □ Yes □ No

If yes, has the income been reported? □ Yes □ No

If yes, indicate the year(s) the income was reported. ______________________

Note: If the income was not reported complete "Section 5" for domestic income and "Section 6" for foreign income.
If you are completing this form on paper, attach a separate sheet with the same information as above for each information return you submit.

Section 4 – GST/HST (complete if applicable)

Complete this area if you are disclosing GST/HST non-compliance

Wash Transactions
Does your application involve or include GST/HST “wash transactions” that are eligible for a reduction of penalty and interest under the policy set out in GST/HST Memorandum 16.3.1, Reduction of Penalty and Interest in Wash Transaction Situations? □ Yes □ No

If you answered yes to the question above, does this application involve related companies? □ Yes □ No

If yes, enter the related business numbers: ______________________

Other

Is there an over-claimed ITC or rebate amount? □ Yes □ No

Is there an amount of GST/HST collected from clients but not remitted? □ Yes □ No

Is there an amount of GST/HST not collected from clients, nor reported or remitted? □ Yes □ No

If your GST/HST disclosure information cannot be represented in the table below, provide a separate document providing the details.

To enter consecutive returns in the fields below, enter your first return of the sequence under ‘Reporting period start date’ and your most recent return under ‘Reporting period end date’.

Select your GST/HST reporting frequency □ Monthly □ Quarterly □ Annually

Reporting period start date	Reporting period end date	Amount of GST/HST that was not included in the return for the period	Amount of over-claimed ITC	Amount of over-claimed rebate	Estimated net tax owing
	Total				

For disclosures which include any off-setting unclaimed ITC's or unclaimed rebates, please provide the following:
A detailed explanation of all ITC's or unclaimed rebates being requested, including any supporting documentation.

Section 5 – Domestic income (from Canadian sources) (complete if applicable)

Complete this area if you are disclosing domestic income, expenses or deductions (does not include GST/HST)

Type of return	Type of adjustment	Relevant tax year(s)	Gross amount of income disclosed	Estimated net tax owing
		Total		

For disclosures which include expenses or credits, please provide the following:

A detailed explanation of all expenses or credits being claimed.
Supporting documentation for all expenses or credits.

Section 6 – Foreign income (complete if applicable)

Section 6 – Part A – Complete this area if you are disclosing foreign income

If you are completing this form on paper, attach a separate sheet with the same information as below for each source of foreign income you submit.

Foreign income # 1

Asset or source of income

Type of foreign income	Relevant tax year(s)	Gross amount of income disclosed	Estimated net tax owing

Section 6 – Part B – Type of foreign income

Note: Provide the following information for each type of foreign asset identified in Part A above. Attach a separate sheet(s) if necessary.

Has the asset identified generated income? □ Yes □ No

If yes, has the income been reported? □ Yes □ No

If yes, indicate the tax year(s) the income was reported. ____________________

If no, is the income part of this application? □ Yes □ No

Section 6 – Part C – Required supplemental information

Country where the asset is located. ____________________

Name of the bank or institution, name(s) on the account (taxpayer(s) or joint account(s) or names of offshore entities).

Enter the year the account was created. __________

How did you learn about opening the account (for example, marketing by domestic institution or representative; sales agent from offshore entity; lawyer; accountant)?

Amount of original capital contribution upon the creation of the offshore asset. ____________________

Source of the original capital contribution. ____________________

Pre-tax or post-tax funds? □ Pre-tax □ Post-tax

If applicable, how were the funds moved from Canada to the offshore account? Provide details as to the steps involved in moving the funds from Canada to the offshore account. Attach a separate document if necessary.

Did the funds you used to buy the asset come from a non-taxable source, such as an inheritance or gift? □ Yes □ No

If yes, select a source.

Did you self-manage the account (for example, online, by mail, by phone, visiting an institution, visits from a representative)? □ Yes □ No

Were any financial instruments associated with the account in question (i.e. offshore debit card or offshore credit card)? □ Yes □ No

If yes, provide details.

Section 6 – Part D – For disclosures which include expenses or credits, please provide the following:

Attach a detailed explanation of all expenses or credits being claimed.

Supporting documentation for all expenses or credits.

Section 6 – Part E – For disclosures identifying shares of non-resident corporations (other than foreign affiliates) also provide the following:

Enter date of acquisition. (Year Month Day) ________________

Enter original cost amount. ____________________________

Attach an analysis of the gain(s) and loss(es) throughout the taxation year outlining the gain(s)/loss(es) on the dispositions as well as the foreign exchange rates used for the conversion.

Section 7 – Declaration

Section 7 – Part A – Taxpayer declaration and signature

This application must be signed by the taxpayer.

I declare that the information and documentation submitted with my application is, to best of my knowledge, true and complete.

I recognize that:

The CRA reserves the right to audit or verify any information provided in this VDP application whether or not it is accepted for relief by the VDP.

I acknowledge that the information I have disclosed in this application constitutes taxpayer information about my tax affairs. This information may be referred to another CRA program area even if I withdraw my VDP application or the CRA concludes that I am not eligible for relief under the VDP. This referral may result in an assessment or reassessment, the charging of penalties and interest, and potentially the initiation of an investigation and prosecution.

In cases where relief is denied, an explanation of the reasons for the decision will be given. Relief of arrears interest and penalties payable may still be requested in accordance with the taxpayer relief provisions described in Information Circular - IC 07-1R1 and GST/HST Memorandum 16-3.

I understand that by submitting this application, I will not have the right to file an objection or an appeal under the Income Tax Act or Excise Tax Act to dispute a decision made by the VDP to deny relief or allow partial relief. Instead, where I believe the Minister or their delegate has not exercised their discretion in a fair and reasonable manner, I understand that I may submit a written request for an administrative review and reconsideration of the original decision by the VDP. If I am not satisfied with the result of the review of the original decision made by the VDP, I understand that I have the right to make an application to the Federal Court for a judicial review of the Minister's decision.

I understand that if the CRA indicates that my application is eligible for acceptance into the limited program, in consideration of the relief being provided, I will be required to waive my right to file an objection or appeal regarding the specific matter disclosed in my application. However, in signing this waiver, I reserve the right to file a notice of objection or appeal where a resulting assessment or reassessment includes a calculation error, relates to a characterization issue (i.e. income versus capital gains treatment), or relates to an issue other than the matter disclosed in this VDP application. I also understand that if a waiver is requested by the CRA, the waiver must be signed by me and returned within the time period provided in the request before my acceptance into the limited program is granted. When a signed waiver is received by the CRA, a decision letter will be issued. I understand that under these circumstances if I do not sign and return a waiver within the time period provided, the CRA will not give further consideration to my application for relief and the VDP will close my file.

Finally, I understand that where the CRA finds any misrepresentation, attributable to neglect, carelessness, wilful default or fraud, with respect to this application and supporting information, a reassessment may be issued at any time for any taxation year or reporting period to which the misrepresentation relates, not just those years or reporting periods included in this VDP application. Consistent with the principles of the VDP, in the case of misrepresentation any relief that may have been granted under the VDP will be cancelled.

Enter the title (role) of the taxpayer (i.e. individual, director, trustee, agent etc.).

Taxpayer signature (Year Month Day)

____ ________________________

Section 7 – Part B – Authorized representative's signature

I am the authorized representative of the taxpayer making this voluntary disclosure application and believe that the information provided therein is to the best of my knowledge, true and complete.

Authorized representative's signature (Year Month Day)

____ ________________________

Personal information is collected under the authority of the *Income Tax Act*, the *Excise Tax Act*, the *Excise Act*, the *Excise Act, 2001*, the *Air Travellers Security Charge Act* and the *Softwood Lumber Products Export Charge Act, 2006* and will be used to process voluntary disclosures of information not previously reported by taxpayers who can avoid penalties that the taxpayers would otherwise be subject to under the Acts noted above, and avoid prosecution. It may also be used for any purpose related to the administration or enforcement of the Act and may be shared or verified with other applicable provincial/territorial government institutions to the extent authorized by law. Failure to provide this information may result in the denial of your application.

Personal information is described in personal information bank CRA PPU 220. Under the *Privacy Act*, individuals have a right of protection, access to and correction or notation of their personal information and to file a complaint with the Privacy Commissioner of Canada regarding our handling of their information.

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INCOME TAX
INFORMATION CIRCULAR

NO. **IC00-1R6** DATE: December 15, 2017

SUBJECT: **Voluntary Disclosures Program**

This version is only available electronically.

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Application

1. The *Voluntary Disclosures Program* (VDP) applies to disclosures relating to income tax, source deductions, excise duties under the *Excise Act*, 2001, excise tax and GST/HST under the *Excise Tax Act*, as well as charges under the *Air Travellers Security Charge Act* and *Softwood Lumber Products Export Charge Act*, 2006. This information circular provides information on the discretionary authority of the Minister of National Revenue (Minister) to grant relief from any penalty or interest under subsection 220(3.1) of the *Income Tax Act* (ITA). GST/HST Memorandum 16.5, *Voluntary Disclosures Program*, provides information on the discretionary authority of the Minister under the other legislation listed above.

2. This information circular applies to VDP applications received on or after March 1, 2018 and supersedes Information Circular IC00-1R5, Voluntary Disclosures Program, dated January 2017. In order for a taxpayer to qualify for the VDP relief outlined in Information Circular IC00-1R5, the CRA must have received the taxpayer's application, including their name, on or before February 28, 2018.

3. In this information circular, the term "taxpayer" includes an individual, an employer, a corporation, a partnership, or a trust.

4. Unless otherwise specified, all legislative references in this information circular refer to the ITA.

Introduction

5. Through the VDP, taxpayers can make an application to correct inaccurate or incomplete information, or to disclose information not previously reported. For example, taxpayers may not have met their tax obligations if they claimed ineligible expenses, failed to remit source deductions, did not file an information return, or underreported their income.

6. Effective March 1, 2018, VDP applications relating to income tax disclosures may fall into one of two tracks:

The first track is a General Program. If accepted under the VDP, these applications will be eligible for penalty relief and partial interest relief.

The second track is a Limited Program. Applications that disclose non-compliance where there is an element of intentional conduct on the part of the taxpayer or a closely related party will be processed under this Limited Program and if accepted, will receive reduced relief under the VDP. The determination of whether an application should be processed under the Limited Program will be made on a case by case basis, using the factors outlined in paragraph 20.

Details of the relief provided under the VDP for both tracks is described in paragraphs 13 to 18 below.

7. This information circular also explains how a taxpayer may make an application, including the proper information and documentation needed to support such an application. In addition, it outlines the administrative guidelines the Canada Revenue Agency (CRA) will follow in making a decision whether to accept the application under the VDP.

8. The information provided on the VDP process is only a guideline, is not intended to be exhaustive, and is not meant to restrict the spirit or intent of the legislation, or to unduly limit the Minister's discretion.

Principles of the VDP

9. The VDP promotes compliance with Canada's tax laws by encouraging taxpayers to voluntarily come forward and correct any previous errors or omissions in their tax affairs. If a VDP application is accepted by the CRA, taxpayers will have to pay the taxes owing, plus interest in part or in full. However, taxpayers would be eligible for relief from prosecution and, in some cases, from penalties that they would otherwise be subject to under the legislation.

10. The majority of taxpayers comply with their obligations and an important principle of the VDP is that the relief be fair and not be considered to reward non-compliance. In other words, it is important to ensure that taxpayers who are fully compliant are not worse off economically than those seeking to correct their affairs through this program. The VDP is not intended to serve as a vehicle for taxpayers to intentionally avoid their legal obligations under legislation administered by the CRA.

11. The Minister is not required to grant relief in respect of all applications made to the VDP. Each request will be reviewed and decided on its own merits. In exercising discretion, the Minister is guided by principles of procedural fairness which require decisions to be made in good faith, in a manner that promotes the objects of the ITA. This information circular provides general guidelines on some of the relevant considerations in the exercise of this discretion. If relief is denied, the CRA will provide the taxpayer with an explanation of the reasons for the decision. In such cases, relief of arrears interest and any penalties payable may be requested and considered in accordance with the taxpayer relief provisions as described in IC 07-1R1, *Taxpayer Relief Provisions*.

12. The CRA reserves the right to audit or verify any information provided in a VDP application whether it is accepted under the VDP or not. If the CRA finds there is any misrepresentation due to neglect, carelessness, wilful default, or fraud, a reassessment can be issued at any time for any tax year to which the misrepresentation relates, not just those years included in the VDP application. Furthermore, any relief that may have been granted under the VDP will be cancelled as a result of the misrepresentation.

Relief Provided Under the VDP

Penalty Relief

13. If a VDP application is accepted as having met the conditions set out in paragraph 28, it will be considered a valid disclosure. Under the General Program, the taxpayer will not be charged penalties (subject to the limitation period explained in paragraph 17) and will not be referred for criminal prosecution with respect to the disclosure (i.e. for tax offences).

14. Under the Limited Program, the taxpayer will not be referred for criminal prosecution with respect to the disclosure (i.e. for tax offences) and will not be charged gross negligence penalties even where the facts establish that the taxpayer is liable for such penalties. However, the taxpayer will be charged other penalties as applicable.

Interest Relief

15. In addition to penalty relief, if a VDP application is accepted by the CRA under the General Program, the Minister may grant partial relief in the application of interest against a taxpayer in respect of assessments for years preceding the three most recent years of returns required to be filed (subject to the limitation period explained in paragraph 18). Generally, this interest relief will be 50% of the applicable interest for those periods. Full interest charges will be assessed for the three most recent years of returns required to be filed.

16. If a VDP application is accepted into the Limited Program, no interest relief will be provided.

Limitation Period on Discretion for Relief of Penalties and Interest

17. The Minister's ability to grant penalty relief is limited to any penalty that could apply to any taxation year that ended within the previous 10 years before the calendar year in which the application is filed.

18. The Minister's ability to grant interest relief is limited to the interest that accrued during the 10 previous calendar years before the calendar year in which the application is filed. This is the case regardless of the taxation year (or fiscal period) in which the tax debt arose. For more information, go to **canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/complaints-disputes/revised-10-year-limitation-period-interest-relief**.

Providing VDP Relief

Circumstances Where Relief May be Considered

19. Relief under the VDP may be considered if a taxpayer:

- failed to fulfill their obligations under the ITA,
- failed to report any taxable income they received,
- claimed ineligible expenses on a tax return,
- failed to remit source deductions of their employees,
- failed to file information returns, or
- failed to report foreign sourced income that is taxable in Canada.

Circumstances Where Reduced Relief May be Considered Under the Limited Program

20. In general terms, the Limited Program provides limited relief for applications that disclose non-compliance where there is an element of intentional conduct on the part of the taxpayer or a closely related party. The following factors may be considered:

- efforts were made to avoid detection through the use of offshore vehicles or other means,
- the dollar amounts involved,
- the number of years of non-compliance,
- the sophistication of the taxpayer,
- the disclosure is made after an official CRA statement regarding its intended specific focus of compliance (for example, the launch of a compliance project or campaign) or following broad-based CRA correspondence (for example, a letter issued to taxpayers working in a particular sector about a compliance issue) .

For example, a taxpayer who opened an offshore bank account in 2010 and has been transferring undeclared business income earned in Canada to that account since that time would not normally qualify under the General Program.

21. Generally, applications by corporations with gross revenue in excess of $250 million in at least two of their last five taxation years, and any related entities, will be considered under the Limited Program.

22. The existence of a single factor will not necessarily mean that a taxpayer is eligible only for the Limited Program. For example, a sophisticated taxpayer may still correct a reasonable error under the General Program.

Circumstances Where Relief Will Typically Not be Considered

23. While special situations will be considered on a case-by-case basis, the following applications will generally not be considered under the VDP:

- applications that relate to income tax returns with no taxes owing or with refunds expected; these would be handled using normal processing procedures.
- elections; there are provisions within the various acts administered by the CRA which entitle taxpayers to choose or "elect" specific treatment of certain tax transactions, e.g. section 216 returns under the ITA. For more information about late, amended, or revoked elections, see **canada.ca/en/revenue-agency/services/forms-publications/publications/ic07-1r1**;
- applications relating to an advance pricing arrangement (an agreement with a taxpayer that confirms the appropriate transfer pricing methodology);
- applications that depend on an agreement being made at the discretion of the Canadian competent authority under a provision of a tax treaty, e.g. S-corporation agreements under Article XXIX(5) of the Canada-US Treaty;
- applications where a person is in receivership or has become bankrupt;
- post-assessment requests for penalty and interest relief; these requests will be considered to be retroactive tax planning.

24. Given the complexity of transfer pricing issues, applications relating to transfer pricing matters will be referred to the Transfer Pricing Review Committee for their consideration under subsection 220(3.1). For efficiency, taxpayers are invited to send their applications directly to:

Transfer Pricing Review Committee
c/o International Tax Division
344 Slater Street
Ottawa ON K1A 0L5

A Second Application by the Same Taxpayer

25. Taxpayers are expected to remain compliant after being granted relief under the VDP. A taxpayer is generally entitled to obtain the benefits of the VDP only once. A second application from the same taxpayer will normally only be considered by the CRA if the circumstances surrounding the second application are both beyond the taxpayer's control and related to a different matter than the first application.

26. The CRA will verify if a taxpayer has made a previous application. If it is discovered during the course of the review that the taxpayer had previously made an application, the CRA **may** refuse to give the second application further consideration under the VDP.

27. If an attempted second application is made for the same issue that was previously denied as incomplete due to information not being received by the stipulated date, then the second application will be denied.

Conditions of a Valid Application

28. A VDP application must meet the following five conditions to be valid and qualify for relief. The application must:

- be voluntary;
- be complete;
- involve the application or potential application of a penalty;
- include information that is at least one year past due; and
- include payment of the estimated tax owing.

Voluntary

29. Subject to the exceptions in paragraph 31, a VDP application will not be voluntary if:

- the taxpayer was aware of, or had knowledge of an enforcement action (see paragraph 30) set to be conducted with respect to the information being disclosed to the CRA,
- enforcement action (see paragraph 30) relating to the subject matter of the VDP application has been initiated against the taxpayer, or a person associated with, or related to, the taxpayer (this includes, but is not restricted to, corporations, shareholders, spouses and partners), or against a third party, where the purpose and impact of the enforcement action against the third party is sufficiently related to the present application; **or**
- the CRA has already received information regarding the specific taxpayer's (or a related taxpayer's) potential involvement in tax non-compliance (for example, a leak of offshore banking or other information that names the taxpayer).

30. For purposes of the VDP, an "enforcement action" may include, but is not limited to:

- an audit, examination, investigation or other enforcement action by the CRA or any other authority or administration, such as, but not limited to, a law enforcement agency, securities commission, or federal or provincial authorities;
- requests, demands or requirements issued by the CRA, relating to unfiled returns, unremitted taxes/ instalments, deductions required at source; (although these actions may only pertain to one specific year, the procedure will be considered to be an enforcement action, for purposes of the VDP, for all taxation years);
- requests, demands or requirements which have been issued with reference to other tax affairs of the taxpayer, partners of the taxpayer, trusts in which the taxpayer is a settlor, trustee or beneficiary, or corporations associated with or related to the taxpayer; and/or
- direct contact by a CRA employee for any reason relating to non-compliance (e.g. unfiled returns, audit, collection issues).

31. Not all CRA initiated enforcement action may be cause for a VDP application to be denied by the CRA. Examples of this include:

- a letter from the CRA inviting the taxpayer to use the VDP to correct their tax affairs; however, this letter would be a factor that could result in the application being considered under the Limited Program; or
- a recent audit of a taxpayer was related to a GST/HST issue. The same taxpayer is submitting a VDP application for an amount of source deductions (payroll), which was withheld but not remitted to the CRA as required. There may be no correlation between these two taxation issues and as such, the enforcement action on the GST/HST account may not be cause to deny the VDP application.

Complete

32. A taxpayer's VDP application must be made for all relevant taxation years where there was previously inaccurate, incomplete or unreported information regarding their tax affairs, including any non-arm's length transactions and circumstances. In cases where books and records no longer exist, the taxpayer should make all reasonable efforts to estimate the income for those years.

For example: A taxpayer opened an offshore bank account in 2000 with an initial deposit of $400,000. Books and records only exist for the years 2007 to 2015. As of January 1, 2007, the balance in the bank account was $2,500,000. In this case, the taxpayer should make all reasonable efforts to estimate all the unreported pre-tax earnings that were deposited to the account during that time, as well as the interest income that would have been earned in the years where books and records are no longer available (2000 to 2006) in order for the VDP application to be considered complete.

33. There may be extraordinary circumstances where the taxpayer cannot submit all of the information or documentation with their VDP application. In these circumstances, a request for an additional specified period of time must be made in writing at the time the application is submitted. Upon review of the request, the CRA may allow the taxpayer a period of time to submit such information in order to complete the application. Normally this period of time is no more than 90 days from the effective date of disclosure (EDD) (paragraphs 50 to 55).

34. While the information provided in an application must be complete, the application may not be disqualified simply because it contains minor errors or omissions. As well, if the CRA is satisfied that the taxpayer has provided all available information and legitimately cannot locate or obtain certain documents (e.g. relating to a deceased relative) or has made reasonable efforts to estimate income amounts related to years for which documentation is unavailable, the application may be considered to be complete. Each application will be reviewed on its own merits.

Penalty

35. A request for VDP relief must involve the application, or potential application of a penalty. The penalty type that could normally be imposed may be a late filing penalty, a failure to remit penalty, an instalment penalty, an omission penalty, or a gross negligence penalty.

36. In the event a penalty does not apply, the taxpayer cannot seek relief through the VDP. However, the information should still be submitted and it will be handled through the CRA's normal processing procedures.

One Year Past Due

37. The VDP application must include information that relates to a taxation year that is at least one year past the due date for filing. The program is not meant to be used as a de facto filing extension. However, an application that includes information that relates to a taxation year that is more than one year past due and information that is more recent may be considered.

38. For example, a taxpayer had not filed tax returns for the years 2012 to 2016. On November 10, 2017, the taxpayer submitted all of the tax returns requesting that they be considered under the VDP. Although the 2016 tax return is less than one year past due (filing deadline of April 30, 2017), the CRA will consider the 2016 return as part of the VDP application, provided that all other conditions have been met.

In contrast, the 2016 tax return would not be considered for VDP treatment if it is the only return being filed. In that case, the 2016 return would be handled through the CRA's normal processing procedures.

Payment

39. Subject to paragraph 40, the taxpayer must include payment of the estimated tax owing with their VDP application.

40. When the taxpayer does not have the ability to make payment of the estimated tax owing at the time of the VDP application, they may request to be considered for a payment arrangement subject to approval from CRA Collections officials. The taxpayer will have to make full disclosure and provide evidence of income, expenses, assets, and liabilities supporting the inability to make payment in full. In some cases, the payment arrangement will need to be supported by adequate security.

Making a VDP Application

Pre-Disclosure Discussion

41. Taxpayers who are unsure if they want to proceed with an application are given an opportunity to participate in preliminary discussions about their situation on an anonymous basis to get insight into the VDP process, a better understanding of the risks involved in remaining non-compliant, and the relief available under the VDP. These discussions with a CRA official are for the benefit of the taxpayer; they are informal, non-binding, and may occur before the identity of the taxpayer is revealed. For complex technical reporting issues or questions, taxpayers will be referred to a CRA official in a specialized audit area to discuss their situation on an anonymous basis.

42. These discussions do not constitute acceptance into the VDP and have no impact on CRA's ability to audit, penalize, or refer a case for criminal prosecution.

Information/Documentation Required

43. Taxpayers should use Form RC199, *Voluntary Disclosures Program (VDP) Application* to apply for VDP. If a taxpayer is not using Form RC199, the VDP application should contain all of the information requested on that form. All CRA returns, forms and schedules needed to correct the non-compliance must be included with the application.

44. Where a taxpayer received assistance from an advisor in respect of the subject matter of the VDP application, the name of that advisor should generally be included in the application.

45. It is expected that taxpayers and/or their representatives will co-operate in the voluntary disclosure process. While the VDP application is being evaluated, the CRA official may request documents, records, books of account, as well as other additional specific documentation, for example information relating to foreign accounts and assets, financial institutions and advisers. The taxpayer must comply with such requests within the stipulated timeframes, and provide sufficient detail to allow the facts of the case to be verified. If a taxpayer refuses to provide complete documentation or if the CRA is not satisfied that the application is complete, then the taxpayer will in most cases not be eligible for relief.

46. Due to the nature of a particular application, referrals to other programs within the CRA may be necessary in order to fully analyze the application. Furthermore, applications involving complex issues or large dollar amounts will be reviewed for completeness by a specialist area prior to the VDP application being accepted.

Authorization of a Taxpayer's Representative

47. The taxpayer's authorized representative can submit the application for relief under the VDP. In this case, both the taxpayer and the authorized representative must sign the VDP application (paragraph 43).

48. The taxpayer must grant proper authorization to the representative by submitting a signed copy of the appropriate authorization form.

- For individuals (income tax matters), through the online services in My Account, in writing, or by sending a completed Form T1013, *Authorizing or Cancelling a Representative*.
- For all business entities (all business program accounts), through the online services in My Business Account, in writing, or by sending a completed Form RC59, *Business consent for access by telephone and mail*.
- For matters pertaining to Canada Pension Plan or Employment Insurance disclosures, submit Form CPT139, *Canada Pension Plan (CPP)/Employment Insurance (EI) – Authorizing or Cancelling a Representative*.

A copy of the authorization should be attached to the VDP application.

49. The CRA cannot discuss any confidential information with a representative prior to receiving the appropriate authorization.

The Effective Date of a Disclosure (EDD)

50. The EDD is the date the CRA receives a completed and signed VDP application (paragraph 43).

51. From this date, provided that the application meets the five validity conditions (paragraph 28), the taxpayer is granted protection from the initiation of prosecution action related to the disclosure and penalty relief, where applicable regarding the amounts included in the disclosure.

52. If the application does not otherwise meet the five conditions to qualify for relief, the application will not be accepted into the VDP and therefore there is no EDD.

53. If necessary, the taxpayer may have up to 90 days from the EDD for the submission of additional CRA-requested information and/or documentation to complete the application.

54. If this time frame is not sufficient due to the complexity of the application or other extraordinary circumstances, CRA officials may authorize an extension of this period, upon receipt of a written request from the taxpayer or an authorized representative. The additional information must be provided within the stipulated time frame.

55. If the additional information and/or documentation is not received within the stipulated time frame, the CRA may commence enforcement action wherein penalties and interest may be imposed and an investigation and subsequent prosecution action may be initiated.

Where to Make an Application

56. The completed VDP application must be sent either:

- Electronically:
  - My Account, at **canada.ca/may-cra-account**;
  - My Business Account, at **canada.ca/my-cra-business-account**; or
  - Represent a Client, at **canada.ca/taxes-representatives**

(For more information go to **canada.ca/cra-submit-documents-online**)

- By mail:

  Voluntary Disclosures Program
  Shawinigan National Verification and Collections Centre
  4695, Shawinigan-Sud boulevard
  Shawinigan, QC G9P 5H9

- By fax:

  1-888-452-8994

Acceptance of a VDP Application

57. If it is determined that the five conditions to qualify for relief (paragraph 28) have been met, the taxpayer will be advised in writing of the following:

- the application has been accepted into the VDP (and for applications received on or after March 1, 2018, under which track – see paragraph 6),
- the taxation years eligible for VDP relief,
- the EDD,
- the disclosed information may be referred to another CRA program area, and
- the disclosed information will be sent to the appropriate area for processing the assessment or reassessment.

Denial of a VDP Application

58. If it is determined that any of the five conditions to qualify for relief (paragraph 28) have not been met or it is a circumstance where the VDP application will typically not be considered (paragraph 23); the taxpayer will be advised in writing that:

- the application has been denied,
- the disclosed information may be referred to another CRA program area,
- the disclosed information may result in an assessment or reassessment,
- penalties and interest may be levied, and
- in certain circumstances, an investigation and prosecution may be initiated.

Right of Redress for the Taxpayer

Second Administrative Review

59. There is no right of objection under the ITA for a taxpayer to dispute a discretionary decision that denied relief, or allowed only partial relief. However, if the taxpayer believes that the Minister has not exercised discretion in a fair and reasonable manner, the taxpayer may request in writing that the Assistant Director of the Shawinigan National Verification and Collections Centre review and reconsider the original decision. The taxpayer has the opportunity at that time to make additional representations for the CRA to consider. The CRA will not consider a request for a second review if an application was denied because the information was not previously submitted within the stipulated time frame.

60. The Assistant Director may designate a delegated authority, not involved in the previous review and decision, to carry out the second administrative review on their behalf.

Judicial Review

61. Where a taxpayer believes the Minister has not exercised discretion in a fair and reasonable manner, the taxpayer may make an application to the Federal Court for a judicial review of the Minister's discretionary decision, pursuant to section 18.1 of the *Federal Courts Act*, within 30 days from the date the notification of the decision was communicated to the taxpayer.

62. To request a judicial review, the taxpayer must send a completed Form 301, *Notice of Application*, with the appropriate filing fee, to the registrar of the Federal Court. For more information on how to file an application for judicial review or other general enquiries, contact the Courts Administration Service at **1-800-663-2096**, or go to their website at **www.cas-satj.gc.ca**.

63. If the Federal Court is of the view that the Minister's discretion was not properly exercised, the Court may set aside the Minister's decision and refer the request back to the CRA for reconsideration by another delegated official.

64. As a general rule, taxpayers should request a second administrative review from the CRA before filing an application for a judicial review with the Federal Court.

Objection Rights

65. Under subsection 165(1.2), a taxpayer is prohibited from filing an objection to dispute the assessment of penalties and interest made under subsection 220(3.1). This applies to VDP applications that have been accepted under either the General or Limited Program.

66. Furthermore, if a taxpayer's application is accepted under the Limited Program, in consideration of the relief being provided, the taxpayer will be required to waive their rights to object and appeal in relation to the specific matter disclosed in the VDP application and any specifically related assessment of taxes. However, this waiver will not prevent a taxpayer from filing a Notice of Objection in circumstances where the assessment includes a calculation error, relates to a characterization issue (such as income versus capital gain treatment), or relates to an issue other than the matter disclosed in the VDP application.

Need More Information

67. For more information on the *Voluntary Disclosures Program*, go to **canada.ca/taxes-voluntary-disclosures**.

68. All income tax technical publications are available on the CRA webpage Technical information – Income Tax at **canada.ca/en/revenue-agency/services/tax/technical-information/income-tax**.

69. To make an income tax enquiry by telephone:

- For individuals, call **1-800-959-8281**;
- For businesses, call **1-800-959-5525**;

For all others, go to **canada.ca/en/revenue-agency/corporate/contact-information/telephone-numbers**.

Comments

70. If you have any comments about this information circular, please write to us at:

Voluntary Disclosures Program
Domestic Compliance Programs Branch
Canada Revenue Agency
Ottawa ON K1A 0L5

Web link to Canada Revenue Agency Authorizing or Cancelling a Representative (Form T1013)

https://www.canada.ca/content/dam/cra-arc/formspubs/pbg/t1013/t1013-fill-17e.pdf

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TAB 11

The Six-Minute Estates Lawyer 2019

The Current State of Draft Planning for Disabled Beneficiaries

Jonathan Keslassy
Keslassy Freedman Gelfand LLP

April 29, 2019

The Current State of Draft Planning for Disabled Beneficiaries

Jonathan Keslassy
Keslassy Freedman Gelfand LLP

Introduction: The Henson Trust

Any discussion regarding estate planning for disabled beneficiaries invariably begins with the *Henson* trust, derived from the case *Ontario (Director of Income Maintenance Branch of the Ministry of Community and Social Services) v. Henson*. Since its beginnings in 1987, it has proven to be one of the most valuable tools in estate planning for a disabled beneficiary. The primary purpose of the *Henson* trust is to ensure that publicly funded social assistance benefits by a person with disabilities remains intact while simultaneously allowing that beneficiary's entitlement in an estate remain unaffected.[1]

At the crux of the *Henson* trust is the discretionary power the trustee is given in relation to all payments from the trust to the beneficiary.[2] To ensure the viability of a proper *Henson* trust, its main features must include that the person with a disability for whom the trust was settled is incapable of compelling the trustee to issue payments.[3] Secondly, a gift over of any remainder of the trust capital upon the death of the beneficiary is also an essential element. This ensures clarity that the beneficiary's interest in the estate does not and will not vest in the beneficiary.[4] From a drafting perspective, it is crucial that the trust funds remain out of reach of the beneficiary.

[1] *Ontario (Director of Income Maintenance Branch of the Ministry of Community and Social Services) v. Henson* (1987), 26. O.A.C. 332 (Div. Ct.), aff'd in (1989), 36 E.T.R. 192 (Ont. C.A.)).

[2] *Stoor v. Stoor Estate*, 2014 ONSC 5684, at para 7.

[3] *Stoor*, at para 7; *Elliott (Litigation guardian of) v. Elliott Estate* (2008), 45 E.T.R. (3d) 84 (S.C.), at para 35.

[4] *Stoor*, at para 7.

This was precisely the issue in the 2017 decision *Armstrong v. Director, Ontario Disability Support Program*. It was determined that the trust in question was not, in fact, a true discretionary trust as a result of the beneficiary receiving a payment on each and every occasion that one was requested.[5]Amongst other factors, such as the beneficiary selecting the trustee and making other financial decisions in relation the trust, the beneficiary's involvement single handedly diminished its standing as a proper discretionary trust. It was apparent that the beneficiary had direct access to the trust and, as such, this is a factor to be carefully considered when it comes to drafting proper *Henson* clauses. Particularly, the proximity in relationship between the trustee and beneficiary should be contemplated if there is a possibility that the trustee may be easily influenced by requests made by the beneficiary.

While the case law has been sparse, the recent case of *S.A. v. Metro Vancouver Housing Corp.* delved into these issues for the first time in a long time. Below is a brief overview of the case and some key considerations for estate lawyers.

S.A. v. Metro Vancouver Housing Corp.

A. FACTS

In this Supreme Court of Canada (SCC) case, a disabled person, S.A., was residing in a housing complex through Metro Vancouver Housing Corporation (MVHC), a non-profit corporation which facilitates and manages subsidized housing complexes. In order to receive rent subsidies, S.A. was required to demonstrate annually that she met the eligibility criteria by submitting to MVHC an assistance application showing that she held less than $25,000 in assets.

[5] *Armstrong v. Director, Ontario Disability Support Program*, 2017 ONSBT 6203.

Having resided in these complexes since 1992 and having received rental assistance from MVHC every year until 2015, the issues in this case arose when S.A., who held an interest in a trust settled for her benefit in 2012, refused to disclose the balance of the trust. The trust was structured as a *Henson* trust to which S.A. was a co-trustee with her sister. As per the elements of a *Henson* trust, S.A. was unable to compel the trustees to make payments to her and she was incapable of unilaterally collapsing the trust as any remaining funds within the trust were to be passed to another beneficiary as a "gift over". Central to this case was the issue of whether the trust settled in S.A.'s favour formed part of her assets for the purpose of her assistance application.

B. THE DECISION

The majority, finding in favour of S.A., determined that she had no enforceable right to receive any distributions from the trust, unless and until the trustees exercised their discretion to do so. Ultimately, Justice Côté found that despite her position as a co-trustee, S.A. has:

> …no independent, concrete right to compel any payments to be made to her or for her benefit, and cannot unilaterally terminate the Trust. Her interest in the trust property therefore amounts to a "mere hope" that the trustees will exercise their discretion in a manner favourable to her.[6]

S.A.'s role as a co-trustee was determined to have no affect on the nature of her interest in the trust since all decisions had to be unanimous. As such, her discretionary power as a trustee was entirely dependent on coming to an agreement with her co-trustee. This determination will be a key feature in drafting future *Henson* trusts, discussed further below, where a disabled person has been designated as a trustee in addition to a beneficiary. The SCC further found that there was a distinction to be drawn between a *requirement to consider* whether distributions should be made

[6] *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, at para 4; D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 1204, note 155.

and an *obligation to exercise* such discretion. Simply put, there existed no commitment or obligation on the part of the co-trustee to make any distributions to S.A. from the trust.

Finally, the court consider the rule in *Saunders v. Vautier* and determined that the nature of the trust in question was such that S.A. was unable to unilaterally cause it to collapse. This rule dictates that a beneficiary of a trust, or multiple beneficiaries acting jointly, can demand that a trustee immediately convey what is owed to them and effectively terminate the trust, but only where the beneficiary has the requisite capacity and is entitled to all the rights of beneficial ownership in the trust property.[7] In this instance, the trust provided for a "gift over" where, upon S.A.'s death, the remaining funds in the trust were to pass to her beneficiaries. As such, the "gift over" created an added layer of separation between S.A. and the corpus of the trust.

***S.A. v. Metro Vancouver Housing Corp.* and Future Draft Planning**

There are several takeaways from the *S.A. v. Metro Vancouver Housing Corp.* decision that prove to be crucial in draft planning for disabled beneficiaries, particularly when it comes to the proper construction of a *Henson* trust. At the crux of this recent SCC decision is the notion of a "mere hope" for a beneficiary. This case importantly showed that a disabled beneficiary can act as a co-trustee and nonetheless lack sufficient discretion to unilaterally make distributions from a trust for his or her own benefit.

In addition to the discretionary powers, the element of the trust's "gift over" proved to be a second key feature to this decision. S.A. was specifically prohibited from appointing either herself or her creditors as remainder beneficiaries and thus, her interest in the trust was not absolute

[7] *Ibid*, at para 38; *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, at para 90; D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 1178.

preventing her ability to invoke the rule in *Saunders v. Vautier*.[8] Combined, the elements of this particular trust validly constituted a *Henson* trust and, therefore, the SCC found that it was not an asset of S.A. and had no bearing on her assistance application with MVHC.

As emphasized by the majority, "…trust arrangements such as these cannot be treated as actually enriching the person with disabilities for whom they were settled, because they are structured in a way that puts the trust property beyond that person's control."[9] As such, the elements for drafting and constructing a proper *Henson* trust dictate a certain amount of arm's length distance between the disabled beneficiary and the corpus of the trust. This can include elements such as implementing co-trustees who must jointly decide to distribute funds of the trust or perhaps even a form of approval process the beneficiary must utilize in order to obtain payments. The absence of the beneficiary's influence on the trustees to disburse trust funds will prove to be a key element, as evidenced in the case of *Armstrong*.

It is important to note, however, that each case will turn on its particular facts and circumstances. As Justice Côté reiterated from the Court of Appeal's decision in *S.A. v. Metro Vancouver Housing Corp.*, "The eligibility criteria associated with any social assistance program must be analyzed on their own terms to determine whether and, if so, how an interest in a *Henson* trust factors into any applicable means test."[10] Therefore, when draft planning for disabled beneficiaries, it is important to obtain as much information as possible regarding their particular circumstances, including the existence of any social assistance programming to which the beneficiary has been, or may in the future, be entitled. Clarity of the beneficiary's position and role

[8] *S.A. v. Metro Vancouver,* at para 38.
[9] *S.A. v. Metro Vancouver,* at para 52.
[10] *S.A. v. Metro Vancouver,* at para 55.

in relation to the trust and its trustees is of utmost importance. For guidance on drafting *Henson* trusts, sample clauses are included for consideration.

Henson Clauses

TWENTY-FIVE (25) of such ONE HUNDRED (100) equal shares shall be held in a Trust for my child/grandchild/niece/nephew/etc., _______, provided he/she should be living at the date of my death (the "_______ Trust"), and my Trustees shall keep the capital of the said _______ Trust invested and pay the net income therefrom or so much thereof as my Trustees in their absolute discretion consider advisable from time to time for the benefit of my said child/grandchild/niece/nephew/etc. until his/her death. Any of the said income not paid to or for the benefit of my said child/grandchild/niece/nephew/etc. shall be accumulated and from time to time and added to the capital of the said _______ Trust and dealt with as part thereof until the expiration of TWENTY-ONE (21) YEARS from the date of my death and thereafter my Trustees may at any time or times pay to or for the benefit of my said child/grandchild/niece/nephew/etc. any amount or amounts out of the capital of the said _______ Trust that my Trustees in their absolute discretion consider advisable.

I declare that the capital of the said _______ Trust and the income therefrom shall not vest in my child/grandchild/niece/nephew/etc., and the only interest my child/grandchild/niece/nephew/etc. shall have therein shall be the payments actually made to or for his/her benefit.

The Trustees to be appointed to act as my Trustees respecting the _______ Trust shall be _______ and _______ jointly or the survivor of _______ and _______ as they may be from time to time. The said Trustees shall have all of the same powers, authorities, obligations, discretions and privileges as are granted to my Trustees under the general provisions of this my Will.

Without in any way binding the discretion of my Trustees, I declare it is my wish that my Trustees, in exercising their discretion in accordance with the provisions of this paragraph, take such steps as will maximize the benefits which my child/grandchild/niece/nephew/etc. would receive from other sources if payments from the income and capital of the _______ Trust were not paid to him/her or if such payments were limited as to amount or time. In order to maximize such benefits, I specifically authorize my Trustees to make payments varying in amount and at such time or times as my Trustees in their absolute discretion consider advisable keeping in mind that the comfort and welfare of my said child/grandchild/niece/nephew/etc. is my first consideration. I expressly declare that my Trustees shall not be required to maintain an even hand between the income beneficiaries and the beneficiaries of capital, whether contingent beneficiaries or otherwise, when investing and administering the said _______ Trust but may in their absolute discretion favour one class of beneficiary over another.

Upon the death of my child/grandchild/niece/nephew/etc., the remainder of the _______ Trust shall be divided equally amongst _______ an _______ for his or her own use absolutely. Provided that if any of my said children are then dead or fail to survive my child/grandchild/niece/nephew/etc. _______ but has left issue surviving him or her and then alive, that deceased child shall be deemed to be alive for the purposes of the foregoing division and allocation. In that case, my Trustees shall set aside ONE (1) of such equal shares for the issue of said deceased child and shall divide that share among the issue of that deceased child (my "grandchild"), then alive in equal shares per capita to be paid upon such grandchild reaching the age of TWENTY-FIVE (25) years for his or her own use absolutely.

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TAB 12

The Six-Minute Estates Lawyer 2019

Don't Be Late: Limitation Periods in Estates and Trusts Law

Written and presented by:
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April 29, 2019

Don’t Be Late:
Limitation Periods in Estates and Trusts Law

Six Minute Estates Lawyer
Monday, April 29, 2019

Lisa Filgiano and Madeleine Dusseault[1]
Miller Thomson LLP

Introduction

“Early is on time. On time is late. Late is unacceptable.” This should be every lawyer’s guiding principle. One of the first things all litigators should do from the outset of every file is to consider the applicable limitation period(s). It is equally important to re-assess the applicable limitation period(s) through the lifetime of a file. Lawyers are acutely aware of the serious consequences of missing a limitation period: facing a potential claim in negligence, the potential loss of a client and additional costs, which may not be recoverable from the client. It is therefore important to be aware of the limitation periods applicable in your specific area of practice, and in any related areas of practice which may apply on any given file.

This paper is intended to provide an overview of the relevant statutory and equitable limitations issues applicable to an estates and trusts practitioner, along with some other statutory and equitable limitation periods applicable in peripheral practice areas, which may be relevant to an estates and trust practitioner.

A. The *Limitations Act*

(i) Basic Limitation Period and Discoverability

The basic limitation period in the Ontario is two years from the day on which a claim is discovered.[2] The basic two year limitation period applies generally to claims either initiated by or against an estate.

[1] Lisa Filgiano is a partner in the Estates and Trusts Litigation Group at Miller Thomson LLP and Madeleine Dusseault is a 2018-2019 articling student at Miller Thomson LLP.

[2] Section 4 of the *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B. (the “*Limitations Act*”).

In the *Limitations Act*, *2002* (the "*Limitations Act*"), a claim is defined as a "claim to remedy an injury, loss or damage that occurred as a result of an act or omission."[3] Pursuant to section 5 of the *Limitations Act*, "claims" are discovered on the earlier of:

> (a) the day on which the person with the claim first knew,
>
> > (i) that the injury, loss or damage had occurred,
> >
> > (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
> >
> > (iii) that the act or omission was that of the person against whom the claim is made, and
> >
> > (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause.

This is known as the principle of discoverability. The starting point for the determination of the relevant limitation period is the day the act or omission forming the basis of the claim took place, which is the presumptive date from which the limitation period starts to run unless the claimant can establish that the limitation period ought to be later on the basis of "discoverability".

(ii) The Ultimate Limitation Period

The *Limitations Act* also includes an ultimate limitation period of fifteen years, regardless of when a claim was discovered.[4] For example, if a claim is discovered twenty years after the injury, loss or damage occurred, the claimant would be precluded from pursuing their claim as a result of the ultimate fifteen year limitation period.

[3] Section 1 of the *Limitations Act*. Note that the definition of "claim" becomes relevant later in this paper when considering the limitation period applicable to Applications to Pass Accounts and Notices of Objection to Accounts.

[4] Section 15(2) of the *Limitations Act*.

There are certain exceptions to the ultimate fifteen year limitation period. For example, it will not run when:

1. the claimant is incapable of commencing a proceeding and is not represented by a litigation guardian;

2. the claimant is a minor and is not represented by a litigation guardian; or

3. the person against whom the claim would be made has wilfully concealed the wrong or misled the claimant about the appropriateness of a proceeding.[5]

Estate practitioners should be aware that the ultimate limitation period may apply to claims in negligence against estate solicitors. Because the ultimate limitation period begins to run on the date an act or omission takes place, it is arguable that the limitation period will begin to run on the date a will is executed, rather than the testator's death. As a result, a cause of action in negligence may already be statute barred at the time of the testator's death, prior to the discovery of a claim by a disappointed beneficiary or other claimant. This could be devastating to a disappointed beneficiary or other claimant who was unaware of their potential claim, but is precluded from pursuing it until after the testator's death.

B. The Real Property Limitations Act

Section 2 of the *Limitations Act* specifically sets out certain proceedings to which the *Limitations Act* does not apply. Of potential significance to estate and trust lawyers is the fact that proceedings under the *Real Property Limitations Act*[6] ("*RPLA*") are not governed by the *Limitations Act*, as real property is often one of the main assets held by an Estate.

Section 4 of the *RPLA* provides a 10 year limitation period for recovery of rent or land:

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent**,** but within **ten years** next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person

[5] Section 15(3) of the *Limitations Act.*

[6] *Real Property Limitations Act*, R.S.O. 1990, c. L.15, as amended.

> making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it. [Emphasis added]

C. Other Limitation Periods

Section 19 of the *Limitations Act* provides that the limitation periods set out in specific sections of certain statutes listed in Schedule A of the *Limitations Act* override the basic two year limitation period. The most relevant statutes to estates and trust practitioners are:

(1) the *Trustee Act* (s. 38(3));[7]

(2) the *Estates Act* (s. 44(2), s. 45(2), and s. 47);[8]

(3) the *Estates Administration Act* (s. 17(5));[9]

(4) the *Family Law Act* (s. 7(3));[10] and

(5) the *Succession Law Reform Act* (s. 61).[11]

In cases where limitation periods conflict, the limitation period set out in the legislation listed at Schedule "A" prevails over the limitation period set out in the *Limitations Act*.[12] As the Court held in *Bikur Cholim Jewish Volunteer Services v. Penna Estate*:

> "If there is a conflict between a limitation period established by a provision referred to in s. 19(1), such as s. 38(3) [of the *Trustee Act*], and a limitation period established by any other provision of the *Limitations Act*, 2002, the limitation period established by a provision such as s. 38(3) prevails."[13]

[7] *Trustee Act*, R.S.O. 1990, c. T.23 ("*Trustee Act*").

[8] *Estates Act*, R.S.O. 1990, c. E.21 (*"Estates Act*").

[9] *Estates Administration Act* R.S.O. 1990, c. E.22 ("*Estates Administration Act*").

[10] *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*").

[11] *Succession Law Reform Act*, R.S.O. 1990, c. S.26 ("*SLRA*").

[12] Section 19(4) of the *Limitations Act*.

[13] *Bikur Cholim Jewish Volunteer Services v. Penna Estate*, 2009 ONCA 196 ("*Penna Estate*"), at para 26

As such, when assessing any given claim, it is important to identify which act governs the proceedings, and which, if any, limitation periods apply.

We have set out below the limitation periods applicable to a number of common claims that arise in an estates practice.

(i) Will Challenges

Will challenges are one of the most common proceedings in estates and trusts litigation. In these proceedings, the applicant generally seeks to have a Will declared invalid on the basis that the testator lacked testamentary capacity, was unduly influenced and / or lacked the requisite knowledge and approval when executing their Will, and seeks to have the Estate administered pursuant to a prior valid Will or pursuant to the rules of intestacy set out in Part II of the *Succession Law Reform Act* ("*SLRA*").

Until relatively recently, the issue of whether the basic two year limitation period applied to will challenges was open for debate. There were mixed views by legal commentators, some of whom argued that will challenges were excluded from the application of the *Limitations Act*, given that the relief sought was declaratory, not consequential.[14] This distinction was important because section 16(1)(a) of the *Limitations Act* provides that there is no limitation period in respect of a proceeding for a declaration if no consequential relief is sought.

This debate was resolved in 2014 by Justice Greer in *Leibel v. Leibel* ("*Leibel*"), in which she confirmed that the basic two year limitation period under section 4 of the *Limitations Act* applies to will challenge proceedings and that the limitation period presumptively begins to run from the date of the testator's death.[15]

In that case, Justice Greer declared that the will challenge proceedings were statute-barred because they were initiated more than two years after the testator's death. In her reasons, she noted that the proceedings at issue clearly involved a request for consequential relief (for example, the applicant was seeking an order revoking the Certificate of Appointment of Estate

[14] See, for example, Anne Werker, "Limitations Periods in Ontario and Claims by Beneficiaries", (2008) 34 Advocates' Quarterly.

[15] *Leibel v. Leibel*, 2014 ONSC 4516 (Ont. S.C.J.), at paras. 50 to 53.

Trustees with a Will, an order removing the estate trustees, an order that the estate trustees pass their accounts, an order appointing an Estate Trustee During Litigation, an order for damages against the drafting solicitor and her law firm, and an order disclosing medical and legal records).[16] These are fairly standard requests made in the context of a will challenge.

Subsequent decisions have considered and followed *Leibel*, although the issue has yet to be considered by an appellate court. These subsequent decisions have clarified how the discoverability principle applies in the context of the limitation applicable to will challenges. Of particular interest to estate and trust practitioners may be Justice Wilton-Siegel's decision in *Shannon v. Hrabvosky* ("*Shannon*").[17] Justice Wilton-Siegel confirmed that there is a presumption that the limitation period in will challenges begins to run from the date of death. The presumption can be rebutted if the claimant can establish that they did not have all of the facts upon which to base a will challenge on the date of death in accordance with section 5(2) of the *Limitations Act*.

In *Shannon*, Justice Wilton-Siegel held that the subject will challenge was not statute-barred, despite having been initiated more than two years from the date of death, given that the claimant did not have knowledge of, or a copy of, the will at issue until months after the testator's death. In this case, the claimant was able to rebut the presumption that the limitation began to run from the date of death.

Notwithstanding the potential discoverability argument, estate and trust solicitors would be well-advised to initiate will challenges within the earlier of two years of the date of the testator's death or fifteen years of the date of execution of the Will. Although it may be possible to apply the discoverability principles in order to successfully rebut the presumption that the limitation period began to run at the date of death, it is considered best practice to initiate proceedings within two years of the date of death to avoid the risk of having the claim struck down on the basis of a limitation period argument and to avoid facing a potential claim in negligence.

[16] *Ibid*, at para 38.

[17] *Shannon v. Hrabvosky*, 2018 ONSC 6593 (Ont. S.C.J.).

(ii) Notices of Objection and Applications to Pass Accounts

One of the duties of an estate trustee is to account to the beneficiaries with respect to the administration of the estate. This requires an estate trustee to keep detailed accounts and records of all transactions related to the estate. Although in certain cases this can be done informally, Rule 74.18 provides for a formal court procedure, known as an Application to Pass Accounts. Such an application allows an estate trustee to seek approval of their accounts from the Court and allows beneficiaries to object to any transactions with respect to the estate assets or claims for compensation being made by the estate trustees.

In 2016, the Ontario Court of Appeal clarified that the basic two year limitation period does not apply to Applications to Pass Accounts. In *Armitage v. Salvation Army* ("*Armitage*"), the Court of Appeal held that applications to pass accounts are not "claims" as defined under the *Limitations Act*.

> "The fact is that in seeking court approval of the passing of accounts, an attorney for property is not seeking redress for any loss, injury, or damage. Rather, he or she is seeking approval from the court of his or her actions in managing the property, including approval for compensation previously taken or now sought. A passing of accounts application is the opposite of remedial; it is the process that seeks a court order that no remedy is necessary with respect to the accounts. Thus the passing of accounts does not fit within the first part of the limitations act definition of claim."[18]

Estate trustees cannot use a limitation period to shield themselves from their duty to account if they have either not obtained a release from the beneficiaries or obtained a judgment on a passing of accounts. Without either of these protections, an estate trustee may be asked to account by a beneficiary at any time during or immediately following the administration of an estate.

More recently, in *Wall v. Shaw* ("*Wall*"), the Ontario Court of Appeal, following its reasoning in *Armitage,* held that the basic two year limitation period similarly does not apply to the filing of a Notice of Objection to Accounts. The court relied upon section 4 of the *Limitations Act*, which

[18] *Armitage v. Salvation Army*, 2016 ONCA 971, at para 27-28.

specifically bars "proceedings" commenced more than two years after the discovery of a "claim". The court held that a Notice of Objection to Accounts does not commence a proceeding for the purposes of the *Limitations Act*, nor is it a claim. As such, it is not subject to the two year limitation period.[19]

Though not subject to the two year limitation period, Applications to Pass Accounts and Notices of Objection may still be barred through equitable doctrines of acquiescence and laches. The application of these doctrines is fact specific and depends on the actions of the estate trustee and the beneficiaries in each case. For example, estate trustees may not be able to rely on acquiescence or laches where the estate trustee has failed to follow best practices, such as preparing and producing annual accounts to the beneficiaries.

(iii) Equitable Remedies Falling Under the Limitations Act

Various equitable remedies commonly sought in estate and trust litigation are also subject to the *Limitations Act*.

Claims for breach of fiduciary duty, for example, fall within the definition of 'claim' and are subject to the basic two (2) year and ultimate fifteen (15) year limitation periods.[20] Other equitable remedies that are also subject to the *Limitations Act* include rectification of a contract, fraudulent conveyances, and fraud and misrepresentation.[21]

Constructive trust claims will also be subject to limitation periods under either the *Limitations Act* or the *RPLA*, depending on the nature of the claim sought.

The court considered this issue in *McConnell v. Huxtable*, where the applicant brought a constructive trust claim in the family law context. The applicant was seeking an interest in the house she had shared with her former spouse, and sought it by way of constructive trust. The two had cohabited until 2007, but the applicant did not bring her claim until 2012. The

[19] *Wall v. Shaw,* 2018 ONCA 929 (Ont. Div. Ct.), at paras 29-40 and 47-51.

[20] *Boyce v. Toronto Police Services Board*, 2012 ONCA 230 at para 2; *Portuguese Canadian C.U. v. Pires*, 2012 ONCA 35 at paras 2-3.

[21] *Bouchan v. Slipacoff*, 2010 ONSC 2693 (Ont. S.C.J.), at paras 8-9; *Toronto Standard Condominium Corp. No. 1703 v. 1 King West Inc.*, 2010 ONSC 2129 (Ont. Div. Ct.), at paras 1 and 28; *Portuguese Canadian C.U. v. Pires*, 2012 ONCA 35, at paras. 2-3.

Respondent argued that the Applicant had knowledge of her potential claim from 2007 forward.[22]

The court found that the action was not statute-barred because the claim was for the recovery of land. The ten year limitation period under the *RPLA*, not the two year limitation period under the *Limitations Act*, applied. Had the claim not been for land, but for the recovery of money, then the two year limitation under the *Limitations Act* would have applied, given that the *Limitations Act* is intended to be comprehensive and to apply to equitable claims that are not exempted (such as the *RPLA*).[23]

D. Estate Administration

There are numerous limitation periods that also need to be considered when administering an estate, such as the limitation period for a spouse to make an election under the *Family Law Act* or the limitation period for a dependant to make a claim for support under the *Succession Law Reform Act*. Limitation periods relevant to estate administration issues are primarily set out in various other statutes. These other limitations periods prevail over the limitation periods set out in the *Limitations Act* pursuant to section 19 and Schedule "A" of the *Limitations Act*.

(i) Election of Spouse under the Family Law Act

Upon the death of a spouse, the surviving spouse has the option to elect either:

- to take either under the Will or pursuant to the rules of intestacy set out in Part II of the *SLRA*, as applicable; or
- to receive their entitlement pursuant to an equalization of the net family properties.[24]

It is worth noting that this right to elect is only available to spouses that are married, not to "common law" spouses.[25]

[22] *McConnell v. Huxtable*, 2014 ONCA 86, at para 1.

[23] *Ibid.,* at paras 48-50.

[24] Section 6 of the *FLA*.

The limitation period to make an election is particularly short. An election must be made within six (6) months of the date of death.[26] If an election is not made within that time, absent an extension, the surviving spouse is deemed to have taken their entitlement under the will or pursuant to the rules of intestacy, as applicable.

It is conceivable that a surviving spouse may not have sufficient information about the estate assets in order to make an election within six (6) months of the date of death. In those circumstances, the surviving spouse may apply to the Court for an extension.[27] The extension may be granted if the Court is satisfied that:

(1) There are apparent grounds for the relief;

(2) The delay has been incurred in good faith; and

(3) No person will suffer substantial prejudice by reason of the delay.[28]

(ii) Claims for Dependant Support under the Succession Law Reform Act

Another consideration in the administration of an estate is whether the deceased had any dependants, and, if so, whether they have been adequately provided for under the will or pursuant to the rules of intestacy under Part II of the *SLRA*.

If a person claims to be a dependant who has not been adequately provided for by the deceased, they have six months from the issuance of a Certificate of Appointment of Estate Trustee with or without a Will to initiate an application for dependant's support.[29] It is notable that, unlike the limitation period applicable to elections by a spouse under the *FLA*, this limitation period runs from the date of issuance of a Certificate of Appointment of Estate Trustee with or without a Will, not the date of death.

[25] Section 1(1) of the *FLA*.

[26] Section 7(3) of the *FLA*.

[27] Section 2(8) of the *FLA*.

[28] Section 2(8) of the *FLA*.

[29] Section 61(1) of the *SLRA*.

The limitation period to commence a claim for dependant support may be extended when the Court considers it proper.[30] The test for granting an extension of the limitation period requires the Court to consider the delay, the reasons for the delay and the extent of prejudice to Estate's ability to defend the claim.[31] The discretion to grant an extension of the limitation period should be exercised in a broad and liberal manner.[32]

Although the limitation period may be extended at the discretion of the court, there is good reason for a dependant to initiate a claim within the limitation period. Any claim initiated after the expiry of the limitation will only apply to "any portion of the estate remaining undistributed at the date of the application."[33] Where the estate has been entirely distributed at the time the claim is initiated (i.e. after the limitation period has expired), there will be no assets against which to enforce the claim.

(iii) Claims in Tort Brought by or against an Estate under the Trustee Act

Any claim in tort, other than libel and slander, for torts or injuries either suffered by or committed by the deceased during their lifetime must be brought within two (2) years of the date of death.[34] This is a strict limitation period to which the discoverability principle does not apply. In the event that a claim is not discovered by the estate trustee or initiated by the claimant against the estate trustee within 2 years from the date of death, the claim will be statute barred.[35]

(iv) Liquidated and Unliquidated Claims against the Estate under the Estates Act

Sections 44 and 45 of the *Estates Act* set out the timelines that are relevant where an estate trustee is responding to liquidated and unliquidated claims against the Estate. Upon receipt of a claim or upon receiving notice of a claim, the estate trustee may serve a Notice of Contestation of the Claim on the claimant. Within thirty (30) days of the Notice of Contestation

[30] Section 61(2) of the *SLRA*.

[31] *Blatchford (Litigation Guardian of) v. Gardiner*, 1999 CarswellOnt 5448 at paras 20 and 23-24.

[32] *Ibid,* at para 22.

[33] Section 61(2) of the *SLRA*.

[34] Section 38(3) of the *Trustee Act*.

[35] *Penna Estate*, supra note 13, at para 25.

being served, the claimant must apply to a judge of the Superior Court of Justice for an order allowing the claim and determining its amount. This limitation period may be extended by up to three months if allowed by the Court. If the claimant takes no action, they will have been deemed to have abandoned their claim.[36]

E. Extending or Tolling Limitation Periods

Estate and trust lawyers should also be aware of ways that limitation periods may be extended, suspended or tolled. A number of statutory and equitable factors may pause or extend the running of the limitations clock.

(i) Statutory

The *Limitations Act* sets out a number of factors that extend or toll limitation periods.

Limitation periods under *Limitations Act* do not run against minors or incapable persons, unless they are represented by a litigation guardian. [37] The limitation period will begin to run again against a minor once they reach the age of majority and against an incapable person if they regain capacity.

Parties may also suspend or extend the limitation periods in the *Limitations Act* by contracting out of them or entering into tolling agreements.[38]

(ii) Common Law

A number of equitable remedies are also available to extend, suspend or toll limitations periods.

Fraudulent Concealment

First, the doctrine of fraudulent concealment will toll a limitation period where material information has been concealed by the defendant. The doctrine applies where the defendant

[36] Section 44 and 45 of the *Estates Act*.

[37] Section 7 and 15 of the *Limitations Act*.

[38] Section 22 of the *Limitations Act*.

and plaintiff are in a special relationship, and given the special or confidential nature of the relationship, the defendant's conduct amounts to "an unconscionable thing for the one to do towards the other."[39]

The doctrine of fraudulent concealment may even be used to suspend the running of the strict limitation period under section 38(3) of the *Trustee Act*. As the court noted in *Giroux Estate v. Trillium Health Centre*, "the legislature intended that s. 38(3) should continue to be governed by common law principles. The doctrine of fraudulent concealment is one such principle."[40]

Laches and Acquiescence

Laches is an equitable doctrine that prevents plaintiffs from pursuing a claim when they have unreasonably delayed in bringing it. The Supreme Court has described the doctrine as follows:

> A good discussion of the rule and of laches in general is found in *Meagher, Gummow and Lehane*, supra, at pp. 755-765, where the authors distill the doctrine in this manner, at p. 755:
>
> > It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (*a*) acquiesced in the defendant's conduct or (*b*) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb.[41]

Mere delay is not enough to make out a claim for laches. Rather, "the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine."[42]

[39] *Giroux Estate v. Trillium Health Centre*, 2005 CarswellOnt 241 (ONCA), at para 22

[40] *Ibid.,* at para 33

[41] *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at para 98

[42] *Ibid.,* at para 98

Doctrine of Special Circumstances

Finally, the doctrine of special circumstances is available to extend limitation periods in very narrow circumstances. The doctrine permits courts to extend limitation periods in "peculiar or special circumstances that warrant the amendment."[43] It has little application to most limitations issues because it does not apply to the *Limitations Act*.[44]

However, like the doctrine of fraudulent concealment, the doctrine of special circumstances survived the *Limitations Act* and thus remains applicable to the s. 38(3) *Trustee Act* limitation period. As such, courts have held that the doctrine can be used to permit a court to add parties to an existing action despite the expiration of the limitation period in s. 38(3).[45]

Conclusion

Limitation periods need to be at the forefront of every litigator's mind from the outset of the retainer. Given the number of exceptions and other limitation periods applicable in the area of estate and trust litigation and estate administration, it is even more important for those of us practising in this area to be aware of the applicable and competing limitation periods.

[43] *Joseph v. Paramount Canada's Wonderland,* 2008 ONCA 468, at para 10.

[44] *Ibid.,* at para 13.

[45] *Penna Estate*, supra note 13 at para 51; *Estate of John Edward Graham v. Southlake Regional Health Centre*, 2019 ONSC 392, at paras. 81 and 84.

APPENDIX – CASE LAW

1. *Bikur Cholim Jewish Volunteer Services v. Penna Estate*, 2009 ONCA 196
2. *Leibel v. Leibel*, 2014 ONSC 4516 (Ont. S.C.J.)
3. *Shannon v. Hrabvosky*, 2018 ONSC 6593 (Ont. S.C.J.)
4. *Armitage v. Salvation Army*, 2016 ONCA 971
5. *Wall v. Shaw,* 2018 ONCA 929 (Ont. Div. Ct.)
6. *Boyce v. Toronto Police Services Board*, 2012 ONCA 230
7. *Portuguese Canadian C.U. v. Pires*, 2012 ONCA 35
8. *Bouchan v. Slipacoff*, 2010 ONSC 2693 (Ont. S.C.J.)
9. *Toronto Standard Condominium Corp. No. 1703 v. 1 King West Inc.*, 2010 ONSC 2129 (Ont. Div. Ct.)
10. *McConnell v. Huxtable*, 2014 ONCA 86
11. *Blatchford (Litigation Guardian of) v. Gardiner*, 1999 CarswellOnt 5448 (Ont. S.C.J.)
12. *Giroux Estate v. Trillium Health Centre*, 2005 CarswellOnt 241 (ONCA)
13. *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6
14. *Joseph v. Paramount Canada's Wonderland,* 2008 ONCA 468
15. *Estate of John Edward Graham v. Southlake Regional Health Centre*, 2019 ONSC 392 (Ont. S.C.J.)

Law Society of Ontario | Barreau de l'Ontario

TAB 13

The Six-Minute Estates Lawyer 2019

Taxation of Trusts Update

Jordan Atin, C.S., TEP
Atin Professional Corporation

April 29, 2019

cpd

ESTATE ADMINISTRATION TAX UPDATE

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MINISTRY CONTACT INFORMATION

Online:
ontario.ca/finance
Phone:
1 866 ONT-TAXS (1 866 668-8297)
Email:
EstateAdminTaxReturnOnline@ontario.ca

For unique situations which require a written ruling please submit a letter outlining all relevant details to the following:

Senior Manager, Advisory Services
Ministry of Finance
Advisory, Objections, Appeals and Services Branch
33 King Street West
P.O. Box 625
Oshawa ON
L1H 8H9

AUDIT DOCUMENT CHECKLISTS

During the audit process the following items may be requested depending on the estate:

- Copy of Will(s)
- Copy of the Certificate of Appointment of Estate Trustee
- Proof of Death Certification
- Clearance Certificate issued by Canada Revenue Agency
- List of assets at the time of death – Supporting documentation related to the Estate Information Return
- Completed Ministry of Finance Form – Authorizing or Cancelling a Representative
- Amended Estate Information Return showing a credit balance
- Bank Statement(s) – as of date of death and one month prior to and after death - Foreign and Domestic
- Brokerage Statement(s) as of the date of death
- Investment Statements(s) as of the date of death
- Real Estate Appraisal(s) with supporting documents
- Appraisal(s)
- Copy of Deed
- Personal Property Insurance Policy Information
- Title of ownership
- Real Property Assessment Notice
- Statement of Adjustments which makes up the purchase price, final amount required from the purchase and the amount due to the vendor.
- Copy of the final cheque received from the lawyer's office when the property is sold
- Encumbrances – outstanding mortgage statement, copies of registered lien, line of credit registered against the property
- Copies of Vehicle / Vessel Ownership
- Details and value of items included in other property
- Personal Tax Return(s) filed with Canada Revenue Agency – Last filed return and final return
- Business Valuation Report
- Corporate Tax Return filed with Canada Revenue Agency
- Copies of the Federal schedule T2SCH(50) attached to the Corporate Tax Return filed with Canada Revenue Agency
- List of the shareholders and their percentage of ownership in the company
- Copy of Partnership Agreement(s)
- Loan Agreement(s)
- Registration of Safety Deposit Box including itemized list
- Proof of payment of estate tax and refund received
- Notice of Estate Sale
- A listing of assets that passed outside of the estate as a result of joint ownership with a right of survivorship or assets with a named beneficiary and the supporting documentation to support the exclusion.

TAB 14

The Six-Minute Estates Lawyer 2019

Client Interviews for Wills and Reporting Letters

Jason Allan
Allan Law

April 29, 2019

Client Interviews for Wills and Reporting Letters

Jason K. Allan, Lawyer at Allan Law

This article endeavors to provide some basic commentary on how to conduct an initial interview for a will and power of attorney file and report to the client (or clients as the case may be) with respect to the completion of your retainer. Due to the brevity that a six-minute presentation calls for, this article is by no means complete on this subject but rather is intended to provide some basic information on this complex and ever evolving area of law. I hope you find my comments of some assistance to you in your practice.

First, it is important to remember that as will drafting lawyers we not only owe a duty of care to our clients to act with skill and competence in the completion of a retainer but also to the client's intended beneficiaries. The rationale for the extension of the duty of care to disappointed beneficiaries is that it is reasonably foreseeable that the beneficiaries will suffer a loss if the will is not properly prepared and/or executed.[1] In one recent case from Alberta *(Meier v Rose,* 2012 ABQB 82), the client instructed his lawyer to prepare a will in which the client's brother was left a property the client owned. The client provided the lawyer with a legal description of the property but the lawyer did not search title. It turned out that title to the property was held by a company the client owned and not the client personally—the net result being that another beneficiary who inherited the company received the property and not the brother who was the intended beneficiary. The disappointed beneficiary (the brother) sued the will drafting lawyer for negligence. In finding the lawyer negligent, the court deemed that the lawyer had an obligation to make proper inquires of the client to ascertain how title to the property was held or alternatively, to search title. While the case may have turned on the fact that the drafting lawyer was aware that the client used corporations to hold properties and was familiar with the client's

[1] This extension of the duty of care to the client's beneficiaries was established in Canada in *Whittingham v. Crease & Co.* (Whittingham v. Crease & Co., (1978) 88 DLR (3d) 353 (BCSC) and was more recently addressed by the court in *Haljan v. Mercer* as follows: "what is clear from the cases is that a court may grant a remedy to a disappointed beneficiary where the interests of the testator and the disappointed beneficiary are in harmony and there is no possibility of conflict."

tendency to not distinguish between his personal and corporate ownership of land, the case is certainly a reminder of our standard of care and the liability exposure we all face in the event we fall below that standard of care.

Given the potential audience of disappointed claimants, it is perhaps no surprise that the number of claims per year in the area of wills and estates has doubled over the last decade according to LawPro. In fact, according to LawPro, law-related errors are more than twice as likely to occur in the wills and estates area as compared to other arears of practice, with an average cost to LawPro of $6.8 million per year or $33,400.00 per claim. With the above in mind, I set out below some practice commentary to assist you with claims prevention.

Do you accept the retainer?

At the risk of stating the obvious, I suggest that the first consideration in any new prospective will intake is whether you wish to accept the retainer. We all know that the *Rules of Professional Conduct* require us to perform our services to the standard of a competent lawyer. The commentary to the Rules of course instructs us in evaluating our competency for a file to consider, among other things, the complexity and specialized nature of the matter, our training and experience, and the preparation and study we are able to give a matter. In a sentence, the Rules require us to know and recognize our limitations and to act (or not act) accordingly. There is no shame in referring a client with a complex matter to a lawyer who may be better able to assist with that complexity. I tend to do rather straight-forward wills (if there is such a thing) and have no problems sending the client elsewhere if the client’s particular situation is beyond my limited abilities.

However, not only must we consider whether we have the requisite skill to assist the client with a particular matter but also whether we *should* be preparing the will. While we may be liable to disappointed beneficiaries, a recent Ontario case confirms that lawyers should decline to accept retainers for clients whom they deem incapable. In *Hall v. Federick* (2001) 40 E.T.R. (3d) 65; [2001] O.J. No. 5092 (Ont. S.C.J.), the Court of Appeal was asked to consider whether a lawyer can be liable to a disappointed beneficiary for declining to prepare a will. The case involved a lawyer was called to attend at a hospital to quickly prepare a will for a dying man who wished to leave a bequest to a friend. The prospective client in that case was able to instruct the lawyer from his deathbed to prepare a will in which his friend was left a bequest but the dying man was not able to tell the lawyer what his net assets were or what his debts were or the exact value of his property. The lawyer turned down the retainer on the basis that he could not obtain complete instructions and was later sued by the friend who stood to benefit from the dying man's intended bequest. The trial judge found the lawyer liable to the disappointed beneficiary for failing to prepare the will but this decision was overturned by the Court of Appeal which agreed that the lawyer in fact had a duty to decline the retainer due to the client's evident lack of capacity.

The Court of Appeal in the Hall case declined to directly address whether a lawyer could ever face civil liability for refusing a will retainer but the court did point out that the commentary to the Rules of Professional Conduct may require the lawyer to act for a client in circumstances in which there is a near-death situation. The commentary states:

> The lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation.

Of course, the problem in such "near-death" scenario is that the lawyer may be in an impossible situation: the lawyer must choose to prepare the will and face the consequences of a lawsuit to set aside the will or alternatively, the lawyer can decline the retainer and potentially be sued by a disappointed beneficiary. In either case, the best course of action may be to take copious notes, document the advice given and obtain a capacity assessment if time permits. Brian Schnurr in his Estate Litigation book suggests the following for these types of near death cases: "the solicitor should give serious consideration to the immediate preparation of an abbreviated 'temporary' will setting out the essence of the testator's intentions. Another approach would be to dictate a form of holograph will for the testator to create immediately. In this way, the testator's intentions would be immediately in force while the solicitor attends to drafting and subsequent revision of the formal will."[2] Certainly, there is a higher duty to complete the will if the retainer is accepted in a timely fashion.

The *Hall v. Estate of Bruce Bennett* case therefore stands as a reminder of the importance for making and retaining detailed notes, even for those cases in which a retainer is declined which is discussed in point number two below.

A final note as a preliminary consideration in a will files is with respect to conflicts of interest and joint retainers. Joint retainers are the norm in will matters involving spouses in my experience. This raises the concern of a conflict for interest or a potential conflict for interest down the road. LawPro advises that over the past five years claims arising out of conflicts of interest have become the fourth most common type of malpractice claims in the wills and estates practice.[3] LawPro recommends that lawyers discuss any restrictions on subsequent retainers and the clients' ability to change the terms of mutual or mirror wills at the time of the initial meeting in addition to ensuring that there is no conflict at the time the initial retainer is accepted. Certainly, it would be advisable to reference these issues in a reporting letter.

Note Taking during Client Meeting

According to LawPro, inadequate investigation or discovery of facts is responsible for 32% of malpractice errors in wills and estates matters.[4] This includes: failure to ask the testator what her assets are; failure to ask about the existence of a prior will; and not digging into more detail about the status of past marital relationships, other children or stepchildren or whether a spouse is married or common law.

[2] Schnurr, B., *Estate Litigation*, 2d ed (Carswell)
[3] "Consider threshold questions before accepting joint retainers in wills" – copy attached
[4] Will and Estate Law Claims Fact Sheet – copy attached

In short, when we meet with a client to receive instructions for a will, we are expected to take careful notes. This is important not only to ensure that the client is well served but also to defend ourselves from claims. Many lawyers use checklists to make sure they address relevant arears of inquiry. I myself tried using checklists but found them to be cumbersome and difficult to work into the flow of an interviews. However, I obtained a precedent checklist for this paper and I attach a copy for your review.

I was recently reminded about the importance of note taking even in for those wills that would seem straight-forward with little danger of attack. I prepared a will for an apparently healthy man in his 50s who had no spouse and no children. He decided to leave his estate to his girlfriend, and to one of his former partner's two children. The man died of a heart attack within months of signing his will and I was named in an Application in which it was alleged that I made a mistake in neglecting to name the one of his former partner's other children. The child who was named had a disability and the child who exclude was self-supporting, not a dependent and not named in other of the testator's prior wills. My notes were taken contemporaneously with the meeting and the claim against me fortunately was dismissed without costs as a result of my notes. This was certainly a reminder for me of the dangers inherent in the wills practice as even the cases we least suspect can result in claims.

The main thing that the negligence cases tell us is that we can't be too probative when it comes to uncovering the client's affairs. Certainly, at a minimum we must make sure that we understand enough about the testator's personal circumstances that we are able to assist in the will with the orderly and tax effective transfer of assets from the testator to the beneficiary(s). In order to accomplish this task, the solicitor must do more than merely express a testator's wishes in proper language. Rather, the solicitor must be aware of any legal limitations that may be placed on the testator by law, know how assets are held and what debts may arise upon the death of the testator, and even be aware of the circumstances of the testator's intended beneficiaries. The malpractice claims illustrate that it is our responsibility to ensure that the will is legal and enforceable and does not contain any provisions that will inevitably lead to litigation after the testator's death.

For instance, it is important to know the testator’s current spousal status, what contractual obligations a testator may have to a former spouse or partner, what individual(s) may be “dependant” upon the testator within the meaning of the *Succession Law Reform Act* (and therefore potential challengers to an estate plan), whether the testator has any minor or adult children and whether any of them are adopted or estranged or disabled and in receipt of government benefits (which need to be maintained following the testator’s death), the manner in which any assets are held (i.e., jointly or as tenants in common), where the assets are located (i.e., foreign taxes may apply), and whether beneficiaries are in place for RRSPs, life insurance policies or pension plans and the citizenship of the testator. It is also advisable to ask about prior wills and the reasons for wanting to vary from the terms of a prior will, such as why a bequest to a beneficiary under a prior will is being changed or revoked, if applicable.

Not only must we ask questions to obtain this important information but we must make adequate notes to demonstrate that we met the expected standard of care. As a follow up, it would be advisable to refer once again to the information obtained in a reporting letter. Relating the facts obtained from a client back to the client in writing not only ensures that we have obtained the correct facts but it allows us to refer back to the facts obtained in the event any issue arises in the future.

Not that I am entirely profit motivated but the interview process is an opportunity to look for other areas in which to assist the client. For instance, I stress for clients the importance of verifying how title is held and I explain to them the difference between tenancy-in-common and joint tenancy and the potential for tax savings when it comes to probate. Quite often, clients are unaware of the fact that the right of survivorship applies to jointly held property or what that means from a tax perspective post-death. Clients are happy to save tax where they can and for me as a lawyer, I am often able to expand the scope of my initial retainer. In other cases, the clients or their children may need a domestic contract, such as when they are anticipating an inheritance of a cottage property (which may be a matrimonial home if used by the child’s spouse). Again, while the goal is of course not to “sell” something to the client, it certainly doesn’t hurt to expand the retainer where appropriate. Alternatively, when the client declines to search title, transfer title (to save probate taxes), or is disinterested in any services beyond their will, I respectfully suggest that it would be advisable to reference your recommendations in your reporting letter.

In terms of testamentary capacity and undue influence during an interview (being the two most common grounds for will challenges), the case law suggests that when a will drafting lawyer prepares a will in light such concerns, the lawyer should document his or her concerns in notes and address the steps taken to investigate or address those concerns. The notes should go beyond noting “capable.” It would seem logical at the least to have notes made which speak to the test for capacity which was set out in *Banks v. Goodfellow* as follows:

1. The testator shall understand the nature of the act and its effects
2. The testator shall understand the extent of the property of which he is disposing
3. The testator shall be able to comprehend and appreciate the claims to which he ought to give effect
4. That no disorder of the mind shall poison his affections, pervert his sense of right or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

It may even be advisable to recommend a capacity assessment for the testator to head off potential challenges down the road on the basis of a lack of capacity. For obvious reasons, if the testator obtains a favourable result, the will should be forthwith executed following the receipt of the opinion.

Reporting Letters

I use a basic template for a reporting letter which I adjust and revise as the circumstances may require. I attach my basic template letter to this article along with other examples I obtained. Among other things, the reporting letters should confirm the instructions obtained from the client, the advice given and any concerns or recommendations to the client with respect to the estate plan. It is also advisable to provide some commentary on circumstances that may require a new will in the future, such as a divorce, marriage, births/deaths, and significant changes in assets or labilities. Some additional details in this regard might include:

- Confirmation of the factual circumstances and instructions given to the lawyer especially when "out of the norm." As an example, "you instructed me to exclude your son, John, from the will because you have been estranged from him;
- Explain mirror wills and comments regarding changing the wills in the future;
- Confirm any advice or instructions regarding verifying ownership of assets, such as whether a title search was suggested or completed;
- Confirm any arising out of the Family Law Act or the Succession Law Reform Act if the will structure potentially exposes the testator's estate to a claim;
- Confirm whether beneficiary designations have been verified and any implications with respect to same; and
- Confirmation of any other advice or planning matter discussed and how this was addressed, including whose responsibility it is for any further follow up action that may be required

The key in my view is to provide enough information to cover oneself as the drafting lawyer but also to make the report concise enough that it is more likely to be read and therefore of use to the client because let's face it, the longer the letter, the less likely it will be read.

Conclusion

While it can be frightening to consider the risks of this practice area, the potential for problems can be significantly reduced, in my view, by taking the time to get a real sense of the client's circumstances at the outset and asking the right questions to overturn enough stones in order to see what may be lurking underneath. The reporting letter can then be the opportunity to confirm one's instructions and advice in writing. Thank you for reading this paper. I sincerely hope it has been of some use to you in your practice.

Jason

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Ask critical questions to head off will challenges

We all know it's impossible to write an effective will for a client without investigating the details of the client's circumstances and estate.

While this conclusion may seem trite, in recent years LAWPRO has seen an average of 60 claims per year alleging that the lawyer did not investigate key details. This specific error has roughly doubled in the last decade. These claims generally arise after a bequest fails because an asset or a beneficiary has been misdescribed, or when a would-be beneficiary asserts a right that the lawyer didn't contemplate when drafting the will.

Asking critical questions before drafting both ensures that the will accurately reflects the testator's intentions, and − provided the answers to the questions are documented − minimizes the lawyer's risk of a challenge that leads to a claim. What information gaps are most likely to lead to claims?

Spousal and dependent relationships

It's not enough for a lawyer to ask a testator for the spelling of a spouse's name. The lawyer must ask about the client's entire history of marriages and cohabitations to ensure that there are not multiple individuals who could be interpreted as "spouses." It's necessary to know whether the testator has ever made a mutual or mirror will with anyone, whether a property the testator wants to include in the will is jointly owned with anyone (spouse or not), and whether any property meets the definition of matrimonial home under the family law.

The same care must extend to questions about children: are they minors, or adults? Are any of these children stepchildren, adopted, or estranged? Are there adult dependents − for example, a child with a disability? Are there any other individuals – a nephew, a partner's child – who are financially dependent on the testator? When there are children with a former spouse, there may be support obligations under a separation agreement or court order that need to be reflected in the will.

Often, arrangements are made to fund support through life insurance or other investments; but for this to occur, the investment must have an appropriate beneficiary designated – something the lawyer should take steps to confirm.

Ownership and value of assets

When a will mentions specific assets, it is up to the lawyer to confirm that they are capable of being passed through the will. In some instances, a testator has attempted to bequeath assets that turned out to be jointly owned with another person, or owned by a corporation rather than personally. To avoid this, the lawyer can perform searches to confirm ownership. Confirmation of ownership details is also prudent when it comes to corporate shares.

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In other cases, the value of assets is important; for example, where the testator is attempting to divide an estate in specific proportions. Ensuring that the testator's intentions are honoured may require the formal valuation of assets, and it's up to the lawyer to recommend this (and if the testator declines, to make a note in the file). It's also important to ask about mortgages, liens, or other debts that may reduce the value of assets.

Critical clerical errors

Often, the questions we fail to ask are the ones for which we think we already know the answers. The resulting oversights include getting a beneficiary's name wrong, or misdescribing a bequest. For example, a gift to "St. Pat's" may lead to a tug-of-war between St. Patrick's Cathedral, St. Patrick's community school and St. Patrick's animal refuge − all of which may operate in the deceased's hometown! Where a charity is named a beneficiary, the lawyer must take steps to record the charity's correct legal name (perhaps including an address for good measure). Similarly, an ambiguous description of assets can lead to a challenge: where a testator who spends summers in a mobile home on the grounds of a mobile home park of which he is part owner leaves his brother "my share in the trailer park," does the gift include the testator's mobile home?

Influence and capacity

Perhaps the hardest questions for a lawyer to ask relate to testator capacity and potential undue influence. Getting to the bottom of either problem requires a lawyer to listen to and act on gut instincts.

Uncovering undue influence may be best approached indirectly: for example, by asking the reasons for instructions to deviate from a prior will. When listening to the explanation, pay attention to who seems to be left out of the story. That individual is the person most likely to challenge the new will. If the testator protests this kind of probing, the lawyer should explain that it's essential to document reasons for "glaring omissions" at the time the will is drafted.

When capacity is in question, the situation is even more delicate: suggesting that the client submit to an assessment means inviting the possibility that the lawyer will not be able to draft the will that has brought the client into the office in the first place. Ignoring doubts about testator capacity, however, is not the answer. The *Rules of Professional Conduct* require a lawyer to take appropriate steps when dealing with a client under a disability. A sincere attempt to grapple with questions of capacity and to document observations that support capacity is more useful, in the long run, than a file that is silent on the issue. If the testator's cognitive abilities are in decline, the family already know it, and a challenge is likely.

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Consider threshold questions before accepting joint retainers in wills

Joint retainers are common in wills practice. Wills and estates lawyers are often asked to prepare mirror or mutual wills for two spouses. While the lawyer is typically assured by the couple that they are in agreement about the proposed estate plan, lawyers should be careful when relying on these assurances, because over the past five years, conflict of interest claims have proven to be the fourth most common type of malpractice claim in wills and estates practice.

A lawyer contemplating accepting a joint retainer should consider three "threshold" questions: is there a conflict of interest in acting for both spouses? Would accepting the retainer be consistent with the *Rules of Professional Conduct*? And finally, how should future retainers by the same parties (individually) be managed, in light of client confidentiality?

Conflicts of interest can arise at various times during the retainer.

Conflicts at the time of drafting

When preparing mirror or mutual wills, the lawyer must be satisfied before accepting the retainer that there is no conflict of interest between the parties. He or she must satisfy himself that the instructions are given freely and without undue influence. If there is any concern about undue influence the lawyer should recommend independent advice be obtained.

To test for conflicts of interest, lawyers must ensure that the clients understand the effect of the proposed will. Do the clients truly intend to restrict the survivor's right to change his or her will? If the intent is that the wills be mutual, should a domestic contract be drafted to confirm the terms? Should the parties have independent advice?

Conflicts down the road

Conflict of interest can arise when the wills are completed and executed. One spouse decides he or she wishes to change a mirror or mutual will. Should the lawyer make changes without advising the other client? And should the lawyer keep the change request confidential? Finally, would accepting a subsequent retainer be contrary to the *Rules of Professional Conduct?*

Any time a lawyer takes on a joint retainer, he or she should remember that the lack of a conflict at the time of the drafting does not mean a conflict of interest will not arise later. The *Rules of Professional Conduct* restrict the circumstances in which a new retainer can be accepted by the lawyer to change the terms of a mutual or mirror will. These restrictions on subsequent retainers and the ability to change the terms of a mutual or mirror will should be explained to the clients at the time of the initial retainer.

The issue of undue influence in the preparation of a will or a conflict of interest in the preparation of a will usually arises on the death of a testator when the will is challenged by the disappointed beneficiaries.

In most cases the lawyer who prepared the challenged will, will be sued or be called to testify at the trial. The best defence for a lawyer is a well-documented file which will include a proper retainer agreement, lawyer's notes on meetings with the clients and a reporting letter on the will.

The caselaw

In *Edell v. Sitzer* (40 E.T.R.(2d) 10, 2001, affirmed (2004) 187 O.A.C. 189) and *Hall v. McLaughlin Estate* (2006 CanLII 23932 (ON SC)), Canadian courts were faced with fact scenarios in which disappointed would-be beneficiaries sought to overturn their fathers' (new) wills by establishing that their parents had created mutual wills when the mothers were alive, but that the fathers had revoked those wills contrary to the provisions of the allegedly mutual wills.

In both cases, the court held that a finding that wills were mutual wills required "clear and satisfactory evidence" of an agreement on the part of the spouses.

In *Edell*, the court preferred the evidence of the father and of the lawyer who had prepared the couple's wills, and who testified that there was no agreement to make mutual wills. The father's new will was upheld. In *Hall*, the court found that evidence of the circumstances surrounding preparation of the wills (the Halls were a "blended family" in which each spouse had children from a previous marriage) and reported conversations between the children were sufficient to establish the necessary "clear and satisfactory evidence" that the original wills were mutual wills. The court imposed a trust on the survivor father's estate in favour of the wife's children.

The bottom line

Joint retainers in the estate planning field create issues which can give rise to potential conflicts of interest for clients and lawyers. Lawyers are advised to take the time to explain and document the advice given to the clients who seek to retain them jointly for estate planning. Any limitations on the retainer should be explained to the clients and documented in the lawyer's notes and reporting letter. Where conflicts of interest are indicated the clients should be instructed to obtain independent advice.

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Wills and Estates Refresher 2018

Monday, March 28, 2018

THE INITIAL MEETING AND INSTRUCTIONS

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The focus of this paper is on all of the things that surround the actual drafting of wills and powers of attorney, starting with the first contact from a potential client. The emphasis is principally on practising defensively, but the best way to practise defensively in this area of law is to ensure that you pay careful attention to your clients and their needs. Of course, you also need to be able to make a living in your practice, so there is also a discussion about practising efficiently at every step from that first call to the storage and retrieval of documents.

Perhaps the most useful tools are checklists. Use one of them, or create you own, but wherever you source your forms, make sure you use them. You can use a single checklist, or a series of checklists. The most useful checklists will cover some or all of the following issues:

- Information provided to a client in advance of the first meeting in order to assist them in preparing, including documents to bring and issues to consider;
- Information about the client’s personal circumstances and assets; and
- Instructions for the disposition of the estate and the preparation of wills and powers of attorney, which can serve as a reminder of questions to raise with clients.

Consider, in addition, having a “soup to nuts” procedure written down so that not only you but your staff and any newcomers to your office will be able to follow it.

First Interview

Apart from taking information about the client and taking instructions, there are number of other issues to be dealt with either before or during the first interview:

- Verifying identification. You may have assumed that since, as a part of the information-gathering process in a standard wills interview, you have identified your client adequately; that is, you will have the client's name, address, telephone number, and occupation. You should, however, also verify identification. Although a typical will drafting and estate planning file will not in itself trigger the threshold for a requirement to verify identity,[1] you may later be asked whether you verified the identity of the client. For example, if a Continuing Power of Attorney for Property is used subsequently on a real estate matter involving title insurance, the title insurer will routinely ask whether the lawyer who prepared the Continuing Power of Attorney for Property verified the identity of the donor of the power. Clients are well inured to the idea of producing photo ID and are unlikely to object to being asked for it. Keep a photocopy or scanned copy of the identifying documents you review.

- Conflict searches. While conflicts may not often occur in wills matters, it is inadvisable to rely on your memory to pick up the possibility that, for example, your potential client is the subject of a debtor's examination by one of your other clients or a client of the firm.

- Compensation agreements. Where the client has decided to appoint a trust company as executor or as attorney under a Continuing Power of Attorney for Property, compensation agreements may have been signed before you begin the process of taking instructions and drafting. Make sure you obtain copies.

- Timetable for process. My practice is to set an appointment date at the end of the first meeting with the client. Not all practitioners do this, but it is, I believe, very important to keep the process of preparing wills and powers of attorney on schedule. There are, of course, cases where failure to prepare a will promptly has resulted in the solicitor being found negligent, but even where there is no reason to anticipate an emergency, this is work that should not sit on your desk for months.[2] Both you and the client will forget the exact instructions or the rationale behind them, and delays inevitably mean lost time which cannot fairly be billed to the client.

[1] According to the Law Society's on-line notes, you are required to obtain verification of identity "When you are retained to provide legal services to a client and you are involved in a funds transfer activity, that is, when you engage in or give instructions in respect of the receipt, payment or transfer of funds."

[2] There have been many cases, over the last 30 years or so in which lawyers have been found negligent for failure to prepare a will in a timely fashion. See Martyn Frost, *With the Best Will in the World: Negligence in Will Preparation* (London: Legalease, 2000).

- Retainers. You need to inform your client of the scope of the work you will be doing and the fees you will charge, and have their signed acknowledgement in a formal retainer. Some practitioners send the retainer by mail to clients following the first meeting. Unless you have a particularly complex retainer, you can have it signed by the clients at the end of the first meeting. It is still not common to request cash retainers (perhaps because it is still rare for client not to pay for this service) but it is becoming more accepted to do so. Even if you do not take a cash retainer, a signed retainer is advisable, and in a joint retainer it is essential.

a. Client Preparation

New clients (and returning client, depending on how recently you have seen them) should be prepared for the first meeting, in order to get the best value from the time you will spend together. At the very least, a new client should be asked to bring:

- Full names, addresses, and dates and places of birth for potential beneficiaries (spouses, children, grandchildren, etc.). Names are required for identification purposes and middle names are especially helpful where families tend to reuse the same name through generations. Dates of birth are helpful in identifying when beneficiaries are minors or will achieve a specified age, and places of birth are helpful in identifying citizenship issues or exposure to US tax for those who may be US persons.

- Names and contact information for professional advisers (accountant, financial planner, family doctor). Identifying other advisers for the client is helpful, especially where they may be involved in some of the planning. While a family doctor is unlikely to be involved in planning, he or she may be called upon if capacity issues arise.

- Copies of any existing wills and powers of attorney. It is helpful to review earlier documents, especially to know whether there are radical changes from previous dispositions, which will be a red flag. Where there are departures, you will want to explore with the client the reasons for the changes.

- Copies of any domestic contracts or court orders. Where the client has had prior relationships, there may be obligations to dependants. For example, if a separation agreement creates a continuing obligation to maintain life insurance for the previous spouse, you will need to be careful about changing beneficiary designations. Where there are dependants, the plan will have to make appropriate provision for them.

- Copies of shareholder agreements. The arrangements in a shareholder agreement for the disposition of shares of a private corporation, or how buyouts are to be funded will impact the plan. You will need to ensure that the shares are not left in contravention of the shareholder agreement.

- Copies of trust deeds. If the client is a trustee or a beneficiary under a trust, you will need to know what provisions are made for the death or incapacity of the client. The client may, for example, have a power of appointment which should be exercised by will.

- Recent investment statements. Clients are often unsure exactly how they hold their assets. Obtaining recent statements will help to clarify which accounts are, for example, held jointly with the spouse, and which accounts are registered or unregistered. It may also allow you to make a rough estimate of the potential for income tax on a registered account or where assets have appreciated.

- The names of the beneficiaries under RRSPs, RRIFs, TFSAs and life insurance. Clients are often unaware of the fact that a will does not change beneficiary designations unless this is done specifically. It is not uncommon for a client to have created a mosaic of fairly random gifts to family members as they have opened new accounts and named various family members as beneficiaries. Part of the planning process will be to rationalize the total estate, and to use beneficiary designations prudently to avoid claims against the estate, to convey discrete benefits, and to reduce Estate Administration Tax.

- Information on the title to any real estate: a deed is good, although you will still need to do a subsearch or any real estate where title is significant. It important to determine that your client actually owns the real estate they are dealing with – as opposed to owning shares in a corporation that owns the real estate. Title information will also give you a good idea of any potential conveyancing issues and whether the property can be passed through a secondary (non-probate) will.

You may also wish to prepare the client for the fact that the first interview may be lengthy. Even with well-prepared clients, a first interview can take an hour or more.

Client Questionnaires and Intake Forms

Your main tool for understanding the client's situation is your checklist or questionnaire. For the most clients, who are clearly capable, it can be a significant saving of your time, and an opportunity for them to begin organizing their thoughts, if they are provided in advance of the first meeting, with the questionnaire.

The purpose of the questionnaire is to provide the information you will need as background to estate planning. It also serves as a reminder to ask questions that may escape in a more free-flowing interview. It should be comprehensive, but you should also be prepared to explain the relevance of any question that you ask.

Generally, the questions you ask will be about the client or clients, their family, and their assets. You will want to probe for complications – are there blended families, former spouses, children who have no contact, informally adopted children, predeceased children, incapable beneficiaries, insolvent beneficiaries, non-resident beneficiaries, clients or beneficiaries who may be considered U.S. persons, hostile family members, charitable beneficiaries? Each of these factors may require a particular set of planning provisions or clauses in the documents you are about to draft.

Similarly, with the assets. You will need to know not only what the client owns, but how it is held – solely, jointly with one or more others, through a corporation or a trust – its current market value and (for capital assets) when and for what it was acquired. You will need to understand the corporate structure of family businesses, and look at the terms of existing trusts.

Your checklist should be revised regularly to respond to changes in the law. For example, if you do not know when real estate was acquired, you cannot advise on the possibility of sheltering its value from Estate Administration Tax. If you have not asked whether the client or the client's children have had fertility treatments, you may not be able to advise about the impact of the posthumous conception provisions in s. 1(1) of the *Succession Law Reform Act*.[3] If you ignore ownership of bank accounts, you cannot advise about the impact of the presumptions under *Pecore*.[4]

Taking Notes: Capacity and Undue Influence

The questions you ask your client in the course of preparing a will are the same questions that establish capacity. Therefore, where capacity may be an issue, you should complete the questionnaire at the meeting, and ask probing, open-ended questions in order to test capacity. You should always, of course, have file notes, but where there is any indication that capacity may be an issue, you must ask more probing questions and take especially meticulous and complete notes.

Your notes are not only the guidance you will need for the work you have to do in drafting for the client, but may also be critical evidence on any challenge to the documents. In particular, you will want to establish that your client had capacity to make the will and powers or attorney, if you are preparing these. You will also want to record the evidence to rebut any suggestion of undue influence.

The classic test for capacity is found in *Banks v Goodfellow*,[5] and elaborated in a number of subsequent cases, *Hall v Bennett Estate* being a good example.[6] To have capacity to make a will, one must:

- understand the nature and effect of a will;
- recollect the nature and extent of his or her property;
- understand the extent of what he or she is giving under the will;

[3] Effective the 1st of January 2017, a child, for the purposes of the *SLRA*, now may includes a "child conceived and born alive after the parent's death". *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 1(1).

[4] *Pecore v. Pecore*, [2007] 1 SCR 795, 2007 SCC 17 (CanLII).

[5] (1870), LR 5 QB 549, applied by the Supreme Court of Canada in *Leger v Poirier*, [1944] SCR 152, [1944] 3 DLR 1.

[6] [2003] OJ No 1827 (CA).

- remember the persons that he or she might be expected to benefit under his or her will; and
- where applicable, understand the nature of the claims that may be made by persons he or she is excluding from the will.

It is possible for a will-maker to suffer from delusions, and still make a valid will, provided that the delusion does not impact the disposition.[7]

The cases where wills are challenged repeat that, while a drafting solicitor is not a guarantor of the will-maker's capacity, he or she is a trained and impartial observer. Detailed notes of the client's demeanor and answers to your questions will carry substantial weight, but the questions must be pointed, especially where there is a possibility of undue influence. Consider, for example, *Walman v Walman Estate,* where the will was rejected by the court. [8] The drafting solicitor appeared to have followed standard practice and, in the court's own words, he "did several things 'right' in connection with this interview. He interviewed [the client] in [his wife's] absence. He kept good notes. And he asked questions that, facially, comport with the requirement of determining whether the testator understood the extent of his assets." The court went on to find, however, that in the circumstances "he needed to go further than he did," and should have asked about the wife's means, what had already been gifted to her, and the reason for his disappointment with his sons, even though they were not, in the end, cut out of the will.

Capacity is nuanced, variable, and not always readily apparent.[9] Medical diagnosis may be helpful, but remember that family physicians are mostly neither able nor willing to opine on testamentary capacity; and capacity to make a will is a legal, not a medical matter. While it may make sense to obtain an assessment from a qualified physician in appropriate situations, you will need to consider:

[7] See Ian Hull and Dr Kenneth Shulman, "Personality Disorders and Their Impact on Testamentary Capacity," 2014 LSUC E&T Summit, Toronto; C. Wagner and N. Herrmann, "Insane Delusions: Has the Test Been Expanded?" (Toronto) LSUC, Estate Litigation Practice Essentials, 2012).

[8] [2015] OJ No 179, 2015 ONSC 185. See also *Stevens v Crawford* 2000 ABQB 5 (CanLII), additional reasons at *Stevens v Crawford*. 2000 ABQB 305 (CanLII), aff'd *Stevens v Morrisroe*, 2001 ABCA 195 (CanLII), 281 AR 201, 202 DLR (4th) 577; leave to appeal refused 2002 CarswellAlta 378 (SCC). See also *Scott v Cousins*, [2001] OJ No 19, 37 ETR (2d) 113 (Sup Ct) and *Smith Estate v Rotstein*, [2010] OJ No 1527, 2010 ONSC 2117, 56 ETR (3d) 216, para 117 (Sup Ct)..

[9] See Brian S Schnurr & Kenneth I Shulman, *Law Society of Upper Canada Special Lectures 2010: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto: Irwin Law, 2011).

- There is a presumption of capacity at common law. The executor of a properly executed formal will made by an adult is entitled to rely on this presumption.[10]

- Capacity to make a will is not the same as capacity to make a power of attorney, or capacity to undertake any number of other legal acts such as marrying, contracting, managing finances, or making decisions about personal care.

- A diagnosis of a dementing disease such as Alzheimer's disease is not the equivalent of incapacity. A newly diagnosed Alzheimer's patient may well have capacity and a real need to make a will and powers of attorney.[11]

- When a client is very elderly or infirm, has been seriously ill, or under severe pressure from family, you must be alert to the likelihood of capacity problems or undue influence and take appropriate steps to establish the "righteousness" of the will. The gold standard here is a full assessment by a trained geriatrician or other specialist physician. [12] Age, however, is not in and of itself an impairment, and it is ageist and insulting to start by assuming that an elderly client lacks capacity.[13]

- If you ask for an opinion from a physician who is not a specialist, a covering letter setting out the legal test for capacity and some background may result in a more helpful response.

- Try to arrange your meetings with a client whose capacity may be impaired at a time and place when they are likely to be at their best. Beware, however, of relying on "lucid intervals" which in those who are truly impaired likely last for far too short a time to complete will instructions.[14]

[10] *Vout v Hay*, 1995 CanLII 105, [1995] 2 SCR 876, 125 DLR (4th) 431, 82 OAC 161.

[11] See *Stevens v Crawford,* [2000] AJ No 21, 2000 ABQB 5.

[12] *Key & Anor v Key & Ors*, [2010] WTLR 623, [2010] EWHC 408, [2010] 1 WLR 2020 (Ch). In this case, the solicitor made a will for an 89-year-old man whose wife of 65 years had not been dead a week, and which changed dramatically the previous disposition. The judge was highly critical of the lawyer, citing (among other failings) his lack of file notes. *Key* also found that depression is a factor that can be taken to impair capacity. We are not aware of any case in Canada adopting the reasoning of *Key*.

[13] "I should add . . . that there is plainly no duty upon solicitors in general to obtain medical evidence on every occasion upon which they are instructed by an elderly client just in case they lack capacity. Such a requirement would be insulting and unnecessary." *Thorpe v Fellowes Solicitors LLP*, [2011] EWHC 61, [2011] EWHC 61 (QB), [2011] PNLR 13, (2011) 118 BMLR 122.

[14] See Kenneth Shulman, *et al*, "Cognitive Fluctuations and the Lucid Interval in Dementia: Implications for Testamentary Capacity" (2015) 43(3) J Am Acad Psychiatry Law 287-92.

- If your client clearly does have capacity, the assessment may be useful if you anticipate a challenge to the will, but you should not make a habit of sending obviously competent clients for medical assessment.

- Do not subject a clearly incapable client to an unnecessary, expensive, and humiliating process of an assessment. It is always an option to decline a retainer.[15]

- A client who is reluctant to undergo an assessment may be persuaded of the value of the process by understanding that the purpose is not to undermine him or her, but to create solid evidence of capacity to bolster the will if it is challenged.

- A client who is reluctant to pay for your time in dealing with these issues should be encouraged to think of your duties as falling into two categories: 1) the preparation of documents, which you might consider billing at a flat fee, and 2) the advice and documentation necessary to protect the will, which you bill at an hourly rate.[16]

Undue influence is not the same thing as lack of capacity, but the two are related. As a person's capacity declines they may be less able to make good judgments about who to trust or the veracity of what they or told, and less able to resist suggestion. Where there are factors that may suggest the possibility of undue influence, the need to establish the "righteousness of the transaction" rises. This will mean:

- Ensuring that you confirm instructions if they have been given by a third party, but even when the client has given them directly;

- Probing as to the reasons for the disposition;

- Reviewing carefully the impact of the decision with the client;

- Ensuring the client has adequate capacity;

- Making sure instructions are given in a context where the client can express themself freely;

[15] *Hall v Bennett Estate*, 2003 CanLII 7157, (2003) 64 OR (3d) 191 (CA), found that the solicitor who was called at the last minute to the deathbed of the deceased and concluded that he was incapable was entitled to decline the retainer in the circumstances.

[16] I thank John Poyser for this ingenious suggestion of a way to explain the billing on a complex estate planning file.

- Offering alternatives, such as a “secret” will not to be shown to family, or a condition on a gift that certain services be provided; and

- Asking the same question in several different contexts and forms, to ensure the client is not simply repeating someone else’s words by rote.

Joint retainer letters and joint retainer documents

In any retainer, you will want to make clear what you are being asked to do, the payment terms, the arrangements regarding delegation, the terms on which information is gathered and retained, etc. In addition, with will clients, you will frequently have to deal with conflicts and joint retainers. If you act for a couple to prepare their wills — and this is perhaps the commonest situation for a wills practitioner — you will most likely have a joint retainer. The following circumstances would indicate a joint retainer:

- the parties attend at the lawyer’s office at the same time;

- the parties meet with the lawyer together;

- the parties appear to have a common goal and instruct the lawyer together on achieving that goal;

- the wills are executed at the same time;

- one account is rendered to both clients; and

a single reporting letter is usually prepared for both clients.

The Rule of Professional Conduct include provisions dealing with joint retainers, one of the most vexing problems in the preparation of wills (and powers of attorney) for a couple. Where there is a joint retainer to prepare a will, the lawyer must inform the clients that information will be shared, and that he or she cannot prepare different wills later without the other partner’s agreement, unless the couple has separated or one of them has died.[17]

[17] https://www.lsuc.on.ca/with.aspx?id=2147502071#ch3_sec4-5-joint-retainers. The Rule make no allowance, however, for changes to wills where one of the parties has lost capacity and the other wishes to make changes to the will.

Joint retainers need to be approached with care. For couples in a stable first marriage with children in common, the risk that things will go awry may be relatively low. But you must ask the questions to discover whether there are factors that would make a joint retainer inappropriate. Does either of the couple have children from a prior marriage, and if so do they understand the impact on their children of a new marriage by a surviving spouse? Do the children get along? Is there a significant difference in net worth between them? Do they have a – mistaken - belief that the wills they are making cannot be re-made without the consent of both of them? Can you safely advise them both? If you do accept joint retainers, it is especially important to use a retainer that clearly sets out the terms on which you are acting. While this may be included in your reporting letter, you must also explain the joint retainer and obtain consent in writing at the outset, according to the Rules.[18]

It is also important to distinguish acting on a joint retainer from preparing mutual wills. You do not want to find yourself faced with the claim that the wills you prepared for a couple were mutual wills — irrevocable without the consent of the other party during their joint lives, and unchangeable at all after the death of one. Because clients are often unsophisticated about this, you need to make clear that you are not preparing mutual wills, that the wills are not set in stone, that there is no contract between them not to change the wills, and that either of them can make changes before or after the death of the other partner. The best way to defend yourself from a claim of negligence in this regard is to be clear and to place this information in simple and accessible language in the retainer.

You will also want to use your retainer agreement to set out any other information that your client needs to know such as:

- Your fees and the basis on which they are calculated, what you charge for disbursements, the period of time for payment of the account, etc.

[18] **3.4-5** *Before a lawyer acts* in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

(a) the lawyer has been asked to act for both or all of them;
(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

- Any information regarding electronic communication. If you plan to send drafts or any other information by email it is advisable to have the client's consent included in the retainer.

- If you plan on sharing information with anyone other than the clients, include consent to do this in the retainer agreement. This is particularly important where you are working with other advisers such as trust companies or accountants (see the comments below on working with third parties) or if you will need to have discussions with family members.

Managing the client's expectations

Your clients will have different levels of familiarity with what it is, exactly, that you do. It is not unusual for client to believe that all they need to do is tell you who they intend to make beneficiaries, and they may react negatively to the extensive questioning that you are required to do in order to act competently. Here are some common misunderstandings, and suggestions about how to deal with them:

- Myth #1: It is not necessary for the lawyer to meet with the client. In fact, the Rules of Professional Conduct require you to meet at least once with any client for whom you are drafting wills. In emergency situations, you may take instructions over the phone, or even take instructions from a third party, but you must verify capacity in person, and confirm the identity of the person you are dealing with, and your instructions.

- Myth #2: It is not necessary to know anything about parties who will not receive anything in the will. In fact, it is especially helpful to know a great deal about any family member who would expect to be in the will and is being omitted, in order to establish that the omission is not a matter of lack of capacity. While the explanation may or may not find its way into the will, the solicitor's background notes may be very helpful if the will is ever challenged.[19] This is also an area where solicitor's advice may be helpful in strategizing how to reduce the likelihood of challenges.

- Myth #3: Solicitors should not give advice on disposition. In fact, one of the most helpful things a competent solicitor can do is discuss with the client the impact of a proposed

[19] See *Spence v. BMO Trust Company*, 2016 ONCA 196 (CanLII).

disposition. This is especially true when the client wishes to make charitable dispositions or is concerned about the tax impact on the estate. It is often helpful to explain the pros and cons of a legacy as opposed to a share of residue, whether legacies can actually be paid on the first death of a couple, or the options for disposing of personal effects.

- Myth #4: It is not necessary to know about previous wills. For a capable client who is clearly intent on changing prior dispositions, this may be true, but for some clients, especially where there is a radical change in the disposition or may be questions about the capacity of the will-maker, reviewing an earlier will is important.

- Myth #5. Lawyers work alone. In fact, in the context of estate planning, lawyers are frequently part of a team of planners and advisers. Clients may find you on their own or a through family member, but they are often referred by other advisers. The risk for a lawyer who depends on these referrals is forgetting that loyalty is owed to the client first. While advisers or family members may participate in part of an interview, actual instructions should be given directly by the client, and without interested parties present.[20] This does not mean, however, that you cannot discuss issues with other advisers or family members. Consider what each of them might legitimately bring to the planning process.

Working With Third Parties

You and your client can benefit from the involvement of family members, financial planners, and trust companies, provided you abide by the basic rule of ensuring that your instructions come from the client, and are careful to share information with other parties only if the client authorizes you to do so, and only to the extent that is appropriate.

Family members are often deeply involved in the planning process, and may even have initiated it. You will need to be wary, of course, of any family member who appears to have a disproportionate influence on your client, especially if that family member is a beneficiary or gains by the changes being proposed. Nevertheless, if your client is clearly dependent on advice and direction from a family member and wants them to be involved, you can incorporate the

[20] See *Re Worrell*, [1970] 1 OR 184, 8 DLR (3d) 36 (Surr Ct), for a judicial view of the solicitor's obligation when taking instructions.

involvement of family into your planning meetings provided to take some of the following precautions:

- Confirm with the client that you are authorized to speak with family members, and if a family member offers to accompany the client into a meeting, ensure that your client is given an opportunity to say no.

- Family members may be present through the portion of the meeting that involves taking information about assets, especially if capacity is not seriously in doubt. If there are capacity issues, however, they may not be apparent to you if the family member is jumping in to answer questions consistently. This interference may arise from protectiveness rather than avarice, but you may need to ask the family member to let the client speak for him or herself.

- Even if family members are present for a portion of the meeting, and are given an opportunity to ask questions, they should be excluded from the portion of the meeting that involves the actual giving of instructions.

- Changes that benefit one family member, who is leading the process to effect the changes, are a red flag for undue influence. This does not mean you cannot make a will for your client, but you must go further take steps to ensure that the client is nort being unduly influenced.

- Family members may have conveyed will instructions by telephone, especially if the will-maker is unwell or in hospital. In this case you will need to have a meeting alone with the client, if necessary just before documents are signed, to confirm the instructions you have been given.

Trust companies provide executor services for a fee set by agreement in advance of the execution of the will. Trust companies need to refer the file to an outside lawyer, and are thus a good source of referrals. As executors, they require particular clauses to be inserted in wills where they are appointed, and they will review draft documents for you. They will also act as attorneys under continuing powers of attorney for property, and require a compensation agreement for this purpose as well. Although an employee of the trust company may have met with the client and may even have taken instructions to forward to the drafting lawyer, it is important to confirm both your retainer and the instructions directly with the client, even if you do so only by telephone.

Accountants, financial advisers, gift planners, and bankers often initiate the will-making process. Financial advisers may have long-standing relationships with clients and may be familiar not only with their assets but with their family and the businesses. Since they have regular meetings with clients, they may be the ones who have insisted on the clients seeing you in order to have wills made.

Large and complex estates will almost certainly need an accountant to assist in making the plan. Accountants may, in fact, prepare a planning letter detailing what steps the client should take, including the provisions that should be included in wills and powers of attorney. This can be extremely helpful, although you must, of course, assess for yourself the appropriateness of the plan and do your own drafting. Most accountants are happy to discuss with you the pros and cons of the options put to the client.

Taking Instructions

You and your clients need to understand your role in taking instructions: you are not simply a scribe, as many even quite sophisticated clients believe. You are an adviser, and that means that you will need to advise on the operation of the law in their situation. Some of the commoner situations where you will be called upon to advise as part of the process of taking instructions are described below.

Second and Subsequent Relationships

Clients who have children from a previous relationship and a new spouse have a particular set of issues to be addressed. They have a legal obligation – and likely a desire – to support the new spouse. They will also, however, want to ensure that some portion of their estate passes to their own children rather than having the whole of a joint estate passed to the children of the spouse. You will have to explain that if the surviving spouse remarries, the wills are revoked and the intestacy rules will result in the whole of the joint estates passing to the new spouse and the surviving spouse’s children, leaving the children of the deceased spouse disinherited.

In truly blended families, the couple may each regard the other's children as his or her own. If the couple has a cohabitation or marriage contract, planning in a second marriage may be easier, but even here there may be issues since the efficacy of such contracts made 20 or 30 years ago in defending against claims for support may be questionable. If they do not have a cohabitation or marriage contract, they are probably not willing to undertake the exercise of preparing one late in their relationship, especially given the potential costs, and the possibility of creating acrimony between them.

There are generally three broad frameworks for planning in this area, one of which, possibly with some modifications, is usually acceptable for couples in second or later relationships.

a. Mirror wills. In this arrangement, each of the parties agrees to leave everything to each other, and both parties will leave their joint estate to their children equally (or in some agreed proportion) on the death of the second to die. Clients who make this arrangement should understand the possibility that after the death of one of them the survivor may remarry, the will be revoked, and (if a new one is not made so that the survivor dies intestate) the estate will be divided between the new spouse and the survivor's children. Also possible is that the surviving spouse will become estranged from step-children, and make a will leaving everything to his or her own children.

   The last scenario has resulted in a number of cases where it is alleged that the original wills were, in fact, mutual wills.[21] The doctrine of mutual wills, of course, holds that where a couple who have made essentially mirror wills intend to bind themselves to maintain the agreed disposition, after the death of one of them, the survivor cannot change his or her will. An attempt to do so will cause equity to impose a trust on the executor of the new will to ensure that the intention under the original mutual wills is honoured. Clients often like the idea of mutual wills, but they are, in fact, very difficult to

[21] See, for example, *Rammage v Estate of Roussel*, 2016 ONSC 1857 (CanLII), where the court imposed a trust, even where there was "no direct written or oral confirmation that the 1998 wills were mutual." For a sense of the complexities, see TG Youdan, "The Mutual Wills Doctrine" (1979) 29 UTLJ 390; Julie Cassidy, "Case Note: Osborne v Estate of Osborne; Equitable Agreement or a Contract in Law: Merely a Matter of Nomenclature?" [2003] MULR 27(1) 218; LA Sheridan, "The Floating Trust: Mutual Wills" (1977) 15 Alta L Rev 211; JDB Mitchell, "Some Aspects of Mutual Wills" [1951] 14 Mod L Rev 136; Albert H Oosterhoff, "Mutual Wills" (2008) 27 ETPJ 135; Mary-Alice Thompson, "Mutual Wills and More" in *Beyond Will and Estate Planning Essentials* (Ontario Bar Association, Continuing Legal Education Program, 10 May 2011).

draft effectively. If you undertake to do them, at the very least they should be paired with a full-fledged domestic agreement, which is likely to add significantly to the time and cost of will preparation. Since the attraction of the "just trust me" will is frequently its simplicity, venturing into the preparation of mutual wills is unlikely to appeal to clients.

Clients who wish to do mirror wills in a second relationship should be advised of the risks, and your file should note that as part of your interview, and include it in a reporting letter. It may even be worthwhile putting a specific statement in the wills themselves to say that they are not intended to be mutual wills.

b. Division between spouse and children. A client with a spouse who plans to leave his or her estate to children of a first marriage will need to be advised about the legal obligations owed to a surviving spouse, and the rights of a surviving spouse to either division of property or support. Where there is no domestic agreement, the estate risks claims being made by a surviving spouse. Equalization claims may be relatively easy to quantify. In a long-standing relationship where the assets have been openly shared, the client can probably make a reasonably reliable estimate of the value of an equalization claim. It is, then, possible to consider using gifts outside of the will – life insurance designations, pensions, and beneficiary designations on registered retirement savings plans are registered retirement income funds – to discourage equalization claims.

The provisions of the *Family Law Act* dealing with how such gifts are taken into account are relevant. Essentially, the *Act* holds that where a surviving spouse has elected to take an equalization, but has received or is receiving life insurance, pension benefits, or property by right of survivorship, not only is the value of those benefits set off against the claim, but the estate may actually recover any excess.[22]

[22] *Amounts to be credited*
(6) The rules in subsection (7) apply if a surviving spouse elects or has elected to receive an entitlement under section 5 and is,
(a) the beneficiary of a policy of life insurance, as defined in the *Insurance Act*, that was taken out on the life of the deceased spouse and owned by the deceased spouse or was taken out on the lives of a group of which he or she was a member;
(b) the beneficiary of a lump sum payment provided under a pension or similar plan on the death of the deceased spouse; or
(c) the recipient of property or a portion of property to which the surviving spouse becomes entitled by right of survivorship or otherwise on the death of the deceased spouse.

In addition, since registered plans like RRSPs and RRIFs are subject to full taxation in the estate unless they are transferred to a surviving spouse (or disabled dependant), there is very good tax planning reasons to make a spouse the beneficiary of these plans. Provided the amount of the plans is – and is likely to remain[23] – roughly equivalent to the value of an equalization payment, designating a surviving spouse as a beneficiary may allow a client in a second marriage to make a will leaving everything to his or her own children.

Where registered plans and life insurance are not available, or are in adequate, the spouse may have to receive a legacy or a share of residue, in order to ensure that he or she is not inclined to make an equalization claim.

A will-maker who is married must also make adequate provision for his or her spouse, or who will otherwise have a claim under Part V of the *Succession Law Reform Act* for support against the estate. In many cases, where provision has been made to ensure that there is no equalization claim, the result will be that "adequate provision" has been made for the spouse. There may be some couples, however, where this is not the case. The will-maker will need to consider what the needs of the surviving spouse will be, and what will be required to ensure that he or she has a standard of living more or less equivalent to what was available during their joint lives.

Will-makers may have to be reminded that, although they may wish to leave an inheritance for their children, they have a legal obligation to support a spouse.

c. Spousal trusts. While recent changes in the *Income Tax Act* have made spousal trusts for less attractive as a tax-planning vehicle, they continue to be extremely useful as a device that allows a will-maker to make provision for a surviving spouse but preserve capital for eventual transmission to his or her children. The creation of a spousal trust does,

(7) The following rules apply in the circumstances described in subsection (6):
1. The amount of every payment and the value of every property or portion of property described in that subsection, less any contingent tax liability in respect of the payment, property or portion of property, shall be *credited against the surviving spouse's entitlement* under section 5.
2. If the total amount of the credit under paragraph 1 exceeds the entitlement under section 5, the deceased spouse's *personal representative may recover the excess* amount from the surviving spouse.

[23] Once RRSPs are converted to RRIFs, of course, they begin to decline in value, so if they are being used as a disincentive to a claim for equalization, the client may need to look at some other source of funding such as life insurance to prevent the claim.

however, require that the will-maker have sufficient assets in his or her own name to fund the trust. In a common arrangement – even in second or later marriages – a couple may hold all of their assets either in investments with a designated beneficiary, such as pensions and registered plans, or in jointly owned assets like real estate or investment accounts. The result is that on the death of the first of the couple, there is nothing in the estate proper. This is a good illustration of why it is important to understand the structure of assets for planning purposes, since if you draft a will with a spousal trust for a client who holds assets in this manner, the result will be that the trust is utterly useless for its intended purpose.

It clients do wish to use spousal trust they must either hold their assets separately or consider taking steps to divide them. Clients may be resistant to changing title on assets, especially if there concerned about simplifying their arrangements. Nevertheless, a well-drafted spousal trust that allows for income to be paid to the surviving spouse, and possibly capital as well with some parameters, will both ensure that adequate provision is made for the surviving spouse, and provide for the preservation of capital for the children following the spouse's death.

It is important to take some time considering who is best to be trustee of the trust. Although the will-maker may in be inclined to make the spouse the sole executor and trustee, this is not always wise. Since the trustee will have the power to make discretionary decisions about capital distributions, the children may feel that this is putting the wolf to mind the sheep. Moreover, if the spouse does not keep especially good records, it may be difficult for a successor trustee to determine what has been done in the course of a long standing trust. Putting the children on alone may set up hostility between the children and the spouse which is antipathetic to the will-maker's intention. Where the relationship with the children is good, the spouse may be put on as the co-trustee with one of the children. Where this is not the case, an impartial professional trustee is probably the best option.

When this arrangement is made, and depending on the funds available, the will-maker may wish to consider a small legacy immediately to the children, in order to prevent their sense that they have received nothing from their own parent and will have to wait for the step-parent to die before getting their inheritance.

Minor Children

Clients with minor children generally have two areas of the will that require particular planning:

- Guardians. Although it is of short duration, the power to name a guardian for minor children can be especially important to parents. Only a parent who has sole custody has this power, so it is important to remind clients that the clause may not be effective if they have joint or shared custody. Apart from naming guardians, clients will need to think about whether they should have a backup guardian – young parents often want to name their own parents as guardians, but this may not be a practical arrangement. They will also want to consider whether to give their executors the power to pay for the application to court to have the guardian confirmed, or for other purposes such as buying a new car or putting an extension on the house, which would technically be for the benefit of the guardians rather than of the children. Parents may also want to put in provisions about maintaining contact with both sides of the family, or education in a particular religion or school. As long as they understand that these provisions are precatory, and cannot be enforced by the executor, it is possible to include them in the will.
- Trusts. Most parents will want some form of trust for minor children in their will. While the standard age varies according to their assumptions about when children will be capable of managing funds, many will like 21 as a traditional age, 25 as a round number approximating when children can be expected to have completed their education and begun their independent lives, or 30. Unless it is for tax-planning reasons, it is unlikely that clients will want funds held for their children past 30. [24]

  Young parents may well have a good portion of their wealth in registered plans or life insurance. Depending on the amount of these funds, it may be prudent to explore having them held in trust. While the clients may have named children and a trustee on their life insurance policy, for example, they will not usually have understood that the trustee, as trustee of a bare trust, has no powers to hold the trust past the age of 18. Where the amounts in registered plans and life insurance are not proportionately large, it may actually make better sense to have them paid to the estate, notwithstanding that they are

[24] Testamentary trusts have, of course, become subject to top marginal tax rates, with the exception of the so-called "40 year trust", under section 104(18) of the *Income Tax Act*, which has arguably limited utility.

thereby exposed to Estate Administration Tax. Larger sums, of course, will justify your time in drafting either trusts within the context of the will, or freestanding trusts.

Disabled Children

Parents of disabled children frequently know that they want a Henson trust, having heard the term at one of the many presentations by associations that work with parents of disabled children. You may need to explain that the term "Henson trust" is simply a convenient way of referring to a fully discretionary trust set up for the benefit of a person in receipt of *Ontario Disability Support Plan Act* payments. Henson trusts vary from very simple to very elaborate, but they should all have certain elements:

- Full discretion for the trustee to pay the income to the beneficiary or not;
- A provision ousting the operation of the "even hand" rule so that the trustees will not be forced into making payments to the disabled beneficiary; and
- Provision for income to be paid to someone other than the disabled beneficiary after 21 years, so that if after 21 years, the *Accumulations Act* compels the payment of income, it will not necessarily vest in the disabled beneficiary and interfere with their entitlement to ODSP benefits.

In addition, the trust may deal with the number of other issues such as:

- termination of the trust once the beneficiary's no longer receiving ODSP;
- guidance for payments that can be made from the trust;
- payment of funeral and expenses of the beneficiaries last illness;
- Provision for replacement trustees in the event that the first named trustee is no longer able or willing to continue;
- naming an adviser, especially for disabled beneficiaries who are unable to speak to their own needs;
- authorization for payment into other sheltered vehicles such as a Registered Disability Savings Plan; and
- Authorization for the trustees to elect to make the trust a qualified disability trust.

Working with parents of a disabled child may require you to explore other vehicles than the Henson trust in a will. Payments into a registered disability savings plan, or the purchase of a principal residence may, in the appropriate circumstances, represent good planning to provide for a disabled beneficiary.

Probate Planning

Clients are frequently very certain that they want to avoid probate, but without really understanding what probate is or how it operates. In order to assist them you will need to be able to advise on:

- Primary and secondary wills
- Beneficiary designations
- Inter vivos trusts, such as alter ego and joint partner trusts, and bare trusts
- Joint ownership of assets, including some very new products such as the joint with right of survivorship bank account

You should also be prepared to make a quick estimate of the client's exposure to Estate Administration Tax, in order to ensure that the cost of the planning does not outweigh the potential benefit of the tax to be avoided.

Small Business

Business owners will need good tax advice, especially with respect to the potential tax on shares in a private business. They will also, however, need you to advise on issues such as who should act as their executor and the impact this may have on the business. For example, while naming a business partner as executor may seem to make good sense, it can place the partner in an acute conflict of interest in the management of the estate. Working with small business owners you should be prepared to discuss:

- Shareholder agreements
- Life insurance – who owns it and who is named as beneficiary?
- How to compensate a child who is not interested in a share of the business
- How to finance a buyout of corporate shares and ensure that there is some liquidity for payment of beneficiaries

- Where shares are to be held in a trust such as a spousal trust, what instructions should be given to the executors to ensure an appropriate flow of income to the spouse
- What clauses will need to be included to facilitate postmortem tax planning if appropriate
- Multiple wills

Real Estate

You will want to do sub-searches of any real estate owned by your client that is not obviously under the land titles system, such as a condominium. Even property in the land titles system may be passed through a secondary will without probate if it benefits from the “first dealing” exemption. Perhaps the most troublesome piece of real estate to be dealt with is a family cottage. You will need to discuss with your clients some of the following issues:

- Various forms of title if the property is passing directly to children. For example, should they own as tenants-in-common or as joint tenants or perhaps each set of children should own as joint tenants with their own spouses and children but as tenants-in-common with their siblings
- Is there a benefit to an immediate transfer of real estate as opposed to a transfer under the will? Do not forget that a conveyance retaining a life interest may accomplish many of your client’s objectives, especially where there is not a large capital gain at the time.
- Should the estate hold the cottage in trust and if so for how long and on what terms?
- If there is a trust, how are the cottage expenses to be funded for the duration of the trust? A common arrangement is to have funds set aside from the residue of the estate, but clients will frequently want some provision for payment to be made by the children who use the cottage
- If the cottage is held in a trust who should be the trustee, bearing in mind that the trustee may be called upon to act as arbiter if there are disputes?
- Do the children really want the cottage, or would they prefer the cash generated by its sale to buy their own cottage?

Income Tax

You may not be a tax expert, but you need to know enough to know where there are likely to be tax liabilities and roughly how much, in order to make a reasonable assessment of the funds that the client has available to dispose of. Obviously, if there are complex questions, you are well advised to involve the client's accountant in addressing the impact of tax on the estate.

Non-Residents

Your clients may have assets or beneficiaries outside Canada or be subject to laws and taxation in another jurisdiction. Property in another jurisdiction will be subject to the laws of that jurisdiction, such as a "forced heirship" regime common in many civil law countries.[25] The United States levies estate taxes on the basis of nationality or citizenship rather than residence.[26] You need be able to identify which of your clients need to be concerned about US estate tax issues and know how to direct them to help.

- US person need to consider US estate and gift taxes. A US person includes a US citizen (including "accidental Americans" born in the US but have no other association with the country) and US resident, Green Card holders or those with a "closer connection" to the US.

- Canadian residents may also need to be concerned if they own US situs assets[27] worth more than US$60,000.00 and worldwide assets greater than $11.2 million USD (for 2018), or if they have beneficiaries who have US connections.

- Unless you are qualified to advise on US law you should be prepared to connect clients to good cross-border accountants and lawyers.

- Recent European Union regulations permit individuals who die on or after August 17, 2015 to select the legal regime of their nationality to govern the succession of EU *situs*

[25] See Catherine Brown, "Death as a Taxable Event: The Problem of Multi-Jurisdictional Estates for Canadians and Their Heirs and a Road Map for Assessing Potential Liability," (2011) 31 ETPJ 27.

[26] So do Chinese Taipei, Czech Republic, Greece, Hungary, Japan, the Netherlands, Norway, Poland, Croatia, and Germany.

[27] US *situs* assets include real estate in the United States, shares in US corporations (even in an account in Canada), tangible personal property situated in the United States (*i.e.*, cars, art, *etc.*), US pension plans (including IRAs and 401(*k*) plans), and US shares held in a Canadian registered account.

assets, so it may now be possible to change the default "forced heirship" by making a declaration that Ontario law will apply to assets located in a EU member state.[28]

Charitable Gifts

Clients who are making significant charitable gifts may already who have discussed the issue with their potential beneficiaries, but if they have not done so it may make sense for you to contact the charities. Particularly where the gift to the charities to be made after an intervening trust, the client will need to understand that the full benefit of the charitable donation may not be obtained.

Where the client wishes to apportion their estate between charities and individual beneficiaries, consider that some charities have become particularly aggressive in their approach to executors, and that the administration of the estate may be significantly easier if the charities receive a fixed sum instead.

Where all or a significant portion of the client's estate is a gift to charity, or where there is a gift of over $10,000, most charities are willing to create a named fund. Clients who do not have children are often very pleased with the suggestion that their name can be carried on through a fund established with the charity.

Choosing Executors

You should be prepared to canvass with your client a range of potential executors in varying combinations. Consider the following:

- The categories of potential executors are: spouses, children, other family members, close friends, professional executors. Strategic combinations of members of these various classes can mitigate some of the potential problems. For example, a child may be still too young to assume the full responsibility of executorship, but could be co-appointed with a close friend. A spouse may have too many conflicts of interest, but could be co-appointed with a trust company.

[28] Regulation (EU) Nr. 650/2012 of the European Parliament of the Council of July 4, 2012 applies to individuals from non-member states. The application of the new regulation is a complex matter, which you should investigate carefully before advising on it.

- Number of executors – while there is no legal limit on the number of people who can be named as executors, there are some very practical problems. Since executors are required to act unanimously, five executors may have difficulty simply in discussing the issues on which decisions are required, even if disagreement is not likely to arise. Where the client has several children who do not get along, the likelihood that the administration will go well if they are all named as executors is slim!
- Try to persuade clients that executorship is a job and that they should be choosing someone who is most likely to do the job effectively, rather than someone whom they would like to honour. Apart from honesty and a willingness to get on with doing the job, there is no essential quality for an executor, although some business experience, an ability to communicate with beneficiaries, and some negotiating skills are likely to be of assistance.
- Where a professional executor is being appointed, it is highly advisable for the will-maker to have discussed compensation with the proposed executor, and for the executor (especially trust company) to have had an opportunity to review your drafts.
- Trust companies have compensation agreements, and some other professionals are occasionally using a similar approach to compensation. Even where a family member is appointed, however, client should be discouraged from "lowballing" the compensation to be paid to the executor. It is also generally not a good idea to try to use a legacy in lieu of compensation, since if it is in lieu of compensation it will be subject to tax at the same rate as ordinary compensation, with the additional complication that the recipient may simply take the legacy and pass on the work.
- Where there are several executors, it may be advisable to provide for some form of majority decision making. Another option may be to appoint an "umpire" who is not actually a trustee but could be appealed to in the event of disagreements among the trustees.
- Clients should also be discouraged from appointing nonresident trustees, since they may thus inadvertently trigger the creation of a non-resident trust, or compel the purchase of a surety bond. If there is, for example, a non-resident child, the simplest solution may be to appoint a Canadian resident co-trustee but without a majority rules clause.
- As trustees, executors are required to act unanimously, and so executors should never be appointed jointly and severally.

Choosing Attorneys

Many of the same considerations when choosing an executor will apply when choosing an attorney under a Continuing Power of Attorney for Property. The skills required of an attorney for personal care may be different, and clients may need to be reminded that they do not have to appoint the same person to manage their finances as they appoint to assist with medical and personal care decision-making. Consider the following:

- Attorneys for property can act for many years without any effective oversight or even notice to beneficiaries and family, so honesty and transparency may be even more important in this role then they are in an executor.
- Attorneys for personal care need to convey the last capable wishes of the donor, including wishes expressed orally, so it is important that the attorney have had discussions regarding those wishes. It would thus be unwise to appoint someone with whom the donor was not comfortable discussing personal and medical matters.
- Some decisions – where the incapable person resides, for example – require cooperation between attorneys for property and attorneys for personal care. Clients should therefore be encouraged to make sure that they will be able to cooperate in making decisions. This is not the time to placate squabbling children by giving them each a role.
- Gifting by an attorney for property has become a particularly contentious area, and the guidelines in the statute are not particularly precise, so – especially where the client is in the habit of making significant gifts to children, or is actively supporting one child, ask about including some guidance for the attorney on how gifts are to be made.
- Medical aid in death is not yet a matter that can be dealt with by an attorney for personal care, but many clients want to include a statement of their desire that their attorney be able to make the decision for them if it does become legally possible.
- You should review your precedent powers of attorney to ensure that they contain a fairly generous package of powers, since the law on some issues – in particular the powers of an attorney for property to make will-like transactions – has yet to be fully clarified.

Some practice pointers

- Use good quality paper for your wills and store them flat, without plastic covers or envelopes. They should be kept in a fireproof, waterproof environment. You *must* have a record system that will allow you to keep track of the wills you hold and to recover them promptly when they are needed.

- If at all possible, do not allow clients to sign wills and powers of attorney except under your direct supervision.
- Scan your wills so that they are easy to call up while you are on the telephone with your client or the executors.
- Consider using larger type and plenty of spaces for clients who have difficulty with their vision.
- Have a series of handouts or YouTube videos to which you can refer clients for the kind of standard information that you provided every meeting, such as the difference between a power of attorney for personal care and a living will or the difference between a will and a power of attorney for property.
- The pace of change in estates law, especially in recent years, means that you should not promise to tell your clients if they need to revise their wills because there is been a change in the law. Blogs are an excellent way to make available information about changes in the law, and can also act as an excellent marketing tool.
- You should charge a decent fee for the work that you do in preparing wills and powers of attorney. If you choose to use a flat fee, you should base it on a reasonable estimate of the actual time you put into meeting and interviewing clients and drafting documents. One option is to break your fee into two parts – a flat fee for each document provided and an hourly fee for your time, expertise, and advice in meeting the client and preparing and executing the plan.

INTAKE INFORMATION FORM — WILLS & POAS/ESTATE PLANNING

Date	Referred by	
Any reason for urgency? ☐No ☐Yes Details:		
Personal Information — Client #1		
Name (in full)		
Date of Birth	Place of Birth	
Citizenship	S.I.N.	
Father's place of birth?	Mother's place of birth?	
Address	Postal Code	
Telephone Number	Email	
Occupation	Employer	Telephone
Personal Information — Client #2		
Name (in full)		
Date of Birth	Place of Birth	
Citizenship	S.I.N.	
Father's place of birth?	Mother's place of birth?	
Address	Postal Code	
Telephone Number	Email	
Occupation	Employer	Telephone
Marital Status — Existing Wills — Health Issues		
☐Single ☐Married ☐Common Law Date of Marriage/Cohabitation ☐Widowed ☐Engaged	☐Separated ☐Divorced Date of Separation/Divorce Separation Agreement /Court Order? ☐No ☐Yes	
Do you have a will now?	Client #1 ☐No ☐Yes	Client #2 ☐No ☐Yes
Are you on medication that affects your mood or thinking?	Client #1 ☐No ☐Yes	Client #2 ☐No ☐Yes
Have you had a capacity — related diagnosis?	Client #1 ☐No ☐Yes	Client #2 ☐No ☐Yes
Other Advisors		
Family Doctor	Accountant	
Financial Advisor		

Children and Grandchildren — Use back of page to provide details if you have more than 3 children				
1.	Name	**Child of**	**Date of Birth**	**Marital Status – circle**
	Address	1/2/Both		S/M/CL/W/Sep.
		Place of Birth		Occupation:
	Tel.	Notes		
His or her children (your grandchildren) — **please indicate step-children**				
		1/2/Both		S/M/CL/W/Sep.
		1/2/Both		S/M/CL/W/Sep.
		1/2/Both		S/M/CL/W/Sep.
2.	Name	**Child of**	**Date of Birth**	**Marital Status –**
	Address	1/2/Both		S/M/CL/W/Sep.
		Place of Birth		Occupation
	Tel.	Notes		
His or her children (your grandchildren) — **please indicate step-children**				
		1/2/Both		S/M/CL/W/Sep.
		1/2/Both		S/M/CL/W/Sep.
		1/2/Both		S/M/CL/W/Sep.
3.	Name	**Child of**	**Date of Birth**	**Marital Status –**
	Address	1/2/Both		S/M/CL/W/Sep.
		Place of Birth		Occupation
	Tel.	Notes		
His or her children (your grandchildren) — **please indicate step-children**				
		1/2/Both		S/M/CL/W/Sep.
		1/2/Both		S/M/CL/W/Sep.
		1/2/Both		S/M/CL/W/Sep.
Other Dependents or Significant Family Members				

ASSETS — Bank Accounts — Please give an estimate of the current balance

Institution and Account Number	Client #1	Client #2	Joint

GICs, Stocks, Bonds, Mutual Funds, Investment Accounts

Institution and Account Number	Client #1	Client #2	Joint

RRSPs and RRIFs

Institution and Account Number	Client #1	Client #2	Beneficiary

Personal Property — Household furnishings, vehicles, boats, jewellery, artworks, etc.

Description	Appraised?

Pets you wish to provide for?

Loans Receivable: Does anyone owe you money?

Details

Pension Plans

Institution	Client	Client #2	Beneficiary	Death Benefit?

Life Insurance

Institution, Policy Number, Type	Owner	Insured	Beneficiary	Death Benefit

Real Estate — please estimate the market value

Address/Legal Description	Client #1	Client #2	Joint/TIC?
1. Principal Residence			
Address			
Mortgage ☐No ☐Yes Estimated Mortgage Balance:			
2. Vacation Property			
Address			
Mortgage ☐No ☐Yes Estimated Mortgage Balance:			
Date Acquired: Value:			
3. Other Property			
Address			
Mortgage ☐No ☐Yes Estimated Mortgage Balance			
Date Acquired: Value:			

Business Interests

Name and Address	Ownership Structure	Fair Market Value
	Sole Part. Corp.	
	Shareholder Agreement No Yes	
Principal Shareholders/Partners		

Liabilities (other than mortgages listed above) — please estimate the current amount owing

Institution/Creditor	Client #1	Client #2	Joint

Do you have any other assets? Please include assets you expect to acquire, such as an inheritance.

Safe Deposit box? ☐No ☐Yes
Inheritance? ☐No ☐Yes
Digital Assets? ☐No ☐Yes
U.S. Securities? ☐No ☐Yes

Genetic Material? ☐No ☐Yes
Power of Appointment? ☐No ☐Yes
Trust Interests ☐No ☐Yes

Notes:

Private & Confidential April 8, 2019

Ms. Jane Doe
Happy Town, Ontario
Canada

Dear Ms. Doe:

Re: Will and Powers of Attorney
Our File No. xxxx

Please find enclosed your original Last Will and Testament and Powers of Attorney which you executed on **April 8, 2019**. We also enclose an Affidavit of Execution which confirms that the Will was signed in our presence.

These wills and powers of attorney revoke any prior wills and powers of attorney you previously executed.

We have not retained copies of your original, signed documents.

We recommend that you store your documents in a secure, fire and waterproof location and let your executor and attorneys know where they are located and how to access them if required. It is also a good idea to leave an up-to-date inventory of your assets and liabilities together with your documents which may assist your estate representatives.

We confirm that we did not provide you with taxation advice and we suggest that you consult with an accountant for tax related inquiries regarding your estate. Further, in the case of assets located outside of the Province of Ontario, you should consult with a lawyer in the jurisdiction where any such assets are located for estate advice.

We confirm your instructions that the powers of attorney only come into effect in the event of incapacity or disability on your part.

You should review your will and powers of attorney at least once every 5 years as circumstances and your wishes may change. In particular, I suggest a review of your estate plans in the event there is any change to your marital status; if a beneficiary, trustee or attorney dies; or if there are any significant changes in your assets.

Please find enclosed our statement of account for services rendered. Thank you for allowing us to assist you with this matter.

Yours very truly,

Jason K. Allan

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Date

Personal & Confidential

«AddressBlock»

Dear :

Re: Estate Planning

As all of my work in connection with the above-noted matter is now complete, I am pleased to report to you with respect thereto.

Your Will[s]

Original Will[s]

I enclose a photocopy of your Will signed on ◘. Your original Will has been placed in my safekeeping facility in accordance with your instructions. You should advise your Executors to that effect.

OR

Your original Will[s], along with Affidavit[s] of Subscribing Witness [was/were given to you on ◘] **OR** [is/are enclosed herewith]. I strongly recommend that you arrange to store your Will[s] in a secure location and that you advise your executors of that location. If at the time of your death, your Will[s] cannot be found, and if [it was/they were] last known to be in your physical possession, the law will presume that you destroyed [it/them]. For that reason, it is very important that you safeguard your original Will[s] against inadvertent loss or destruction.

Destruction of Prior Will[s]

I strongly recommend that you physically destroy your previous original Will[s] to ensure that there is no confusion in the future. [To that end, I am enclosing herewith your previous original Will[s]. **OR** If your previous original Will[s] [is/are] stored with another law firm, you should request that [it/they] be returned to you so that you can personally see to [its/their] destruction.]

Reliance on Information/Documentation Provided by Client

This will confirm that in discussing your estate planning objectives and in preparing the Will[s] that you ultimately signed, I relied exclusively on the information and documentation you provided to me. In particular, with respect to each of the assets in which you assert an ownership interest, I relied upon that information and documentation as a complete, accurate and current picture regarding (i) title to that asset (ii) valuation of that asset and (iii) freedom to deal with that asset by way of a testamentary disposition. You did not ask me to conduct title searches or to make any further inspections or inquiries to confirm independently any of the foregoing.

The documentation I reviewed as provided by you included the following [sample listing]:

- Shareholder agreement dated •, respecting • Corporation
- Partnership agreement dated •, respecting the • Partnership
- Joint venture agreement dated •, respecting •
- Co-tenancy agreement dated •, respecting •
- Marriage contract dated •, between you and •
- Cohabitation agreement dated •, between you and •
- Separation agreement dated •, between you and •
- Divorce judgment dated •
- Deed to •
- Mortgage respecting •

[Add the following heading and commentary where double wills have been prepared to minimize estate administration tax]

Double Wills

As you know, I prepared two Wills for you. One of the Wills (the "Non-Probate Will") is stated to govern assets which should not, according to current law and experience, require that the Will be probated. The other Will (the "Probate Will") is stated to govern all other assets. The intention is that upon your death, only the latter Will need be submitted for probate, thereby limiting the amount of estate administration tax payable. (When a Will is submitted for probate, the estate administration tax payable is based on the value of the assets governed by that Will, rather than on the value of all of the deceased person's assets.)

I confirm here my previous advice to you that, as part of the plan to minimize estate administration tax through the use of □ as a nominee for certain of your assets, you should ensure that □'s board of directors can continue to function in the event of your death – and, in particular, that it can fill the vacancy on the board that results from your death. One way of ensuring this result is to have at least three directors on the board and to provide (by way of the corporation's by-laws) that a majority of the directors will constitute a quorum for any meeting of the board of directors

However, notwithstanding this objective of minimizing estate administration tax, I cannot offer any assurance that this objective will be met, for a number of reasons:

1. Future changes to applicable laws or to current administrative practices of third parties in possession of, or in control of title to, assets you own at death may necessitate probate of the Non-Probate Will.

2. If the validity of the Non-Probate Will were ever challenged by a party having standing to do so, it would necessitate submitting that Will to the court for "proof in solemn form." In that event, the estate administration tax sought to be avoided would have to be paid.

3. The executors appointed under your Non-Probate Will have the ultimate authority to decide whether that Will should be submitted to probate. While they may have good reasons for taking such action (apart from being required by third parties to do so), I would urge you to advise them of your reasons for having made separate Wills, to ensure that they do not, merely out of ignorance of your purpose in having made double Wills, submit the Non-Probate Will for probate.]

Changes Warranting a Review of your Will

I suggest that if one or more of the following occur, you should consider the effect thereof on your Will and whether it should be amended:

(a) If anyone mentioned in your Will changes his or her name.

(b) If an Executor dies or becomes unsuitable to act due to age or ill-health.

(c) If a beneficiary dies.

(d) If you have specifically bequeathed any property which you subsequently cease to own.

(e) If there are births in the family.

(f) If your marital status or the marital status of a beneficiary changes.

(g) If your estate assets alter considerably.

(h) If you move outside the Province of Ontario or your citizenship status changes.

With respect to changes in marital status, I would advise that in general, marriage or remarriage automatically revokes an existing Will. Divorce, on the other hand, does not revoke an existing Will, but does revoke a devise or bequest to the spouse from whom you are divorced and removes that spouse as an Executor if he or she has been so named. Separation does not affect your Will.

Should you at any time wish to revoke or alter your Will, I would ask you to advise me in order that I might ensure that the proper legal formalities are observed.

Beneficiary Designations for RRSPs/RRIFs

I confirm here my understanding regarding each of your [RRSPs/RRIFs] you currently hold [If any RRSP is covered by an insurance declaration (see below), add: other than any insurance-based RRSP referred to below under the heading “Insurance Declarations”]. Specifically, you will attend personally at each of the financial institutions to complete a new beneficiary designation form reflecting • as the designated beneficiary.

Provided you are mentally capable at the relevant time, you can change any of those beneficiary designations in the future, if changed circumstances warrant your so doing. You should bear in mind that under current income tax laws, RRSPs and RRIFs have an inherent income tax liability associated with them, which liability falls on the planholder's estate, and not on any person designated to receive the plan proceeds payable on death. You should therefore ensure that the dispositive scheme in your Wills takes proper account of the income tax implications of any such beneficiary designation. (RRSPs and RRIFs designated payable to a spouse or to a financially dependent child or grandchild need not give rise to any tax liability on the planholder's death. However, there are post-mortem tax-planning opportunities that should be explored at that time.)

Continuing Power of Attorney

On ◘, you signed five (5) copies of a Continuing Power of Attorney in favour of ◘ [where more than two attorneys are named jointly, add with a proviso that all decisions are to be made by ◘]. With respect to that Continuing Power of Attorney, I confirm the following advice (some of which was given to you at the time of execution of same):

(a) Set out any limitations contained in the document.

(b) Once the Continuing Power of Attorney is delivered to the attorneys, the attorneys may [add, if appropriate, subject to the limitations referred to in paragraph (a),] take any action which you yourself can take, *irrespective of your state of mental health at that time.*

(c) You may revoke the Continuing Power of Attorney at any later time, provided you then have the requisite mental capacity. As a result of the *Substitute Decisions Act, 1992*, there are formal requirements for revoking a Continuing Power of Attorney. If you wish to revoke the Continuing Power of Attorney in the future, I would be pleased to assist you.

(d) The Continuing Power of Attorney is automatically revoked on your death, although the named attorneys may act, and third parties may rely, on the authority contained in the Continuing Power of Attorney without actual knowledge of your death.

(e) This Continuing Power of Attorney will also be revoked if you execute a later Continuing Power of Attorney which does not specifically state that there may be multiple Continuing Powers of Attorney in existence. In this regard, you should be particularly careful when asked by a bank or other financial institution to sign a standard form Continuing Power of Attorney for the limited purpose of carrying out financial transactions with that institution. (There is, by the way, no legal reason why the bank or other financial institution should not recognize the Continuing Power of Attorney I prepared for you.)

Safekeeping / Distribution / Release

One signed copy of your Continuing Power of Attorney has been placed in my safekeeping facility and you were given five (5) signed copies of same for immediate distribution to the named attorney[s].

OR

Because you have instructed me to retain all signed copies of your Continuing Power of Attorney in my safekeeping facility, you also signed a Direction to me which indicates the circumstances under which I am to release any of those signed copies to the named attorney[s]. ◘ signed copies of that Direction were given to you, to be distributed to the named attorney[s] for information purposes.

Power of Attorney for Personal Care

On ◘, you executed a Power of Attorney for Personal Care in favour of ◘ [where more than two attorneys are named jointly, add with a proviso that all decisions are to be made by ◘]. With respect to the Power of Attorney for Personal Care, I confirm the following advice (some of which was given to you at the time of execution of same):

(a) The Power of Attorney contains no restrictions.

(b) The attorneys may make any decisions with respect to your personal care if you are incapable of making such decisions yourself.

(c) The Power of Attorney is automatically revoked on your death.

I have retained one signed Power of Attorney for Personal Care in my safekeeping facility and you have retained three signed copies of same. I confirm my previous advice to you that you should distribute one signed copy of this document to each of your named attorneys as soon as practicable so that it will be available without undue delay, should it be needed in the future.

Insurance Declaration

On □ [date], you signed four (4) copies of an Insurance Declaration with respect to the following policies:

Insurer	Policy Number	Individual (I) / Group (G)	Owner
◘	◘	◘	◘

In connection with each of the listed polices, the Insurance Declaration became legally effective when you signed it, without the need to deliver a copy of it to the particular insurance company. None the less, I strongly recommend that you provide one signed copy of the Insurance Declaration to each listed insurance company as soon as possible. By giving such early notification to each insurer, you can expect any concerns the insurer may have with the form or content of the Insurance Declaration to be raised immediately. Moreover, the insurer will be more comfortable in making payment -- and therefore likely more expeditious in doing so -- in accordance with a declaration in its own records, as compared with making payment in accordance with a freshly presented declaration following your death.

Please note that the declaration covers only the policy [policies] specifically referred to in the Insurance Declaration. The proceeds of any policy acquired after the date the declaration was signed will be distributed to the beneficiaries as specified in the later-acquired policy itself. Accordingly, should you wish to have a similar declaration apply to a later-acquired policy, a new Insurance Declaration should be signed after the date of acquisition of the new policy. [Add the following sentence only where there is a group policy.] If the insurance carrier for the group policy changes in the future and if you wish to have a similar declaration apply to the insurance proceeds payable under that new policy, you should sign a new Insurance Declaration which identifies the new carrier and includes the new policy number. I would be pleased to assist you in the event fresh Insurance Declarations are required in the future.

Direction Respecting Release of Documents

As I will be holding in safekeeping original signed documents of yours, I would like to have your written direction as to the circumstances under which I can release any of them to third parties. For this purpose, I am enclosing for each of you four (4) copies of a form of Direction. I would ask each of you to review the Direction I have prepared for you and, if you are satisfied with its content, date and sign all copies, return one signed copy to me for my records and retain the rest for your own records or use. (You may wish to distribute a copy of the Direction to those persons who may in future have need of an original or notarial copy of a document in my safekeeping facility, so that such persons may know where the original document is located and the circumstances under which it can be released.)

Changes in the Law

All of my discussions with you and the preparation of your estate planning documents were premised upon current applicable laws. Likewise, the comments in this letter reflect current applicable laws. Should any of those laws change in the future, a review of your estate plan may be warranted to ensure that the objectives reflected in your estate planning documents are not adversely affected by such changes. While I endeavour to keep clients advised generally about important changes to the law (through my website or mailed newsletters, for example), I cannot assume any responsibility for monitoring the impact such changes might have on a particular individual’s estate plan. For that reason, I suggest that you contact me in two to three years’ time to see whether there have been any changes to the law which may require (i) modifications to your estate planning documents, or (ii) preparation of entirely new estate planning documents, having regard to your estate planning objectives.

I am pleased to have been able to assist you in this matter. At this time, I am enclosing my account for all services rendered and trust you will find it to be satisfactory. If you should have any questions or concerns, please call me at your convenience.

Yours very truly,

CORBIN ESTATES LAW
PROFESSIONAL CORPORATION

Barry S. Corbin

BSC/
Enclosures

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Reporting Letter

<Reporting Lawyer>
Direct +<Telephone>
<email>

<Date>
File No.: <@>

<@>

Dear <@>:

Re: Will<s> and Powers of Attorney

Please find enclosed photocopies of the Will<s> and Powers of Attorney for Property that you executed on <Date>, together with one original Power of Attorney for Personal Care <for each of you>, which should be kept in a convenient location in the event of a medical emergency in the middle of the night. All other original documents have been placed in my fireproof, waterproof safe in accordance with your Acknowledgement and Direction signed on <Date>. I enclose <number> business cards which you may wish to pass along to <names of executors> so that they know where your original documents are located.

<Please find enclosed the original Wills, Powers of Attorney for Property and Powers of Attorney for Personal Care that you executed on Date, together with affidavits of execution for the Wills which may be required by the court after your deaths. I recommend that you keep one original of each Power of Attorney for Personal Care in a convenient location in the event of a medical emergency in the middle of the night. You should place all other original documents in a secure, fireproof, waterproof location and let your executors and attorneys know where they are and how to obtain access to them if required. As discussed, if you choose to keep your original Wills and Powers of Attorney in a safety deposit box, I suggest that you add one or more of the executors as a titled co-owner of the box.>

[NTD: if an executor does not have keys access may still be problematic so it may be best to outline issues involved in safety deposit boxes clearly or advise clients to keep them safe but not in such a place.]

For your convenience, I enclose a summary of the primary provisions in your Will<s> and Powers of Attorney. Although the documents have been drafted to take account of many future contingencies, you should still review them whenever your financial and personal circumstances change in a material manner (for example, if you <marry,> <separate,> if any person named in your Will<s> dies, or if there is a significant change

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in your assets), and in any event every three to five years. <I remind you that in the absence of a binding contract between you not to change your Wills, either spouse is entitled to deviate from this mutually agreed distribution, for example, by disinheriting the family of the first spouse to die.>

[NTD: if you are providing a summary, you may wish to consider sending it with the draft documents instead of the reporting letter. Visual aids such as flow charts, for which there are a number of inexpensive software programs available, can also be considered.

If the retainer was a joint spousal retainer, you may wish to include a reminder about the implications of a joint retainer, or perhaps generally refer them to the terms of the retainer as outlined in the agreement or letter acknowledged/signed.]

Please send a copy of your memorandum of personal property to me when you prepare it and each time you change it. I confirm that you will also <outstanding matters> <advice given but not followed>.

Finally, I enclose my invoice for services rendered, which I trust you will find satisfactory.

It has been a pleasure dealing with you. Please don't hesitate to contact me should you have any questions about the enclosed documents or my invoice, or if you wish to make any changes to your estate plan in the future.

<*NTD: The foregoing may also be augmented by including from the menu of attached commentary.*>

Yours truly,

LARRY LAW FIRM

<Retained Lawyer>

<Initials>

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ADDITIONAL MATTERS TO DETAIL IN REPORTING LETTER

- Note: some of these matters might best be included in the letter enclosing the draft documents (or retainer letter if no separate retainer letter is sent)
- Double Wills and Other *Estate Administration Tax* Planning
  - Confirmation of use of double Wills and explanation of its purpose
  - Confirmation of any other *Estate Administration Tax* planning done or contemplated
  - Can be a good idea to set out tax savings expected to arise from such planning, especially to reinforce value of services vis-a-vis fees
  - If client declined, confirmation of this and why
- Asset Information
  - If applicable, details of any searches made or documents reviewed on behalf of client (e.g. title searches)
  - Confirmation that except as mentioned above, lawyer has relied on information provided by client with respect to value, ownership and associated tax liability of assets (some lawyers summarize this information in the letter but this shouldn't be necessary if you got fulsome information in the client questionnaire, unless it was missing information and your notes are illegible)
- Family Law Act
  - Confirmation if Will structure exposes Estate to claim by the surviving spouse under the Family Law Act for equalization
- Succession Law Reform Act
  - Confirmation if Will structure exposes Estate to claim for dependant's relief under Part V of Succession Law Reform Act
- Beneficiary Designations

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    - Confirmation of manner in which RRSPs, life insurance and other assets over which a beneficiary designation has been done and implications *vis a vis* new assets acquired after the date of the Will, including any follow up client should consider with insurance companies such as providing excerpts of the Will designations to insurance companies and group policy holders

- Lawyers and Executors

    - Confirmation of clauses included in Will to address having the drafting lawyer as the Executor

    - Reference should be made to recommendation for independent legal advice

- Foreign Advice

    - Confirmation of manner in which any need for foreign advice was addressed

- Social Media and Digital Assets

    - Recommendation to client to keep list of social media currently "owned" by client as well as all passwords

- Other Advice

    - Confirmation of any other advice or planning matter discussed, and how dealt with or to be dealt with, whose responsibility follow up is, or if client declined advice or recommendation

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Basic Information Checklist

PERSONAL INFORMATION

Your Full Name: ____

The name you commonly use, if different: ______________________________

Home Address: ____

____

Telephone: (H) ____________________ (B) __________________ (cell) ________________

Email: ____

Occupation: ____

Employer Information:

____

Date of Birth: ____

Place of Birth: ____

Citizenship: ____

Marital Status: ____

Full name of Spouse: ____

Date and Place of Marriage: ______________________________________

Do you have a domestic contract? ______________________________________

Any Previous Marriages? ______________________________________

Full name(s) of ex-spouse(s): ______________________________________

Full names of all children from **previous** marriages:

Name Age

Full names of children from **current** marriage:

Name Age

Are any of your children residents or citizens of other countries?

Are any of your children married?

If so, please provide details of spouse and grandchildren, if any.

Child's Name	Spouse's Name	Grandchildren's Names and Ages
1.		1. 2. 3.
2.		1. 2. 3.
3.		1. 2. 3.

(attach additional sheets as necessary)

Details of any relevant personal situations:

e.g. disabled or spendthrift spouse and/or children:

Your Parents and Siblings (attach additional sheets as necessary)

Parents’ Names	Siblings’ Names	Nieces and Nephews Names and Ages
1. Deceased?	1.	1. 2. 3.
2. Deceased?	2.	1. 2. 3.
	3.	1. 2. 3.
	4.	1. 2. 3.

Name and Phone Number of Accountant: ________________________________

____

ASSET INFORMATION

REAL ESTATE

Your Home:

Names on title:

____

Joint Tenants □ Tenants in Common □ Percentage ownership ________________

Current Approximate Value: ____

Value of Mortgages or other Encumbrances:___________________________________

Acquisition Cost and Date: ____

Other Real Estate:

Property 1

Street address or location:

____

Names on title:

____

Joint Tenants □ Tenants in Common □ Percentage ownership ________________

Current Approximate Value: ____

Value of Mortgages or Other Encumbrances:___________________________________

Acquisition Cost and Date: ____

Property 2

Street address or location:

____

____

Names on title:

____

Joint Tenants □ Tenants in Common □ Percentage ownership ______________

Current Approximate Value: ____

Value of Mortgages or Other Encumbrances:_______________________________

Acquisition Cost and Date: ____

Property 3

Street address or location:

____

____

Names on title:

____

Joint Tenants □ Tenants in Common □ Percentage ownership ______________

Current Approximate Value: ____

Value of Mortgages or Other Encumbrances:_______________________________

Acquisition Cost and Date: ____

REGISTERED INVESTMENTS

RRSPs or RRIFs:

Plan Holder	Issued by	Beneficiary	Approximate Value

Tax Free Savings Accounts:

Owner	Financial Institution	Beneficiary	Approximate Value

DPSP's and pensions:

Name	Issued by	Beneficiary	Estimated Value on Death

Other Registered Investments:

Name	Issued by	Beneficiary	Estimated Value on Death

LIFE INSURANCE

Name and phone number of Insurance Advisor:___________________________________

____

Policies:

Insurance Company	Policy No.	Owner	Life Insured	Beneficiary	Amount Payable on Death

Loyalty Reward Programs

Are you a member of a loyalty rewards program, such as aeroplan, air miles, etc? If yes, please indicate member number and approximate number of points.

____

NON REGISTERED INVESTMENTS

Bank Accounts:

Name and Address of Bank or Depository	Type of Account and No.	Ownership	Approximate Amount ....

____

____

____

____

Investment Accounts:

Name of Investment Advisor:____

(Approximate value of Portfolio) $ ____

Attach copy of most recent portfolio statement(s).

Non-Registered Assets

Do you own any stocks, bonds, debentures, GICs etc. separately from your investment account?

If yes, please attach a list including current value, acquisition cost and date and location of instrument.

Do you own any US stocks or bonds (including those held in any Registered or Non-Registered Account)?

____

PRIVATE CORPORATIONS

1. **Do you have any shares or other interest in a private corporation?**

Full Legal Name of Corporation	Are you the sole shareholder?	Approximate value of Shares/ Shareholder Loans?

Is there a Shareholder's Agreement? ________. If yes, please provide a copy.

2. **Do you have any interests in a partnership or an unincorporated business?**

If yes, please describe and supply copies of all shareholder or partnership agreements.

____

3. **Do you have an interest in an existing trust?**

If yes, please describe and supply copies of all Trust agreements.

____

4. **Are you currently acting as an executor or trustee of an estate or trust?**

If yes, please describe and supply copies of all Trust agreements or Wills

____

Debts owing by you including promissory notes:

Name of Creditor	Amount	Maturity	Other terms

Debts owing to you including promissory notes:

Name of Debtor	Amount	Maturity	Other terms

Automobiles, Boats and Recreation Vehicles:

Description	Ownership	Value

ANY heirlooms, artwork, jewellery and any collections, etc. OF SPECIAL NOTE?:

____

____

Total approximate value of assets $______________________________

Total value of debts $______________________________

Approximate net value of estate $______________________________

TAB 15

The Six-Minute Estates Lawyer 2019

The Intersection of Family Law and Trust Law for Discretionary Trusts: It's a Control Thing

Arieh Bloom
Tupman & Bloom LLP

April 29, 2019

The Intersection of Family Law and Trust Law for Discretionary Trusts: It's a Control Thing

By Arieh Bloom[1]

The intersection of matrimonial litigation and trust law is highlighted upon the breakdown of a marriage where an equalization claim is advanced and a spouse is a beneficiary of a discretionary trust. A beneficiary of a discretionary trust only has a mere hope of collecting on the corpus of the trust. A discretionary beneficial interest does not create much by way of any type of property right other than a chose in action whereby the beneficiary has the right to an accounting from the trustee and the right to hold a trustee liable where he or she exercises his or her discretion with mala fides.

Under the *Family Law Act*[2] regime of Ontario the preamble makes clear that the goal of the legislation which governs the division of assets upon the breakdown of a marriage is to "provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership." This paper will examine the interplay between Trust principles and the *Family Law Act* for equalization claims surrounding discretionary beneficial interests. In such circumstances a court in deciding how to value a spouse's discretionary beneficial interest in a trust will ultimately look at the beneficiary's ability to control the trust's distribution when evaluating whether to include the interest as property for net family property purposes and how to value the interest.

Under the *Act* property for the purposes of an equalization claim is defined as:

> [A]ny interest, present or future, vested or contingent, in real or personal property and includes,
>
> (a) property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself,

[1] Arieh Bloom is a partner at Tupman & Bloom LLP practicing exclusively in the areas of trust, estate and power of attorney litigation. His email is Arieh@TupmanBloom.com

[2] *Family Law Act*, RSO 1990, c. F. 3 (the "**Act**").

(b) property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, and

(c) in the case of a spouse's rights under a pension plan, the imputed value, for family law purposes, of the spouse's interest in the plan, as determined in accordance with section 10.1, for the period beginning with the date of the marriage and ending on the valuation date;[3]

Trust law viewed a beneficiaries' interest in a purely discretionary trust as a mere hope to an entitlement from the corpus of the trust. As a discretionary beneficiary has no right to compel a payment from a trustee, the beneficiary's interest is confined to a hope that he or she will receive a distribution from the trust. Additionally, where there are other beneficiaries or beneficial interests that are contingent under the trust a beneficiary of a discretionary trust has no ability to collapse the trust under the rule of *Saunders v Vautier.*

In the recent Supreme Court of Canada decision *Sa v Metro Vancouver Housing Corp.*[4] the court further enunciated and repeated the legal approach as to how a beneficiary's interest in a discretionary trust should be recognized. In *Metro* the SCC was analyzing the status of a Henson trust. In that case the object of the discretionary trust was also a co-trustee and there were contingent beneficiaries.

In Metro the court analyzed whether a beneficiary's interest in the discretionary Henson trust would qualify as an asset that could potentially disqualify the beneficiary from receiving a government provided rent subsidy. In holding that the beneficiary's interest in the trust was not an asset that could disqualify her from being considered for a rent subsidy the majority of the panel held:

> [A]lthough she is a co-trustee, she has no independent, concrete right to compel any payments to be made to her or for her benefit, and cannot unilaterally terminate the trust. Her interest in trust property therefore amounts to a mere

[3] *Section 4(1)* of the *Act*.
[4] *Sa v Metro Vancouver Housing Corp.*, 2019 SCC 4 ("**Metro**")

> hope that the trustees will exercise their discretion in a manner favourable to her.[5]

In analyzing why the beneficiary of a discretionary trust in *Metro* did not have a vested property right the Supreme Court of Canada held that while the trustees must periodically consider whether distributions should be made, they are not obliged to exercise this discretion in any particular manner and no single beneficiary had the ability or right to collapse the trust.[6]

In *Brinkos v Brinkos*[7] the Ontario Court of Appeal analyzed the issue of whether a beneficial interest in a trust is property for the purposes of section 4 of the Family Law Act. In that case a wife settled moneys in her bank account in trust whereby her brother and father were the trustees. Under the trust deed the wife had an inalienable life interest in the net income from the trust fund with a discretionary power resting in the trustees to encroach on the capital held in trust.

In reversing the trial judge who had held that such a beneficial interest in the trust of the wife was not property, the Court of appeal in finding that such a beneficial interest was property for the purposes of the *Act* stated:

> [T]he life interest in this case is property in itself, and under the particular definition must certainly be a vested interest in the settled estate, which is clearly personal property. Thus the life interest is itself property, as generally understood, and an interest in property under this definition.[8]

Brinkos was a watershed moment in matrimonial litigation as the decision stood for the proposition that beneficial interests in trust could be recognized as property for the purposes of the *Act*. However, the case in *Brinkos* did not address on all fours the issue of whether a discretionary beneficial interest could be construed as property under section 4 and how such an interest would be valued for equalization purposes.

[5] *Ibid* at para. 4.

[6] *Ibid* at para. 39.

[7] *Brinkos v Brinkos,* 69 O.R. (2d) 225 (ONCA).

[8] *Ibid*.

In *Sagl v Sagl*[9], the Superior Court was tasked with the issue of whether a beneficiary's interest in a discretionary trust was property under section 4 of the Act and if so how it should be valued for the purposes of an equalization payment. Mr. Sagl, who was in divorce proceedings with his spouse was a beneficiary of a trust settled 2 years prior to his marriage. The capital beneficiaries of the trust were Mr. Sagl and his children from a prior marriage as well as the children's issue. The income beneficiaries under the trust deed were the same as the capital beneficiaries.

Under the trust deed the trustees were Mr. Sagl and two of his friends and Mr. Sagl held a power at his discretion to remove and appoint trustees. Decisions had to be made by a majority of the trustees provided that Mr. Sagl was in the majority. Mr. Sagl had resigned as a trustee two months after his marriage to Mrs. Sagl. The court in *Sagl* decided without much of an analysis to consider a contingent capital interest in the trust to be property in the assets held in trust for the purposes of the *Family Law Act.*

Although the court in *Sagl* noted that the "valuation of a contingent interest in a discretionary trust under the Act is regarded as a difficult subject because the very nature of the contingency lens to uncertainty…I have decided to approach this difficult issue on a fair and equitable basis having regard to trust law, the definition of property and the evidence as to what the intention was at the time of the creation of the trust." The court proceed to take the number of capital beneficiaries and divide the value of the trust assets by the number of capital beneficiaries to arrive at a pro-rata value to attribute to Mr. Sagl for the purpose of equalization.[10]

The Sagl decision encountered criticism from trust practitioners who viewed the decision as turning trust law on its head.[11] In addition to ignoring the mere expectancy

[9] *Sagl v Sagl,* 1997 Canlii 12248 (ONSC) ["**Sagl**].
[10] *Ibid* at para. 37
[11] As an example see the following paper: Margaret R.O'Sullivan, "*Valuation Issues and Discretionary Trusts"* [2008], Estates, Trusts and Pensions Journal, vol. 28, at p. 75.

approach that trust law has traditionally espoused, a beneficiary does not have a property interest in the specific property held in trust.

As noted by the Ontario Court of Appeal in *Spencer v Reisberry*:

> Unless the terms of a trust expressly provide otherwise, a beneficiary has no property interest in any specific asset of the trust, prior or absent an appropriation of such asset to the beneficiary by the trustee.[12]

Since *Sagl* there have been improvements in the jurisprudence in this area. For the purposes of determining whether a beneficiary of a discretionary trust has a property interest for the purposes of the equalization claim the courts have been cognizant of trust principles and will instead look at the beneficiary's relationship to the trustee and whether the beneficiary has a method of exercising control over the assets held in trust.

In *Durakovic v Durakovic*[13] the court for the purposes of a matrimonial dispute was again looking at the issue of whether a beneficiary's interest in a discretionary trust was property for the purposes of the Act. The court analyzed Alberta court authorities in assisting its analysis to look at control and specifically whether the spouse had the ability to cause a flow of a benefit from the trust as an essential aspect of determining whether the beneficial interest was a property interest under the *Act*.[14]

In Muddronja v Mudronja[15] Justice Seppi was tasked with determining a husband's beneficial interest in a discretionary trust. Under the trust deed the settlor of the trust was the husband's father and the sole trustee of the trust was the husband. The beneficiaries of the trust were the wife and their issue. The powers given to the husband as trustee were extensive and included a power to appoint others as well as himself at the husband's discretion as a beneficiary.

[12] *Spencer v Reisberry*, 2012 ONCA 418 at para. 37.

[13] *Durakovic v Durakovic*, 2008 CarswellOnt 5329.

[14] *Ibid* at paras. 159-162.

[15] *Mudronja v Mudronja*, 2014 ONSC 6217.

The trustee's power to appoint himself as a beneficiary was specific that this power bestowed on the trustee was a personal and not a fiduciary power.[16] At the date of the trial Mr. Mudronja had not exercised his power of appointment to make himself a beneficiary of the trust. As a result, the court analyzed how it should value the power of appointment for the purposes of equalization.

The court took the approach citing various trust authorities and caselaw that a general non-fiduciary power of appointment was tantamount to complete ownership.[17] The court in deciding to attribute the property of the trust to the husband as the holder of the power of appointment and $1 for the wife' beneficial interest in the trust for the purposes of net family property provided a nuanced and sound analysis that was attune to both trust and family law principles stating:

> I find an interest in a discretionary trust is an interest in property for purposes of equalization pursuant to the FLA. That statute in its preamble endorses the necessity of providing "the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the [marriage] partnership". Having regard to the numerous and varied methods spouses choose to arrange their financial affairs during marriage, and the need to ensure an equitable result on marriage breakdown, a beneficial interest in a trust is not automatically excluded from a spouse's net family property merely because it is subject to discretion. The approach needs to be contextual, having regard to the particular circumstances of the parties, their financial situation and the terms of the trust in relation to the marital relationship on V-day.
>
> The real question therefore is one of value. What is the value of the respondent's discretionary interest as an object in the Mudronja Family Trust, in circumstances where she has no status or right to enforce the allocation and distribution of any capital or interest from the assets of the trust? On V-day she had no right or power to either require or prevent the disposition, transfer or encumbrance of the entire trust value, nor does she currently have such a right or power.[18]

Tremblay v Tremblay[19] is another example of a court considering the beneficiary's ability to control a distribution when assessing a property interest for the

[16] *Ibid* at paras. 80-83.

[17] *Ibid* at paras. 90-93.

[18] *Ibid* at paras. 98-99.

[19] *Tremblay v Tremblay*, 2016 ONSC 588

purposes of net family property. Justice Phillips' analysis of how to analyze a spouse's control over the property in a trust is particularly inciteful. His Honour provided the following analysis of the issue:

> In my view, the central question with respect to determining the proprietary character of the Respondent's discretionary interest in the Jeff Tremblay Family Trust No.2 is his ability to control whether distributions of trust property are made to him for his benefit. His having meaningful control in that regard would undermine the separation as between the entities.
>
> Assessing the level of control that a beneficiary actually has in respect of a trust can involve a contextual analysis, informed by the nature of the relationships as between the parties and the concept of fairness touched upon by Cory J., above. Without trying to set out an exhaustive list, this may involve consideration of the degree to which he as beneficiary can directly or indirectly control the actions of the trustees, which may include consideration of such factors as:
>
> (i) any evidence with respect to the founding intent of the trust. Was the trust designed to effectively allow control by the beneficiary?;
> (ii) the composition of the trustees, including whether the beneficiary is a trustee;
> (iii) any requirement, including veto powers, that the beneficiary be part of any trustee decisions;
> (iv) any history of past trustee actions which demonstrate direct or indirect control by the beneficiary;
> (v) any powers of the beneficiary to remove trustees, or to appoint replacement or additional trustees;
> (vi) the relationship of the beneficiary to the trustees. Are the trustees independent and at arm's length or are they instead family members or other persons who may not act independently?
>
> None of those factors are necessarily determinative. The weight to be assigned to each will vary on a case by case basis.[20]

Justice Kurz in *Borges v Santos*[21] looked at whether a spouse could garnish income from a testamentary Henson trust of which the partner was a discretionary beneficiary. The Court applied the control principle enunciated in *Tremblay* to hold that as the spouse was a discretionary beneficiary, was not a trustee and had no control

[20] *Ibid* at paras. 31-33.
[21] *Borges v Santos,* 2017 ONCJ 651.

over the funds, the separating spouse only had an expectancy and no property interest. The spouse seeking to garnish wages could not assert such a garnishment claim against the trustees of the trust. The Court however stated that should the trust make a distribution into the hands of the former spouse then the funds could be subject to execution.[22]

Conclusion:

A beneficiary's interest in a discretionary trust is a mere expectancy and not a property interest at law. Courts in Family Law Litigation will often balance trust principles with a contextual case by case analysis to determine if a beneficiary asserts such control over the property held in trust that would necessitate the recognition of a property interest to ensure there is an orderly and equitable settlement of the affairs of spouses upon the breakdown of a marriage.

[22] *Ibid* at paras. 4, 46-54, 64.

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TAB 16

The Six-Minute Estates Lawyer 2019

Dead men tell no tales: corroboration and section 13 of the *Evidence Act*

Brendan Donovan
Donovan Kochman LLP

April 29, 2019

Dead men tell no tales: corroboration and section 13 of the *Evidence Act*

Brendan Donovan[1]

In a memorable mystery, Sherlock Holmes is reading a holograph will with Inspector Lestrade. The handwriting is occasionally neat, bad in some places, worse in others. Mr. Holmes deduces as follows:

> That it was written in a train; the good writing represents stations, the bad writing movement, and the very bad writing passing over points. A scientific expert would pronounce at once that this was drawn up on a suburban line, since nowhere save in the immediate vicinity of a great city could there be so quick a succession of points. Granting that his whole journey was occupied in drawing up the will, then the train was an express, only stopping once between Norwood and London Bridge.

Inspector Lestrade begins to laugh,

> You are too many for me when you begin to get on your theories, Mr. Holmes. How does this bear on the case?

To which Mr. Holmes replies,

> Well, it corroborates the young man's story to the extent that the will was drawn up by Jonas Oldacre in his journey yesterday.[2]

The importance of corroboration should be well known not just to "consulting detectives," but also to litigators in the field of estate, trust and capacity litigation. In Ontario, we have sections 13 and 14 of the *Evidence Act*, R.S.O. 1990, c. E.23 (the "*Evidence Act*"), which provide as follows:

> *Actions by or against heirs, etc.*
> **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. R.S.O. 1990, c. E.23, s. 13.

[1] Brendan is a partner at Donovan Kochman LLP, an estates and trust litigation boutique in Toronto.
[2] Sir Arthur Conan Doyle, *The Return of Sherlock Holmes* (1905) McClure, Phillips & Co., New York: "The Adventure of the Norwood Builder"

> *Actions by or against incapable persons, etc.*
> **14**. An opposite or interested party in an action by or against one of the following persons shall not obtain a verdict, judgment or decision on the party's own evidence, unless the evidence is corroborated by some other material evidence:
>
> 1. A person who has been found,
>   1. incapable of managing property under the *Substitute Decisions Act, 1992* or under the *Mental Health Act*,
>   2. incapable of personal care under the *Substitute Decisions Act, 1992*, or
>   3. incapable by a court in Canada or elsewhere.
> 2. A patient in a psychiatric facility.
> 3. A person who, because of a mental disorder within the meaning of the Mental Health Act, is incapable of giving evidence. 2009, c. 33, Sched. 2, s. 32 (1).

Similar legislation exists in other Canadian jurisdictions.[3]

The effect of these statutes is to create an exception to the common law rule that the evidence of one witness can meet the burden of proof.[4] It is said that such an exception exists to address "the obvious disadvantage faced by the dead: they cannot tell their side of the story or respond to the livings' version of events."[5] Dead men tell no tales.

Unfortunately, while these sections emphasize the need for corroboration, they do not define corroboration, nor do they indicate how much corroboration will be needed in any given case.

What is corroboration?

Mr. Justice Dickson once wrote:

> It is, I think, unfortunate that the word 'corroboration' ever became part of the legal lexicon.[6]

[3] *Alberta Evidence Act*, R.S.A. 2000, c. A-18, ss. 11-12; *Evidence Act*, R.S.N.L. 1990, c. E-16, s. 16; *Evidence Act*, R.S.N.W.T. 1988, c. E-8, s. 17-18; *Evidence Act*, R.S.N.S. 1989, c. 154, s. 45; *Evidence Act*, RSNWT (Nu) 1988, c. E-8, ss. 17-18; *Evidence Act*, R.S.P.E.I. 1988, c. E-11, s. 11; *Evidence Act*, R.S.Y. 2002, c. 78, s. 15.

[4] *Brisco Estate* v. *Canadian Premier Life Insurance Co*., 2012 CarswellOnt 15259 (C.A.), para. 59; *Harris* v. *Leikin Group Inc*., 2013 CarswellOnt 2778 (S.C.), para. 578.

[5] *Burns Estate* v. *Mellon*, 1998 CarswellOnt 4912 (S.C.), at para. 5, citing Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* , 2d ed. (1999) at §994.

[6] *R*. v. *Vetrovec*, 1982 CarswellBC 663 (S.C.C.), para. 38.

His Honour was referring to the difficulty often encountered in explaining the concept of corroboration to juries in criminal proceedings. According to the Court of Appeal in *Pepe* v. *State Farm Mutual Automobile Insurance Co*.:

> Broadly speaking, both at common law and under statute, corroborative evidence is evidence from a source extraneous to the witness whose evidence is to be corroborated, that is relevant to a material fact in issue, and that tends to show that the witness whose evidence needs corroboration is telling the truth.[7]

Both of the underlined portions bear some explanation.

First, one often sees the words "extraneous," "extrinsic" or "independent" used in reference to corroborative evidence. This should not be read as a requirement that the witness giving corroborative evidence be neutral as between the parties. The Court of Appeal considered this question in *Pepe*, a case where the corroborative evidence came from the plaintiff's girlfriend, who was a passenger in his car during a collision.[8] Doherty J.A. held that her evidence was sufficient for the purposes of section 13, and explained:

> [I]t is the *evidence* of the witness that must be independent, in the sense of extrinsic to the testimony of the party to be corroborated. The independence requirement in the context of corroboration has always referred to the independence of the evidence and not to the neutrality of the witness. The witness's neutrality or lack thereof is relevant to the ultimate credibility of the witness's evidence.[9]

Pepe was followed in the recent case of *Paulus* v. *Fleury*.[10]

The second underlined portion of the definition refers to the "materiality" of the corroboration; as in, what part of the evidence of the witness needs to be supported as true for her evidence to be corroborated. In 1891, Osler J.A. made the following observation in *Radford* v. *Macdonald*:

> It has long been conceded that it need not be corroborated in every particular. Had that been the intention of the Act, it would have been simpler to enact that the party in such case should not be a competent witness, since the evidence required in corroboration would alone be sufficient. Nor is the corroboration required to be directed to any particular fact, or part of the evidence. It is the

[7] *Pepe* v. *State Farm Mutual Automobile Insurance Co*., 2011 CarswellOnt 2889 (C.A.), para. 15.
[8] *Pepe* v. *State Farm Mutual Automobile Insurance Co*., 2011 CarswellOnt 2889 (C.A.)
[9] *Pepe* v. *State Farm Mutual Automobile Insurance Co*., 2011 CarswellOnt 2889 (C.A.), paras. 16-17.
[10] *Paulus* v. *Fleury*, 2018 CarswellOnt 2460 (S.C.), para. 42.

> evidence of the party which is to be corroborated by some other material evidence.[11]

In other words, it would make no sense if the corroborative evidence needed to confirm every detail of the evidence to be corroborated. If that were the case, the corroborative evidence would simply *be* the evidence. Thus, we are told in the case law that the corroboration must be of a material fact in the evidence of the witness.[12] To understand what that means in any particular case, it is necessary to review the jurisprudence.

What is sufficient corroboration?

The leading authority in Ontario on the sufficiency of corroboration is *Burns Estate* v. *Mellon*. The case involved the transfer of $195,000 from Leo Burns to Margaret Mellon about two years before his death. The administratrix of the Burns Estate claimed that Mrs. Mellon was holding the money on a resulting trust, whereas Mrs. Mellon insisted that it was a gift. The learned trial judge held that there was sufficient corroboration to support Mrs. Mellon's evidence:

> The long delay without any demand for an accounting or return of the monies, the failure of Mr. Burns to keep any written record of the transfer to Mrs. Mellon, not even the "customer's record of draft purchased" and the failure of Mr. Burns to include in the inventory of assets contained in his will any reference to the $195,000 transferred to Mrs. Mellon, considered cumulatively, constitute sufficient corroboration under s. 13 of the *Evidence Act*.[13]

On appeal, the administratrix argued that these three pieces of circumstantial corroborative evidence were insufficient to satisfy section 13. The Court of Appeal held that, even standing by itself, the absence of any reference to the $195,000 in in the deceased's will was sufficient corroboration.[14] In other words, one piece of circumstantial evidence – the lack of a reference to the loan in a will – was sufficient.

The *Burns Estate* case was recently applied by the Ontario Court of Appeal in 2017 in *Mammone* v. *Mammone*.[15]

[11] *Radford* v. *Macdonald* (1891), 18 O.A.R. 167 (headnote)

[12] In the *Radford* case, the plaintiff was an architect suing the estate for payment for his services in drawing plans for a house. His evidence of the agreement was sufficiently corroborated by a single document, in the deceased's writing, showing the cost and a catalogue of all the rooms and accommodation required, together with a sketch of the ground partly in the same handwriting.

[13] *Burns Estate* v. *Mellon*, 1998 CarswellOnt 4912 (S.C.), at para. 35. Notably, each of these pieces of circumstantial evidence is really an absence of evidence, much like the dog that did not bark during the night in the Sherlock Holmes mystery entitled "The Adventure of Silver Blaze."

[14] *Burns Estate* v. *Mellon*, 2000 CarswellOnt 1990 (C.A.), paras. 29-32.

[15] *Mammone* v. *Mammone*, 2017 CarswellOnt 168 (C.A.), paras. 2-3.

Although *Burns Estate* is certainly the most well-known authority on the sufficiency of corroboration in estate litigation, the more detailed guidance can be found in the older cases that were followed by the trial judge and footnoted by the Court of Appeal in *Burns Estate*. The Court of Appeal in the 1988 case of *Paquette* v. *Chubb* provided the following roadmap for the application of section 13:

> 1. that the corroboration required by section 13 must be evidence, independent of the evidence of an opposite or interested party, which shows or tends to show that such opposite or interested party is speaking the truth upon a material issue in the proceedings;
> 2. that the corroboration required by section 13 may be found in direct evidence, circumstantial evidence, or in a combination of both types of evidence;
> 3. that where circumstantial evidence is relied upon as potentially corroborative of the evidence of an opposite or interested party, it must be independent evidence which renders it probable that the evidence of such party upon a material issue is true;
> 4. that several pieces of circumstantial evidence, taken together, may potentially corroborate the evidence of an opposite or interested party, notwithstanding that each item or piece of evidence viewed in isolation may not be so capable, provided that cumulatively the pieces or items satisfy the test of corroboration, that is to say, independent evidence which renders it probable that the evidence of an opposite or interested party upon a material issue is true;
> 5. that it is the function of the trial judge to determine in each case which item or items of evidence bear corroborative potential, to so instruct the trier of fact and, thereafter, [the duty] of the trier of fact to determine whether such evidence is, in fact, corroborative;
> 6. that in determining whether evidence bears corroborative potential such evidence must be viewed in the context of the entirety of the evidence adduced save and except without reference to any explanation which may be offered on behalf of the representatives of the deceased person for the acceptance or rejection of such explanation is ultimately a matter for the trier of fact not something which impairs or destroys the corroborative potential of the evidence.[16]

More recent case law adds little to this roadmap other than illustrations. In *Mammone*, the respondents/cross-applicants sought to enforce an agreement supposedly entered into with Frank Mammone before his death. The trial judge observed that all the evidence

[16] *Paquette* v. *Chubb*, 1988 CarswellOnt 495 (C.A.), para. 46 (quoting from *Sands Estate* v. *Sonnwald*, 1986 CarswellOnt 599 (H.C.), para. 48). There were three more bullets on the list that the court suggested were either inappropriate or inapplicable. Leave to appeal to the Supreme Court of Canada was refused (1989), 66 O.R. (2d) xi, [1988] S.C.C.A. No. 465.

regarding the essential terms of the agreement came directly or indirectly from the respondents themselves. Moreover, there was nothing to corroborate Frank's actual acceptance of the terms.[17] The court dismissed the cross-appeal,[18] and its holding was affirmed by the Court of Appeal.[19]

Criticism

Section 13 and its counterparts in other Canadian jurisdictions have faced significant criticism. The authors of *Wigmore on Evidence* write that the statutory requirement for corroboration is misguided.[20] They describe three types of injustice that flow from the exception to the common law rule:

> In the first place, it favors the dead above the living, for it would rather see an honest survivor unjustly lose his claim than an honest decedent be made unjustly to pay; yet, the equities being equal, the living person should rather be favored.
>
> In the next place, it is based on a mere contingency – the contingency that the claim will be dishonest and that there will be no means of exposing its dishonesty; and so, for the sake of defeating the dishonest man who may arise, the rule is willing to defeat the much more numerous honest men who are sure to possess just claims.
>
> Finally, there is always an abstract impropriety and injustice in any rule which interposes a technicality to prevent judicial action upon testimony which is in fact completely believed and trusted.

Estate litigators might doubt the statement that "much more numerous honest men" are advancing claims against estates, but it is difficult to find logical support for a rule that effectively assumes that the dead, if living, would testify truthfully against all claims. Honest people and liars die with equal frequency, *i.e*., 100% of the time, so why would one presume that the survivor is the liar?

The three Wigmore criticisms were cited by the Ontario Court of Appeal in *Brisco Estate* v. *Canadian Premier Life Insurance Co*.,[21] a case involving a mistakenly cancelled life insurance policy. The appellant argued that the evidence of the deceased's statements regarding his insurance policy were not corroborated. The court held:

[17] *Mammone* v. *Mammone*, 2016 CarswellOnt 8185 (S.C.), paras. 13-15

[18] *Mammone* v. *Mammone*, 2016 CarswellOnt 8185 (S.C.), para. 19.

[19] *Mammone* v. *Mammone*, 2017 CarswellOnt 168 (C.A.), paras. 3-4.

[20] Wigmore, J.H., *Wigmore on Evidence*, vol. 2 (Chadbourn rev. 1979), §578, p. 821.

[21] *Brisco Estate* v. *Canadian Premier Life Insurance Co*., 2012 CarswellOnt 15259 (C.A.), paras. 3 and 29.

> Given its anomalous place in the modern law of evidence, especially in a case such as this, I see no reason to give s. 13 a broad interpretation when considering its application nor a narrow interpretation when considering the scope of evidence capable of corroborating the evidence of the interested party.[22]

The appeal was dismissed.

Although *Brisco Estate* can be distinguished on its somewhat unique facts, it can also be read as the Court of Appeal saying that section 13 is to be read narrowly and applied sparingly. The Court of Appeal's comment about section 13 being "anomalous" in the law of evidence was picked up in *Harris* v. *Leikin Group Inc*.[23] and in *David* v. *TransAmerica Life Canada*.[24]

Conclusion

For estate litigators, section 13 may make all the difference, or none at all. One should endeavour to make clear to the court what direct, indirect or circumstantial pieces of evidence corroborate the evidence of one's witnesses. Where possible, one should also argue that the other side's case lacks the requisite corroborative evidence for the material facts in dispute. Perhaps the other side's corroborative evidence does not relate to the critical time period;[25] or perhaps the corroborative evidence only points to a belief in certain facts, rather than the truth of the facts themselves.[26]

After all, it is better to be Mr. Holmes than Inspector Lestrade when it comes to litigation over the last will and testament of Jonas Oldacre.[27]

[22] *Brisco Estate* v. *Canadian Premier Life Insurance Co*., 2012 CarswellOnt 15259 (C.A.), para. 62.

[23] *Harris* v. *Leikin Group Inc*., 2013 CarswellOnt 2778 (S.C.), para. 573.

[24] *David* v. *TransAmerica Life Canada*, 2015 CarswellOnt 12630 (S.C.), para. 115.

[25] *Orfus Estate* v. *Samuel & Bessie Orfus Family Foundation*, 2013 CarswellOnt 3927 (C.A.), paras. 74-75.

[26] *Walman* v. *Walman Estate*, 2015 CarswellOnt 350 (S.C.), para. 105.

[27] In "The Adventure of the Norwood Builder," Jonas Oldacre has actually faked his own death to frame a man for murder. Mr. Holmes is able to smoke him out, quite literally, by lighting a fire where the old man is hiding.

TAB 17

The Six-Minute Estates Lawyer 2019

Passing Accounts: Defining the Terms: Original Assets, Capital Receipts and Disbursements, Capital Revenue Receipts and Disbursements and Investment Accounts

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April 29, 2019

Passing Accounts: Defining the Terms: Original Assets, Capital Receipts and Disbursements, Capital Revenue Receipts and Disbursements and Investment Accounts

by Kathleen Robichaud[1]

Accounts can be passed formally and informally. This paper will focus on a formal passing of accounts and the expectations of what accounts should generally address in the event of a formal passing of accounts. Accounts of any trust may require a formal passing - which is essentially the process of having the accounting transactions and any compensation claimed by a trustee reviewed and approved. This means that an attorney for property may be required to pass accounts for the work done in assisting the grantor. It also means that an Estate Trustee may be required to pass accounts for work done in administering an estate.

The authority for the ordering of a passing of accounts comes from sections 48, 49(1) and 50 of the Estates Act[2] in the case of an estate of a deceased person and under section 42 of the Substitute Decisions Act in the case of the accounts of an attorney acting under a power of attorney for property[3] and also from Rule 74.15(1)(h)[4] which allows a party with a financial interest which could include a beneficiary or a creditor to seek an order to pass accounts. The authority for what orders can be made on passing of accounts comes from subsections 49(2) and

[1] This paper was prepared by Kathleen Robichaud of the Law Office of Kathleen Robichaud to provide details on what to include in Estate Accounts and to identify some of the general rules for calculating trustee compensation. There will be variations in complexity depending on type and location of assets and beneficiaries. Each estate will need to be considered in light of its unique set of circumstances. In some cases the advise of outside professionals will be required.

[2] *Estates Act*, R.S.O. 1990, c. E.21 (hereinafter "Estates Act"); see also section 23 of the *Trustee Act*, R.S.O. 1990, c. T.23 regarding the authority of a Trustee to the Trustee's accounts.

[3] *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 (hereinafter "Substitute Decisions Act"); see also *Strickland v Thames Valley District School Board* [2007] O.J. No. 3758 (Sup. Ct.) (hereinafter *Strickland*) at paras 40 to 46 for a discussion of the limits on the authority to order a passing of an attorney's accounts prior to the enactment of the Substitute Decisions Act.

[4] Rules of Civil Procedure, R.R.O. 1990, Reg. 194 (hereinafter Rules of Civil Procedure).

(3) of the Estates Act[5]. The process for seeking and for responding to an order for a passing of accounts is set out at Rules 74.16; 74.17 and 74.18. The form for the accounts is more particularly described at Rule 74.17.

> FORM OF ACCOUNTS
> 74.17 (1) Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include,
>
> (a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;
>
> (b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investments, if any, on the date the accounts for the period were opened;
>
> (c) an account of all money received, but excluding investment transactions recorded under clause (e);
>
> (d) an account of all money disbursed, including payments for trustee's compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);
>
> (e) where the estate trustee has made investments, an account setting out,
>
> (i) all money paid out to purchase investments,
>
> (ii) all money received by way of repayments or realization on the investments in whole or in part, and
>
> (iii) the balance of all the investments in the estate at the closing date of the accounts;
>
> (f) a statement of all the assets in the estate that are unrealized at the closing date of the accounts;
>
> (g) a statement of all money and investments in the estate at the closing date of the accounts;

[5] *Supra* note 2; For a case where the authority of the court and the orders that can be made on a passing of accounts, see *Strickland, supra*, note 3 at para 103.

(h) a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;

(i) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and

(j) such other statements and information as the court requires. O. Reg. 484/94, s. 12.

(2) The accounts required by clauses (1) (c), (d) and (e) shall show the balance forward for each account. O. Reg. 484/94, s. 12.

(3) Where a will or trust deals separately with capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income. O. Reg. 484/94, s. 12.

What this means is that on a court passing of accounts, subject an order or agreement that permits a more information set of accounts, an Estate Trustee or other person who is required to account will be required to provide:

1. A Statement or Inventory of Original Assets;
2. A Statement setting out Capital Receipts;
3. A Statement setting out Capital Disbursements;
4. A Statement detailing Investments of the deceased;
5. A Statement setting out Revenue Receipts;
6. A Statement setting out Capital Receipts;
7. A list of Original Assets Remaining;
8. A list of Money and Investments on hand at the end of the accounting Period;
9. A Statement showing (Estate) Trustee Compensation Claimed;
10. A list of Liabilities of the Estate

Original Assets

Original Assets are those assets that the deceased owned at the time of his or her death and accrued entitlements as well. Original Assets include things like bank accounts and interest accrued on money held in the account to the date of death; cash on hand; shares and dividends accrued and payable up to the date of death; Canada Savings Bonds; GICs; RRSPs; RIFs; annuities and other investments and interest accrued on any of those accounts or investments to the date of death; a house; land; a building; horses and other livestock; crops; personal possessions including furniture; jewellery and musical instruments; a boat; a car and so on. It will also include assets that the deceased had a beneficial interest in at the time of death such as a mortgage held by a trustee to which the deceased is entitled to a percentage interest in the payments; a debt owed to the deceased and payments paid and or payable up to the date of death; and, insurance proceeds payable to the estate.

Original Assets can include jointly owned property if the property was held jointly for administrative purposes only. That is the subject of another paper and will not be addressed in any detail in this paper, but, it is important to be aware that you cannot assume that jointly owned assets will never be included on the Statement of Original Assets.[6] Where assets were left by beneficiary designation to a named beneficiary then only the value of the accrued interest is included as an original asset and in the Statement of Capital Receipts. How much detail should be included regarding the personal assets and whether an inventory needs to be made and in turn listed on the Statement of Original Assets will depend on a number of factors. Things like whether an asset was specifically identified in the Will; the value of the asset like a car or a boat, antiques or jewellery may need to be individually listed. If the beneficiaries live far away and cannot come themselves to see what there is that may also increase the need for an inventory. Typically, personal and household items are Original Assets and are shown with a one line entry on the Statement of Original Assets.[7]

[6] For a case where the rules for determining whether to include a jointly held asset or not as an Estate asset and in turn in the List of Original Assets, see *Strickland, supra*, note 3 at paras 66 to 101.

[7] For a case where there was some discussion regarding the expectation of an inventory of household and personal items see *Pascale Estate v. Stark* [2014] O.J. No. 5583 (hereinafter *Pascale Estate*) at paras 33 and 34. See also *Sveinson, infra* note 24 where there is some discussion regarding requirements regarding valuing personal items and listing them at paras 95 to 97.

Capital Receipts

Capital Receipts include the balance of funds held in bank accounts that the deceased owned when he or she died; interest accrued in the bank account up to the date of death; funds from a redeemed GIC; accrued interest on the GIC up to the date of death; funds from a redeemed Canada Saving Bond (CSB); accrued interest on the CSB up to the date of death; funds from the sale of a house and the sale of shares.

Where assets were left by beneficiary designation to a named beneficiary then only the value of the accrued interest is included as an original asset and in the Statement of Capital Receipts. In the case of the proceeds of sale of a house, if the proceeds are greater than the date of death value, the receipts should show the date of death value and a separate entry recording the gain. In the case of a capital gain realized on an investment, the receipts should show the date of death value and a separate entry recording the gain realized between the date of death and the actual value of the investment as at the date of the accounts should be made. Assets that are distributed *in specie* to beneficiaries should also be recorded for accounting purposes in the Statement of Capital Receipts at their book value which should be the value recorded for the asset on the Statement of Original Assets.[8]

Capital Disbursements

The Statement of Capital Disbursements is where estate debts owed at the time of death are to be recorded. Capital Disbursements also include payment to the Minister of Finance on account of Estate Administration Tax; payment for funeral expenses; the cost of cremation; a cemetery inscription; tomb stone; payments to the Receiver General on account of income tax paid by the estate for prior years and for the year of death and subsequent years; interim distributions whether of residue or of legacies; final distributions; solicitor's fees; accounting fees. An asset

[8] Some estates will own business assets. For a helpful explanation of the differences between capital receipts and captial disbursements in the context of business assets, see: https://www.wallstreetmojo.com/capital-receipts-vs-revenue-receipts/

received in kind and recorded as a receipt on the Statement of Capital Receipts will be recorded as being written off at its book value in the Statement of Capital Disbursements with a description that it has been transferred to a beneficiary. A loss between the date of death value on the sale of the house and the actual sale proceeds will be recorded on the Statement of Capital Disbursements as will a loss on an estate investment.

Investment Account

The Investment Account statement includes things like term deposits bought by the Estate Trustee and the purchase and redemption of them would get recorded in the Investment Account Statement. Interest on the Term deposit, however, gets recorded in the Revenue Receipts statement.

Revenue Receipts

Revenue Receipts include any income sources that count as revenue for trust law purposes. Generally, income received by the estate after the date of death is recorded as a Revenue Receipt. Revenue Receipts include things like interest earned on money in bank accounts after the date of death; dividends on shares accrued and paid after the date of death; interest on GICs and Canada Savings bonds accrued and paid after the date of death; pension payments coming into the estate after the date of death; annuity payments coming into the estate after the date of death, but, not the Canada Pension Plan Death Benefit which is to be recorded as a Capital Receipt.

Note that dividends accrued, but, paid after the date of death are generally recorded as a Revenue Receipt, but, then transferred to the capital account by an entry in the Statement of Revenue Disbursements recorded as a transfer of income accrued to the date of death.

Revenue Disbursements

The Revenue Disbursements account shows all payments out of the Revenue Receipts account. Any payments made for the purpose of earning income are to be recorded as Revenue Disbursements. This includes things like bank charges; expenses related to the operation of a rental property; commission paid for the collection of a mortgage held by the deceased and now an asset of the estate; the transfer of accrued interest in the estate bank account; the payment of any income payments to a beneficiary; the payment of any income taxes on income retained in the estate.

Payments on real property can be a Revenue Disbursement or a Capital Disbursement depending on whether the asset is income producing or not. Realty taxes on a property that produces income should be recorded as a Revenue Disbursement. Realty taxes on vacant land that produces no income should be recorded as a Capital Disbursement. Taxes and maintenance costs for a property being maintained by the estate for a life tenant are usually recorded as Revenue Disbursements, but, may be recorded as Capital Disbursements if the will directs that the payments be made from capital.

Rules for Estate Trustee Compensation - Adjustments to Capital Receipts; Capital Disbursements; Revenue Receipts; and Revenue Disbursements

What goes in which statement is important because in some cases there are both income and capital beneficiaries in an estate.[9] What should and should not be included in these statements is also important since Estate Trustee Compensation is generally calculated based on the total of the capital receipts; capital disbursements; revenue receipts; and revenue disbursements. The general guideline for this was set out in *Jeffrey Estate* (1990), 39 E.T.R. 173 (Ont. Surr. Ct.). This case has not been overruled and continues to be referred to and accepted such that the

[9] For cases where the issue of how assets where dealt with affected income and capital beneficiaries see: *Wood* O.R. 573 (High Ct); and see *Josephs v. Josephs Estate* [1992] O.J. No. 516.

percentages that are the usual percentages used to calculate estate trustee compensation are 2.5% of each plus a care and management fee of 2/5 of 1% of average annual value of the assets in the case of estates of deceased persons.[10] In the case of the accounts of an attorney for property, compensation is set by regulation to the Substitute Decisions Act at 3% of Capital Receipts; Capital Disbursements; Revenue Receipts; and Revenue Disbursements and three-fifths of 1 per cent on the annual average value of the assets as a care and management fee.[11]

All of the totals of the Capital Receipts; Capital Disbursements; Revenue Receipts; Revenue Disbursements and average value of the estate are then carried to the Statement of (Estate) Trustee Compensation for the purpose of calculating what compensation is to be claimed or at least the starting point for the amount to be claimed. As such, it is important to note that when it comes to calculating Trustee compensation, what is and is not included follows some special rules. I mention these rules, because it is possible that a trustee might be able to avoid a passing of accounts or settle the accounts if adjustments are made to the calculation of compensation so as to reduce the totals of the Capital Receipts; Capital Disbursements; Revenue Receipts; Revenue Disbursements and average value of the estate based on these rules.

The Rule against Double Compensation

One of those rules is that compensation should not be paid where double compensation would result. For example, in my view the case of *Bagnall*, stands for this proposition. In that case, the guardians for property sought compensation on amounts that included rents collected from two apartment buildings. One guardian worked at one of the apartment buildings as a property manager in exchange for free rent. The court found that the collection of rent was part of the rent

[10] For additional cases that address the factors to be used in determining what is fair compensation see also: *Laing Estate v. Hines* [1998] O.J. No. 4169 (C.A.); *Toronto General Trusts Corp. v. Central Ontario Railway* (1905), 6 O.W.R. 350 (H.C.); and, *Mortimer (Re)*, [1936] O.R. 438, [1936] 3 D.L.R. 380 (C.A.)

[11] O. Reg. 26/95: GENERAL; See *Bagnall v. Bruckler*, [2009] O.J. No. 3559 (hereinafter *Bagnall*) for a case where these percentages were applied to the accounts of guardians for property.

free arrangement that the guardians had with the incapable person, their grandmother. To allow compensation on those receipts would mean that the guardians would receive both free rent and compensation as guardians or a total of 6% on account of those receipts. As such, the court reduced the amount of the Revenue Receipts used to calculate compensation by the amount of the rent receipts.[12] Similarly with respect to Revenue Disbursements, the court deducted disbursements that were related to property management functions from the total of Revenue Disbursements used to calculate compensation.[13] The idea here is that the guardians were being compensated for that work already as a result of another arrangement.

No Compensation for Work done by Others

While it is proper for the accounts to show a capital disbursement for work done by the estate solicitor, but, there a few things that can result in such an account being removed from the total Capital Disbursements. If the fact of making payment on the solicitor's account was unreasonable or if the account included work that would typically be done by an estate trustee it will likely be removed form the total of the Capital Disbursements for the purpose of calculating estate trustee compensation. With respect to the reasonableness of a payment made by an estate trustee, see for example, in *Knight Estate (Re)*, [1999] O.J. No. 4825, where the estate consisted of one major asset being the proceeds of a damage award. The estate trustee authorized the payment of the legal bill of $455,000.00 and included the payment in the total capital disbursements used to calculate her compensation. The court approved the payment as part of the total of the Capital Disbursements on the basis that it was reasonable for the estate trustee to make the payment.[14]

Where work is done by a professional that is work that would normally be done by the estate trustee, the value of that work likely will be deducted from the total of the Capital Disbursements

[12] *Bagnal, supra* paras 11 and 12

[13] *Bagnal, supra* para 13

[14] *Knight Estate (Re)*, [1999] O.J. No. 4825 (hereinafter *Knight Estate*) at para 27

reducing the total compensation payable[15]. It is also generally understood, that the Estate Trustee is not to receive compensation on the amount of the legal fees paid by the estate on behalf of the estate trustee for responding to concerns of a beneficiary regarding the management of and accounting for the estate.[16] A similar rule is followed if an accountant is paid to maintain and/or prepare the estate accounts subject to some exceptions. The treatment of professional fees paid for from the estate and when those fees should and should not be deducted from the total of the Capital Disbursements when calculating compensation can be found in *Miller Estate* where the court explains that specialized services not within the expertise ordinarily expected of an Estate Trustee should be reimbursed and not taken out of the Trustee's compensation.[17] Note that in *Miller Estate*, the fees related to investment advice for a substantial estate. Contrast this with *Pascale Estate* where the court ordered that the fees paid for the preparation of the accounts themselves should not be included in the total of the Capital Disbursements used ot calculate compensation and the fees should also be paid out of what would otherwise have been paid to the Estate Trustee as compensation.[18]

No Compensation on Compensation

While it is correct to record compensation paid to the Estate Trustee as a Capital Disbursement (unless the Will requires it to be paid out of income and there is income available for that purpose), it is not correct to include it in the total used to calculate compensation. This also falls under the rule against double compensation since to compensate a trustee on compensation

[15] See for example, *Knight Estate, supra* at paras 30 and 31

[16] See *McDougall Estate (Re)*, [2011] O.J. No. 3327 (Sup. Ct.) at paras 59 and 74

[17] *Re Miller Estate* [1987] O.J. No. 2409 (hereinafter *Miller Estate*) at para 11

[18] *Pascale Estate, supra note* 7 at para 38; See also *Strickland, supra* note 3 at paras 128 to 134 for a discussion of which professional fees can be included in compensation and which should not and regarding when they are deducted from the total of the trustee's compensation.

would be to compensate the trustee twice for some of that work. Generally, "transactions in which money is paid to the Executor are excluded from compensation."[19]

No Compensation for Losses

There is a generally accepted rule that losses are not to included in the total value of the assets for the purpose of calculating compensation. For example, in *Pascale Estate*, the shares were sold at a loss of $1,147.85 and so the court reduced the amount of the Capital Disbursements by that amount for the purpose of calculating the compensation of the estate trustee.[20] There is no discussion in that case regarding whether the loss was due to any fault on the part of the estate trustee which does not appear to be a relevant factor in assessing whether this rule should be applied.

No Compensation on Encumbrances

In *Pascale Estate* the respondent successfully argued that the amount of any encumbrances, real estate commission including HST and legal fees must be deducted when calculating compensation. The court agreed that these amounts should be netted out against the proceeds of sale reducing the total value of the Capital Disbursements to be used in calculating compensation.[21] *Re McLennan Estate* was referred to tor the general rule that encumbrances on real property are to be deducted from the value of the property for the purpose of calculating trustee compensation.[22]

[19] See *Re Mortimor* [1936] O.R. 438 (C.A.); see also *Pascale Estate*, *supra* note # at para 28.

[20] *Pascale Estate*, *supra* note 7 at pars 15 and 16

[21] *Pascale Estate*, *supra* note # at pars 17 and 18

[22] *Re McLennan Estate* [2002] O.J. No. 4716 (hereinafter *Re McLennan Estate*) at paras 33 to 35. Reference is made to *Re McColl* (1881) 8 P.R 480 at para 34 of *Re McLennan Estate* for how to deal with a vendor take back mortgage.

No Compensation Where Trustee fails to Properly Account

The courts will generally refuse to award compensation if a trustee has failed to properly account for transactions. See for example, *Pascale Estate* where the court deducted amounts that could not be accounted for from the Capital Disbursements total used for calculating compensation.[23] The court took the same approach in *Strickland* where the attorney was unable to explain why transactions totalling $8,000.00 had been completed. There was no suggestion of the funds having been improperly used, just no explanation for what happened.[24] In the case of *Sveinson Estate*, the trustee failed to properly account for his dealings with the trust assets despite several orders and was found to have deliberately mislead the court. The details of what should have been included in the accounts is addressed throughout the decision. The court in that case did not only order him to reimburse the estate, it declined to order him any compensation.[25]

No Compensation on Funds for Trustee's Personal Benefit

Where a trustee receives money from the estate for the trustee's own personal benefit, the trustee can expect that amount to be reduced from any calculation of his or her compensation. This includes payments for things like property left to the trustee. It definitely includes payments made by the trustee from trust funds that were not clearly set aside to be used for the benefit of the trustee. For example, in *Strickland* the estate trustee used funds belonging to the estate to finish a repair and renovation project that the deceased had started that remained unfinished when the deceased died. The property in question had been left to the estate trustee. The money spent on the repairs had to be reimbursed with interest and the value of the repairs were deducted from the

[23] *Pascale Estate*, *supra* note 7 at paras 26 and 27

[24] *Strickland, supra* note 3 at paras 51 to 54. Note that in *Strickland* amounts recorded simply for the purpose of transferring funds from one account to another were also excluded for the purpose of calculating compensation by agreement of the parties.

[25] *Sveinsen v. Sveinsen Estate* [2012] M.J. No. 26 (Q.B.) (Hereafter *Sveinsen Estate*) at paras 142 to 159

total of the capital disbursements for the purpose of calculating compensation. In *Sveinsen Estate*, where the Estate Trustee used trust funds for his own personal expenses because of "cash flow" problems and did so while attempting to mislead the beneficiaries and the court about having done so, he was denied compensation altogether.[26] He was also required to reimburse the estate with interest.

Summary

Estate or fiduciary accounting is different from other accounting. The way that fiduciary accounts are looked at on a passing of accounts is also different since an important purpose of a passing of accounts is to approve the compensation of the trustee. It is important that trustees track all transactions and record them. The statement of Original Assets will record all of the deceased's property and entitlements at the date of death. The Capital Receipts will record the receipt or realization of the original assets. The Capital Disbursements will record payments out of the Capital Receipts. The Revenue Receipts record money received on income earning assets and income received by the estate after the date of death. The Revenue Disbursements will record payments made to earn the revenue. It is important to be aware also of some general rules that are going to be considered by the court on a passing of accounts to advise your clients on what they can reasonably expect and possibly to assist them with a settlement of the accounts before the hearing.

[26] *Sveinson, supra* note 24

Tips for (Estate) Trustee Clients

- Keep track of what you do; what you receive and what you spend in a log book; keep copies of receipts; transaction records; cheques and other "vouchers";
- Do not use money for your own benefit unless specifically authorized to do so in writing;
- Proceed with diligence to sell estate assets that need to be sold;
- Proceed with diligence to pay debts and distribute assets;
- Use objective measures to value items - do not rely on your own personal opinion;
- You will generally be expected to invest money if you can't distribute it right away and invest it reasonably - preferably getting advice from appropriate professionals (who are probably not going to include bank tellers);
- It will generally be wise to rent property that will not or cannot be sold for a while;
- Deduct from the totals used to calculate compensation the following amounts: your share of the estate; fees incurred by you as estate trustee; the mortgage; losses incurred by the estate; a disbursement you cannot trace to anything; disbursements you look after as part of some other agreement for which you receive some form of compensation from the estate/deceased already;
- Use judgment about when the advice of a professional advisor is needed and get it where appropriate;
- Persons with a financial interest can get an order to pass accounts without first giving you notice
- You will have to reply within a specified time frame or ask for permission to get more time;
- You can seek to pass your own accounts and if there are no objections the hearing can proceed in writing unless the judge requires a hearing;
- If there are objections, it is a good idea to deal with them before a hearing;
- You should have back up documents for every entry in the accounts (vouchers);

Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE
Consolidation Period: From January 1, 2019 to the e-Laws currency date.
Last amendment: 537/18.
This is the English version of a bilingual regulation.

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ORDERS FOR ASSISTANCE
Kinds of Orders

74.15 (1) In addition to a motion under section 9 of the Estates Act, any person who appears to have a financial interest in an estate may move,

Order to Accept or Refuse Appointment

(a) for an order (Form 74.36) requiring any person to accept or refuse an appointment as an estate trustee with a will;

(b) for an order (Form 74.37) requiring any person to accept or refuse an appointment as an estate trustee without a will;

Order to Consent or Object to Proposed Appointment

(c) for an order (Form 74.38) requiring any person to consent or object to a proposed appointment of an estate trustee with or without a will;

Order to File Statement of Assets of the Estate

(d) for an order (Form 74.39) requiring an estate trustee to file with the court a statement of the nature and value, at the date of death, of each of the assets of the estate to be administered by the estate trustee;

Order for Further Particulars

(e) after receiving the statement described in clause (d), for an order for further particulars by supplementary affidavit or otherwise as the court directs;

Order to Beneficiary Witness

(f) for an order (Form 74.40) requiring a beneficiary or the spouse of a beneficiary who witnessed the will or codicil, or who signed the will or codicil for the testator, to satisfy the court that the beneficiary or spouse did not exercise improper or undue influence on the testator;

Order to Former Spouse

(g) for an order (Form 74.41) requiring a former spouse of the deceased to take part in a determination under subsection 17 (2) of the Succession Law Reform Act of the validity of the appointment of the former spouse as estate trustee, a devise or bequest of a beneficial interest to the former spouse or the conferring of a general or special power of appointment on him or her;

Order to Pass Accounts

(h) for an order (Form 74.42) requiring an estate trustee to pass accounts; and

Order for Other Matters

(i) for an order providing for any other matter that the court directs. O. Reg. 484/94, s. 12.

Notice of motion

(2) A motion under subrule (1) may be made without notice, except a motion under clause (1)(e), which requires 10 days notice to the estate trustee. O. Reg. 484/94, s. 12.

Service

(3) An order referred to in subrule (1) and an order for production under section 9 of the Estates Act shall be served by personal service, by an alternative to personal service or as the court directs. O. Reg. 484/94, s. 12.

Examination

(4) The court may require any person to be examined under oath for the purpose of deciding a motion under subrule (1). O. Reg. 484/94, s. 12.

PASSING OF ESTATE ACCOUNTS

74.16 Rules 74.17 and 74.18 apply to accounts of estate trustees and, with necessary modifications, to accounts of trustees other than estate trustees, persons acting under a power of attorney, guardians of the property of mentally incapable persons, guardians of the property of a minor and persons having similar duties who are directed by the court to prepare accounts relating to their management of assets or money. O. Reg. 484/94, s. 12; O. Reg. 69/95, s. 13.

FORM OF ACCOUNTS

74.17 (1) Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include,

(a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;

(b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investments, if any, on the date the accounts for the period were opened;

(c) an account of all money received, but excluding investment transactions recorded under clause (e);

(d) an account of all money disbursed, including payments for trustee's compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);

(e) where the estate trustee has made investments, an account setting out,

(i) all money paid out to purchase investments,

(ii) all money received by way of repayments or realization on the investments in whole or in part, and

(iii) the balance of all the investments in the estate at the closing date of the accounts;

(f) a statement of all the assets in the estate that are unrealized at the closing date of the accounts;

(g) a statement of all money and investments in the estate at the closing date of the accounts;

(h) a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;

(i) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and

(j) such other statements and information as the court requires. O. Reg. 484/94, s. 12.

(2) The accounts required by clauses (1) (c), (d) and (e) shall show the balance forward for each account. O. Reg. 484/94, s. 12.

(3) Where a will or trust deals separately with capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income. O. Reg. 484/94, s. 12.

APPLICATION TO PASS ACCOUNTS
Material to be Filed

74.18 (1) On the application of an estate trustee to pass accounts, the estate trustee shall file,

(a) the estate accounts for the relevant period verified by affidavit of the estate trustee (Form 74.43);

(b) a copy of the certificate of appointment of the applicant as estate trustee;

(c) a copy of the latest judgment, if any, of the court relating to the passing of accounts. O. Reg. 484/94, s. 12.

Notice of Application

(2) On receiving the material referred to in subrule (1), the court shall issue a notice of the application to pass accounts (Form 74.44). O. Reg. 484/94, s. 12.

Service

(3) The applicant shall serve the notice of application and a copy of a draft of the judgment sought on each person who has a contingent or vested interest in the estate by regular lettermail. O. Reg. 484/94, s. 12.

(3.1) Where the Public Guardian and Trustee or the Children's Lawyer represents a person who has a contingent or vested interest in the estate, the Public Guardian and Trustee or the Children's Lawyer shall be served with the documents referred to in subrules (1) and (3). O. Reg. 377/95, s. 6.

(3.2) Where a person other than the Public Guardian and Trustee acts as an attorney under a continuing power of attorney for property or as a guardian of property for a person under disability who has a contingent or vested interest in the estate, the attorney or guardian shall be served with the documents referred to in subrules (1) and (3). O. Reg. 193/15, s. 12 (1).

(4) Where the person is served in Ontario, the documents shall be served at least 60 days before the hearing date specified in the notice of application. O. Reg. 484/94, s. 12; O. Reg. 55/12, s. 12 (1); O. Reg. 193/15, s. 12 (2).

(5) Where the person is served outside Ontario, the documents shall be served at least 75 days before the hearing date specified in the notice of application. O. Reg. 484/94, s. 12; O. Reg. 55/12, s. 12 (2); O. Reg. 193/15, s. 12 (3).

Person under Disability or Unknown

(6) If a person referred to in subrule (3) is under disability or is unknown, the court may appoint someone to represent the person on the passing of the accounts if,

(a) neither the Public Guardian and Trustee nor the Children's Lawyer is authorized under any Act to represent the person; and

(b) there is no litigation guardian to act for the person on the passing of the accounts. O. Reg. 193/15, s. 12 (4).

Notice of Objection to Accounts

(7) A person who is served with documents under subrule (3) or (3.2) and who wishes to object to the accounts shall, at least 35 days before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a notice of objection to accounts (Form 74.45). O. Reg. 193/15, s. 12 (4).

Request for Further Notice

(8) A person who is served with documents under subrule (3) or (3.2) and who does not object to the accounts but wishes to receive notice of any further step in the application, including a request for costs or a request for increased costs, shall, at least 35 days before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a request for further notice in passing of accounts (Form 74.45.1). O. Reg. 193/15, s. 12 (4).

(8.1) Unless the court orders otherwise, a person who serves and files a request for further notice in passing of accounts is entitled to,

(a) receive notice of any further step in the application;

(b) receive any further document in the application;

(c) file material relating to costs under subrule (8.6), (11) or (11.2); and

(d) in the event of a hearing, be heard at the hearing, examine a witness and cross-examine on an affidavit, but with respect only to a request for increased costs under subrule (11). O. Reg. 193/15, s. 12 (4).

No Response

(8.2) Unless the court orders otherwise, a person who is served with documents under subrule (3) or (3.2) but does not serve and file either a notice of objection to accounts or a request for further notice in passing of accounts, is not entitled to,

(a) receive notice of any further step in the application;

(b) receive any further document in the application;

(c) file material on the application; or

(d) in the event of a hearing, be heard at the hearing, examine a witness or cross-examine on an affidavit. O. Reg. 193/15, s. 12 (4).

Response to Application — Public Guardian and Trustee or Children's Lawyer

(8.3) If the Public Guardian and Trustee or the Children's Lawyer is served with documents under subrule (3.1), the Public Guardian and Trustee or the Children's Lawyer, as the case may be, shall, at least 30 days before the hearing date specified in the notice of application, serve on the applicant and file with proof of service,

(a) a notice of objection to accounts (Form 74.45);

(b) a request for further notice in passing of accounts (Form 74.45.1);

(c) a notice of no objection to accounts (Form 74.46); or

(d) a notice of non-participation in passing of accounts (Form 74.46.1). O. Reg. 193/15, s. 12 (4).

Withdrawal of Objection

(8.4) A person who wishes to withdraw a notice of objection to accounts shall, at least 15 days before the hearing date of the application, serve on the applicant, and file with proof of service, a notice of withdrawal of objection (Form 74.48). O. Reg. 193/15, s. 12 (4).

When Hearing not Required

(8.5) An applicant may seek judgment on the passing of accounts without a hearing under subrule (9) if,

(a) no notices of objection to accounts are filed; or

(b) every notice of objection to accounts that was filed is withdrawn before the deadline set out in that subrule. O. Reg. 193/15, s. 12 (4).

Request for Costs

(8.6) Subject to subrule (11), any person served with documents under subrule (3), (3.1) or (3.2) who wishes to seek costs shall, at least 10 days before the hearing date of the application, serve on the applicant a request for costs (Form 74.49 or 74.49.1) and file the request with proof of service. O. Reg. 193/15, s. 12 (4).

Judgment on Passing of Accounts Granted Without Hearing

(9) The court may grant a judgment on passing accounts without a hearing if, at least five days before the hearing date of the application, the applicant files with the court,

(a) a record containing,

(i) an affidavit of service of documents served under subrule (3), (3.1) or (3.2),

(ii) the notices of no objection to accounts or notices of non-participation in passing of accounts of the Children's Lawyer and Public Guardian and Trustee, if served,

(iii) an affidavit (Form 74.47) of the applicant or applicant's lawyer stating that a copy of the accounts was provided to each person who was served with the notice of application and requested a copy, that the time for filing notices of objection to accounts has expired and that no notice of objection to accounts was received from any person served, or that, if a notice of objection was received, it was withdrawn as evidenced by a notice of withdrawal of objection (Form 74.48) attached to the affidavit,

(iv) requests (Form 74.49 or 74.49.1), if any, for costs of the persons served,

(iv.1) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2), and

(v) the certificate of a lawyer stating that all documents required by subclauses (i) to (iv.1) are included in the record;

(b) a draft of the judgment sought, in duplicate; and

(c) if the Children's Lawyer or the Public Guardian and Trustee was served with documents under subrule (3.1) and did not serve a notice of non-participation in passing of accounts, a copy of the draft judgment approved by the Children's Lawyer or the Public Guardian and Trustee, as the case may be. O. Reg. 484/94, s. 12; O. Reg. 69/95, ss. 19, 20; O. Reg. 332/96, s. 4 (2, 3); O. Reg. 575/07, s. 1; O. Reg. 193/15, s. 12 (5-9).

Costs

(10) Where the court grants judgment on passing accounts without a hearing, the costs awarded shall be assessed in accordance with Tariff C, except as provided under subrules (11) to (11.4). O. Reg. 55/12, s. 12 (5); O. Reg. 193/15, s. 12 (10).

Request for Increased Costs

(11) Where the applicant or a person served with documents under subrule (3), (3.1) or (3.2) seeks costs greater than the amount allowed in Tariff C, he or she shall, before the deadline referred to in subrule (11.1), serve on the persons referred to in subrule (11.1),

(a) a request for increased costs (Form 74.49.2 or 74.49.3) specifying the amount of the costs being sought; and

(b) a costs outline (Form 57B). O. Reg. 55/12, s. 12 (5); O. Reg. 193/15, s. 12 (11).

(11.1) Unless the court orders otherwise, the documents referred to in subrule (11) shall be served on the applicant and on the following persons, as applicable, at least 15 days before the hearing date of the application:

1. Every person who has served and filed a notice of objection to accounts in accordance with subrule (7), even if he or she has since withdrawn it.

2. Every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8).

3. The Public Guardian and Trustee or Children's Lawyer, as the case may be, if the Public Guardian and Trustee or the Children's Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts. O. Reg. 193/15, s. 12 (12).

(11.2) Any objection or consent to a request for increased costs shall be made by returning the completed Form 74.49.2 or 74.49.3, as the case may be, to the person making the request so that he or she receives it at least 10 days before the hearing date of the application. O. Reg. 55/12, s. 12 (5); O. Reg. 193/15, s. 12 (13).

(11.3) Where a request for increased costs is served under subrule (11), the person making the request shall, at least five days before the hearing date of the application, file with the court a supplementary record containing,

(a) the documents served under that subrule, together with an affidavit of service of those documents; and

(b) an affidavit containing,

(i) a summary of the responses to the request for increased costs received under subrule (11.2), and a list of the persons who failed to respond, and

(ii) the factors that contributed to the increased costs. O. Reg. 55/12, s. 12 (5); O. Reg. 193/15, s. 12 (14).

Judgment on Increased Costs Granted Without Hearing

(11.4) The court may, on consideration of the documents referred to in subrule (11.3), grant judgment on a request for increased costs without a hearing, and may, for the purpose, order the person making the request to provide any additional information that the court specifies. O. Reg. 55/12, s. 12 (5).

Contested Passing of Accounts (Hearing)

(11.5) If one or more notices of objection to accounts are filed and not withdrawn, the applicant shall, at least 10 days before the hearing date of the application, serve on the persons referred to in subrule (11.6), and file with proof of service,

(a) a consolidation of all the remaining notices of objection to accounts; and

(b) a reply to notice of objection to accounts (Form 74.49.4). O. Reg. 193/15, s. 12 (15).

(11.6) The documents referred to in subrule (11.5) shall be served on,

(a) every person who has served and filed a notice of objection to accounts in accordance with subrule (7) and not withdrawn it;

(b) every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8); and

(c) the Public Guardian and Trustee or Children's Lawyer, as the case may be, if the Public Guardian and Trustee or the Children's Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts. O. Reg. 193/15, s. 12 (15).

(11.7) If the application to pass accounts proceeds to a hearing, the applicant shall, at least five days before the hearing date, file with the court a record containing,

(a) the application to pass accounts;

(b) the documents referred to in subrule (11.5);

(c) any responses to the applicant's reply to notice of objection to accounts by the persons on whom the reply was served;

(d) in the case of any notice of objection to accounts that is withdrawn after the documents referred to in subrule (11.5) were served and filed, a copy of the notice of withdrawal of objection (Form 74.48);

(e) the notices of non-participation in passing of accounts of the Public Guardian and Trustee and the Children's Lawyer, if served;

(f) any requests for further notice in passing of accounts (Form 74.45.1);

(g) any requests for costs (Form 74.49 or 74.49.1) of persons served under subrule (11.5);

(h) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2); and

(i) a draft order for directions or of the judgment sought, as the case may be. O. Reg. 193/15, s. 12 (15).

(11.8) If the applicant and every person referred to under subrule (11.6), as applicable, agree to all of the terms of a draft order, the applicant shall indicate that it is a joint draft order. O. Reg. 193/15, s. 12 (15).

(11.9) If the applicant and every person referred to under subrule (11.6), as applicable, fail to agree to all of the terms of a draft order,

(a) the applicant shall indicate that it is the applicant's draft order; and

(b) any person referred to in clause (11.6) (a) may file an alternative draft order at least three days before the hearing date of the application or, with leave of the court, at the hearing. O. Reg. 193/15, s. 12 (15).

(12) No objection shall be raised at a hearing on a passing of accounts that was not raised in a notice of objection to accounts, unless the court orders otherwise. O. Reg. 484/94, s. 12; O. Reg. 55/12, s. 12 (6).

(13) At the hearing, the court may assess, or refer to an assessment officer, any bill of costs, account or charge of lawyers employed by the applicant or by a person who filed a notice of objection or a request for further notice in passing of accounts. O. Reg. 193/15, s. 12 (16).

Trial may be Directed

(13.1) On the hearing of the application, the court may order that the application or any issue proceed to trial and give such directions as are just, including directions,

(a) respecting the issues to be tried and each party's position on each issue;

(b) respecting the timing and scope of any applicable disclosure;

(c) respecting the witnesses each party intends to call, the issues to be addressed by each witness and the length of each witness' testimony; and

(d) respecting the procedure to be followed at the trial, including methods of adducing evidence. O. Reg. 193/15, s. 12 (17).

Directions regarding mediation

(13.2) In making an order under subrule (13.1), the court may, in addition to giving any direction under that subrule,

(a) give any direction that may be given under subrule 75.1.05 (4), in the case of a proceeding that is subject to Rule 75.1 (mandatory mediation); or

(b) in the case of a proceeding that is not subject to Rule 75.1, order that a mediation session be conducted in accordance with Rule 75.2, and, for the purpose, give any direction that may be given under subrule 75.1.05 (4). O. Reg. 193/15, s. 12 (17).

Form of Judgment

(14) The judgment on a passing of accounts shall be in Form 74.50 or 74.51. O. Reg. 484/94, s. 12.

Estates Act
R.S.O. 1990, CHAPTER E.21

Consolidation Period: From June 22, 2006 to the e-Laws currency date.
Last amendment: 2006, c.19, Sched.C, s.1 (1, 3).
Legislative History: 1994, c. 27, s. 43 (2); 1997, c. 23, s. 8; 1998, c. 34, s. 63; 1999, c. 6, s. 23; 1999, c. 12, Sched. B, s. 6; 2002, c. 24, Sched. B, s. 36; 2005, c. 5, s. 24; 2006, c. 19, Sched. C, s. 1 (1), (3); CTS 30 AU 10 - 1.

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Accounting by executor trustee
48 Every executor who is also a trustee under the will may be required to account for their trusteeship in the same manner as they may be required to account in respect of their executorship. R.S.O. 1990, c. E.21, s. 48.

Passing accounts
Passing accounts by guardians
49 (1) A guardian appointed by the Superior Court of Justice may pass the accounts of the guardian's dealings with the estate before the judge of the court by which letters of guardianship were issued. R.S.O. 1990, c. E.21, s. 49 (1); 2006, c. 19, Sched. C, s. 1 (1).
Powers of judge on passing accounts
(2) The judge, on passing the accounts of an executor, administrator or trustee under a will of which the trustee is an executor, has jurisdiction to enter into and make full inquiry and accounting of and concerning the whole property that the deceased was possessed of or entitled to, and its administration and disbursement. R.S.O. 1990, c. E.21, s. 49 (2).
Further powers
(3) The judge, on passing any accounts under this section, has power to inquire into any complaint or claim by any person interested in the taking of the accounts of misconduct, neglect, or default on the part of the executor, administrator or trustee occasioning financial loss to the estate or trust fund, and the judge, on proof of such claim, may order the executor, administrator or trustee, to pay such sum by way of damages or otherwise as the judge considers proper and just to the estate or trust fund, but any order made under this subsection is subject to appeal. R.S.O. 1990, c. E.21, s. 49 (3).

. . .

At whose instance executors or administrators compellable to account
50 (1) An executor or an administrator shall not be required by any court to render an account of the property of the deceased, otherwise than by an inventory thereof, unless at the instance or on behalf of some person interested in such property or of a creditor of the deceased, nor is an executor or administrator otherwise compellable to account before any judge. R.S.O. 1990, c. E.21, s. 50 (1).

Substitute Decisions Act, 1992
S.O. 1992, CHAPTER 30

Consolidation Period: From March 26, 2019 to the e-Laws currency date.
Last amendment: 2019, c. 1, Sched. 4, s. 57.

. . .

Passing of accounts
42 (1) The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed. 1992, c. 30, s. 42 (1).
Attorney's accounts
(2) An attorney, the grantor or any of the persons listed in subsection (4) may apply to pass the attorney's accounts. 1992, c. 30, s. 42 (2).
Guardian's accounts
(3) A guardian of property, the incapable person or any of the persons listed in subsection (4) may apply to pass the accounts of the guardian of property. 1992, c. 30, s. 42 (3).
Others entitled to apply
(4) The following persons may also apply:

1. The grantor's or incapable person's guardian of the person or attorney for personal care.
2. A dependant of the grantor or incapable person.
3. The Public Guardian and Trustee.
4. The Children's Lawyer.
5. A judgment creditor of the grantor or incapable person.
6. Any other person, with leave of the court. 1992, c. 30, s. 42 (4); 1994, c. 27, s. 43 (2).

P.G.T. a party
(5) If the Public Guardian and Trustee is the applicant or the respondent, the court shall grant the application, unless it is satisfied that the application is frivolous or vexatious. 1992, c. 30, s. 42 (5).
Filing of accounts
(6) The accounts shall be filed in the court office and the procedure in the passing of the accounts is the same and has the same effect as in the passing of executors' and administrators' accounts. 1992, c. 30, s. 42 (6).
Powers of court
(7) In an application for the passing of an attorney's accounts the court may, on motion or on its own initiative,

(a) direct the Public Guardian and Trustee to bring an application for guardianship of property;
(b) suspend the power of attorney pending the determination of the application;
(c) appoint the Public Guardian and Trustee or another person to act as guardian of property pending the determination of the application;
(d) order an assessment of the grantor of the power of attorney under section 79 to determine his or her capacity; or

(e) order that the power of attorney be terminated. 1992, c. 30, s. 42 (7).

Same

(8) In an application for the passing of the accounts of a guardian of property the court may, on motion or on its own initiative,

(a) adjust the guardian's compensation in accordance with the value of the services performed;

(b) suspend the guardianship pending the determination of the application;

(c) appoint the Public Guardian and Trustee or another person to act as guardian of property pending the determination of the application; or

(d) order that the guardianship be terminated. 1992, c. 30, s. 42 (8).

Section Amendments with date in force (d/m/y)

1994, c. 27, s. 43 (2) - 03/04/1995

Substitute Decisions Act, 1992

ONTARIO REGULATION 26/95

GENERAL

Consolidation Period: From September 1, 2015 to the e-Laws currency date.
Last amendment: 272/15.
Legislative History: 101/96, 159/00, 411/12, 272/15.
This is the English version of a bilingual regulation.

1. For the purposes of subsection 40 (1) of the Act, a guardian of property or an attorney under a continuing power of attorney shall be entitled, subject to an increase under subsection 40 (3) of the Act or an adjustment pursuant to a passing of the guardian's or attorney's accounts under section 42 of the Act, to compensation of,

(a) 3 per cent on capital and income receipts;

(b) 3 per cent on capital and income disbursements; and

(c) three-fifths of 1 per cent on the annual average value of the assets as a care and management fee. O. Reg. 26/95, s. 1; O. Reg. 159/00, s. 1.

Trustee Act
R.S.O. 1990, CHAPTER T.23
Consolidation Period: From December 15, 2009 to the e-Laws currency date.
Last amendment: 2009, c. 34, Sched. T, s. 5.
Legislative History: 1992, c. 32, s. 27; 1993, c. 27, Sched.; 1994, c. 27, s. 43 (2); 1998, c. 18, Sched. B, s. 16; 2000, c. 26, Sched. A, s. 15; 2001, c. 9, Sched. B, s. 13; 2002, c. 24, Sched. B, s. 47; 2005, c. 5, s. 71; 2006, c. 19, Sched. B, s. 23; 2009, c. 34, Sched. T, s. 5; CTS 30 AU 10 - 1.

. . .

Filing of accounts
23 (1) A trustee desiring to pass the accounts of dealings with the trust estate may file the accounts in the office of the Superior Court of Justice, and the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of executors' or administrators' accounts in the court. R.S.O. 1990, c. T.23, s. 23 (1); 2000, c. 26, Sched. A, s. 15 (2).
Fixing compensation of trustee
(2) Where the compensation payable to a trustee has not been fixed by the instrument creating the trust or otherwise, the judge upon the passing of the accounts of the trustee has power to fix the amount of compensation payable to the trustee and the trustee is thereupon entitled to retain out of any money held the amount so determined. R.S.O. 1990, c. T.23, s. 23 (2).
Section Amendments with date in force (d/m/y)
2000, c. 26, Sched. A, s. 15 (2) - 06/12/2000
Expenses of trustees
23.1 (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,

(a) pay the expense directly from the trust property; or

(b) pay the expense personally and recover a corresponding amount from the trust property. 2001, c. 9, Sched. B, s. 13 (1).

Later disallowance by court
(2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust. 2001, c. 9, Sched. B, s. 13 (1).

. . .

ALLOWANCE TO TRUSTEES AND PERSONAL REPRESENTATIVES
Allowance to trustees, etc.
61 (1) 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. R.S.O. 1990, c. T.23, s. 61 (1); 2000, c. 26, Sched. A, s. 15 (2).
Though estate not before the court
(2) The amount of such compensation may be settled although the estate is not before the court in an action. R.S.O. 1990, c. T.23, s. 61 (2).

Allowance to personal representative for services

(3) The judge, in passing the accounts of a trustee or of a personal representative or guardian, may from time to time allow a fair and reasonable allowance for care, pains and trouble, and time expended in or about the estate. R.S.O. 1990, c. T.23, s. 61 (3).

Allowance to barrister or solicitor trustee for professional services

(4) Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be considered fair and reasonable in respect of such services. R.S.O. 1990, c. T.23, s. 61 (4).

Where allowance fixed by the instrument

(5) Nothing in this section applies where the allowance is fixed by the instrument creating the trust. R.S.O. 1990, c. T.23, s. 61 (5).

Section Amendments with date in force (d/m/y)

2000, c. 26, Sched. A, s. 15 (2) - 06/12/2000

MISCELLANEOUS

Trustees buying or selling

62 A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of section 1 of the Vendors and Purchasers Act. R.S.O. 1990, c. T.23, s. 62.

Indemnity

63 This Act or an order purporting to be made under it is a complete indemnity to all persons for any acts done under the Act or order, as the case may be. R.S.O. 1990, c. T.23, s. 63.

Costs may be ordered to be paid out of estate

64 The Superior Court of Justice may order the costs of and incidental to any application, order, direction, conveyance, assignment or transfer under this Act to be paid or raised out of the property in respect of which it is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as the court considers proper. R.S.O. 1990, c. T.23, s. 64; 2000, c. 26, Sched. A, s. 15 (2).

Section Amendments with date in force (d/m/y)

2000, c. 26, Sched. A, s. 15 (2) - 06/12/2000

Law Society of Ontario | Barreau de l'Ontario

TAB 18

The Six-Minute Estates Lawyer 2019

Issues with Insolvent Estates

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April 29, 2019

ISSUES WITH INSOLVENT ESTATES

The Six Minute Estates Lawyer 2019

The Law Society of Ontario

April 29, 2019

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**This paper is intended only to inform and educate. It does not constitute a legal opinion or other legal advice.*

Issues with Insolvent Estates

Insolvent estates may seem daunting at first glance; however, they do not always have to be, as long as the appropriate advice is given and correct steps are taken throughout the administration of the estate. An executor[1] should not administer an insolvent estate without specific and detailed guidance from counsel. The following is a brief explanation of insolvent estates and issues of which an executor should be aware.

1. Insolvent Estate vs. Bankrupt Estate

It is important to differentiate between an insolvent estate and a bankrupt estate. Although the terms "insolvent" and "bankrupt" are sometimes used interchangeably, there are notable differences, particularly in the context of estate administration. An insolvent estate is one in which the assets of the deceased are not sufficient to enable payment of all the deceased's debts and obligations.[2] The executor remains in control of the administration of the insolvent estate, and such administration is covered by the *Trustee Act* and the *Estates Act*.[3] A bankrupt estate is one in which an assignment or bankruptcy order has formally been made under the *Bankruptcy and Insolvency Act*.[4] A trustee in bankruptcy will assume control over the bankrupt estate, and is governed by the *Bankruptcy and Insolvency Act*.

The executor's liability differs between an insolvent estate and a bankrupt estate. Simply put, with a bankrupt estate, the executor ceases administering the estate in favour of the trustee in bankruptcy, thereby limiting the executor's exposure to liability. With an insolvent estate, the executor must tread very carefully or risk being found personally liable for any missteps in the payment of debts and the administration of the estate. An executor

[1] The term Executor in this paper is intended to be gender neutral and to cover the singular and plural.

[2] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s.2. [*B.I.A.*].

[3] *Trustee Act,* R.S.O. 1990, c. T.23 [*Trustee Act*]; *Estates Act*, R.S.O. 1990, c. E.21 [*Estates Act*].

[4] *B.I.A.,* s.2.

should always seek legal advice prior to moving forward with an insolvent estate so that they have a full appreciation of the role that he is taking on.

2. Duties of Executor

An executor is responsible for paying the deceased's debts, funeral and testamentary expenses and estate administration fees.[5] An executor is obligated to determine whether there are any claims against the deceased's estate. If the executor wishes to contest a claim against the estate, they may serve the claimant with written notice that they intend to contest the claim in whole or in part. The *Estates Act* outlines the procedure for the executor to follow in serving such claims, whether for liquidated or unliquidated debts. Once the notice has been served, it triggers a series of steps during which the claimant must bring an application for the amount owing, failing which, the claim may be considered abandoned or forever barred.[6]

An executor is also able to call a meeting of creditors, similar to the rights a trustee in bankruptcy has under the *BIA*. This allows the executor to discuss the debts of the deceased, including tax obligations, directly with the creditors.[7] However, there is some relief for an executor who has acted in good faith on minor issues. An executor's authority to pay all debts of the estate is typically included in most wills. Section 48 of the Ontario *Trustee Act* specifically gives authority to a personal representative to pay or allow any debtor's claim on evidence that the personal representative determines is sufficient.[8] There is not much guidance provided in the *Trustee Act* as to the nature and extent of this duty. A creditor of an estate cannot be prejudicially affected by the terms of the will. The creditor's rights are fixed and determined by the law and are not governed in any way by the debtor or the debtor's will. A compromise made by an executor can only be on claims that are doubtful and contestable; its objective must be the resolution or prevention of

[5] *Estates Administration Act*, R.S.O. 1990, c.E.22, s.5. [*E.A.A.*]

[6] *Estates Act*, s.44 and s.45 [this does not include claims by creditors where notice with full particulars is filed with the executor or office of the Superior Court of Justice registrar prior to the limitation periods outlined in the *Trustee Act*.]

[7] *Trustee Act,* s. 59.

[8] *Trustee Act*, s.48

litigation. In *Vanek v. O'Hara*, the Court held that it should not easily override the discretion of Executors in making compromises in relatively minor matters.[9]

Doctrine of Plene Administravit

As with any estate, an executor must always consider the implications of mismanaging an estate. Where an executor of an insolvent estate is found to have mismanaged funds, there could be even greater costs for the executor. An executor or an administrator is personally liable where he or she has admitted that they have assets, even if there are insufficient assets or no assets. Therefore, if an action is commenced, the executor must respond, must do so carefully and must plead appropriately. If the executor does not plead that they have no assets or *plene administravit*, they will be taken to have conclusively admitted that they do have assets to satisfy the judgment and will be personally liable for the debts and costs if the debts and costs cannot be satisfied fully through the assets of the deceased. If the executor has some, but insufficient assets to satisfy the judgment and costs, the executor should plead *plene administravit praetor*. Pleading *plene administravit praetor* will render the executor liable only to the value of assets that is proven to remain in their hands as the executor. The executor should be proactive in responding to any claims against the estate and to limit their personal exposure by pleading in an appropriate and specific manner.

In *Commander Leasing Corp.* v. *Aiyede*, the appellant, who was owed rental arrears, brought an action, including an allegation of *devastavit,*[10] against the deceased's widow both personally and as the Estate Trustee of her husband's Estate.[11] The question that came before the Ontario Court of Appeal was whether the executor could be held personally liable for the estate's indebtedness. In her reply, the executor did not respond to the allegation of *devastavit*, nor did she plead that the estate did not have any or sufficient assets to cover the debts or that the estate had been fully and properly

[9] Vanek v. O'Hara (1995), 7 E.T.R. (2nd) 187 (Ont. Gen. Div.) at 193. [*Vanek*].

[10] *Devastavit* is defined in *Commander Leasing Corp. v. Aiyede* as a wasting of the assets: "…the mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators must answer out of their own pockets, as far as they had, or might have had, assets of the deceased."

[11] *Commander Leasing Corp. v. Aiyede* (1983), 44 O.R. (2nd) 356 (Ont. C.A.)

administered. The Court found that by distributing the entire estate to the beneficiaries and disregarding the creditor's outstanding claim, she breached her duty as executor. The Court found that her actions amounted to *devastavit* and she was thus found personally liable to the creditor.

In *Edwards* v. *Law Society of Upper Canada*, the plaintiffs brought an action for losses suffered as a result of investments in a scheme of purchasing gold delivery contracts.[12] The plaintiffs pleaded that they had a solicitor-client relationship with the deceased (who was a solicitor), and that he had fraudulently paid out their funds from his trust account. The defendants moved for an order dismissing the claims on the ground of the doctrine of *plene administravit*; that there were no assets or insufficient assets in the estate of the deceased solicitor; specifically, that the estate only had $7,138 available to pay the estate's debts. The plaintiff argued that there was an unrealized liability insurance policy in favour of the deceased solicitor's estate that would cover the allegations of the deceased solicitor's breach of duty. To obtain an order dismissing the claims on the ground of the doctrine of *plene administravit*, executors (the defendants in this case) must show that it was plain and obvious that there were no other assets that the creditors could look to in order to respond to their claims.[13] In *Edwards,* the Court found that it was not plain and obvious that the estate only had assets amounting to $7,138, and dismissed the defendants motion to dismiss the action based on *plene administravit*.[14]

Devastavit

Although executors have a duty to pay the claims of the estate, they also have a duty not to waste an estate that they are administering for the benefit of others by satisfying demands that are untenable in law or in equity. An executor who distributes the estate without knowing of an outstanding claim is liable personally to that creditor. As mentioned above, *devastavit* is the breach by an executor or administrator in their duty to administer the estate by the mismanagement of the estate, squandering and misapplication of assets

[12] *Edwards* v. *Law Society of Upper Canada* (2000), 48 O.R. (3rd) 321 (Ont. C.A.) (Application for leave to SCC dismissed November 23, 2000). [*Edwards*]

[13] *Edwards* at para 28. (application for leave to SCC dismissed November 23, 2000).

[14] *Ibid*. at paras 229-31. This case also considered a limitations period argument. I have not summarized the facts or decision surrounding that issue here.

contrary to the duty that is imposed on them.[15] *Devastavit* can be deliberate or reckless, and can include negligence. As with all breaches of fiduciary duty, the liability is personal.

An Executor or administrator must be cautious about their administration of an insolvent estate. If the Executor or administrator delays in discharging debts, or if they discharge debts out of order of priority, it could give rise to a claim for *devastavit*.

An Executor has a duty to ensure the deceased's debts are paid. It is prudent for an Executor to publish notices to creditors even where they believe all creditors are known, as the failure to do so could have serious repercussions to the Executor.

3. Priority of Debts

It is common knowledge that a deceased's reasonable and necessary funeral expenses are paid first from the residue of the estate, followed by the testamentary expenses and costs to administer the estate, including legal and other professional fees, and executor's compensation.[16]

If an executor wishes to administer an insolvent estate under the *BIA*, distribution must be made in accordance with s.136. Funeral and testamentary expenses are still the first charge against the estate under this distribution scheme, followed by the costs of administering the estate, including the legal fees and executor's fees.[17]

The question of priority under the *B.I.A*, was considered in the British Columbia case of *Re: Ladner Estate* (2001), B.C.S.C. 943. In this case, there was a petition filed in respect of an estate under the *B.I.A.* and was delivered to counsel representing the estate. Although the petition was eventually disposed of without being heard, an Application was brought by the estate for payment of the estate solicitor's account out of the trust. The Court considered the priority of the solicitor's accounts for work performed for the estate, and held that they constituted a testamentary expense of the estate within the meaning of section 44(2) of the *Bankruptcy and Insolvency Act*. Section 44(2) of the *BIA* is as follows:

[15] *Commander Leasing Corp. v. Aiyede* (1983), 44 O.R. (2nd) 356 (Ont. C.A.)

[16] Widdifield on Executors and Trustees, 6th Edition, Carmen S. Thériault at section 3.8.

[17] *BIA*, s.136.

> *[a]fter service of a petition for a receiving order on the legal personal representative of a deceased debtor, he shall not make payment of any moneys or transfer any property of the deceased debtor, except as required for payment of the proper funeral and testamentary expenses, until the petition is disposed of, otherwise, in addition to any penalties to which he may be subject, he is personally liable therefor.*

The question that the Court considered in *Ladner* was whether the payment of the monies for the solicitor's accounts was required for payment of the proper funeral and testamentary expenses.[18] The Court also found that the preparation of financial statements and income tax returns for the estate constitute proper testamentary expenses.[19] The Court, in referring to a number of cases and texts, agreed that executorship expenses, testamentary expenses and administration expenses are in essence synonymous terms relating to the proper performance of the duties of the executor of an estate, and that these expenses include the costs incurred in obtaining professional advice, like legal advice, especially where such advice is with respect to ascertaining the debts and liabilities due from the estate and the legal and proper distribution of the estate among the entitled beneficiaries.

After the testamentary and administrative expenses have been paid, the executor must turn to dealing with the deceased's debts. The *Trustee Act* protects the rights of secured creditors, and any secured debts may be paid first.[20] If there is a question of the value of the secured debts, the executor may ask the secured creditor to confirm the value of the secured debt. If a creditor fails to value any security it holds that it has been called upon to value and if the creditor does not notify the executor of same, the executor may apply to the Court for an order that unless a specified value is provided within a stated timeframe, the creditor is wholly barred of any right to share in the proceeds of the estate unless the judge extends the time for valuation of the security.[21]

[18] Re Ladner Estate, 2001 B.C.S.C. 943 at para 3.
[19] Ibid at para 7.
[20] *Trustee Act*, s.50(1).
[21] Ibid, s.58.

There is no priority among unsecured debts of an estate.[22] Such unsecured debts, including provincial Crown debts, will be paid proportionately. There is a question of whether federal debts, like income taxes, are bound by the provincial *Trustee Act* and take priority over the unsecured debts. When in doubt, an executor can seek the advice and opinion of the Court before paying any debts or distributing the funds.[23] Should an executor proceed to make payments to creditors greater than their proportionate share, the court can relieve the executor of personal liability either wholly or in part if it is satisfied that the executor acted honestly and reasonably, and with the intention of protecting and conserving the assets of the estate.[24]

There are some debts that are treated differently in the context of an insolvent estate versus a bankrupt estate. Although child support and spousal support take priority over others in a bankrupt estate, they do not have any priority in an insolvent estate and they share equally with the other unsecured creditors.

4. What if an Executor DOES want to petition an estate into bankruptcy?

There may be circumstances in which it is advisable to petition an insolvent estate into bankruptcy. Factors for an executor to consider in choosing whether to keep the estate insolvent or to petition it into bankruptcy include: the executor's personal liability, the potential increased cost of administering the estate, and the priority of debts.

Petitioning to have an estate declared bankrupt removes the administration of the estate out of the hands of the executor and into those of an appointed trustee in bankruptcy, thereby limiting the estate trustee's liability. On the other hand, the executor would also lose all control over the administration of the estate. If an executor is unwilling to relinquish control, they must consider their risk tolerance for exposure to personal liability. If an estate is small and if the debts are straightforward, perhaps it makes more sense not to petition to have the estate declared bankrupt and have the executor continue to administer the estate themselves. Finally, there is a difference in priority among debts

[22] Ibid, s.48 and 50
[23] *Trustee Act*, s.60
[24] Ibid, s.50(3)

in an insolvent estate and debts in a bankrupt estate. As discussed, where in an insolvent estate there is no priority among unsecured creditors, the debts in a bankrupt estate will be prioritized. For example, support orders are considered among the other unsecured creditors in an insolvent estate, however, will rank higher in priority in a bankrupt estate.

5. Advising the Executor

An executor should always be encouraged to seek advice prior to administering any form of estate, including those that are solvent. A simple misstep could expose the executor to a number of problems and liability. In an insolvent estate, the estate lawyer should carefully review the complex obligations that the executor has to the creditors, in addition to the beneficiaries of the estate. At the end of the day, an executor named in a will has no obligation to step forward to administer an estate and can renounce. If the task of administering an insolvent estate seems daunting, an executor can always step away and renounce, and let someone else, like a creditor, step forward to administer the estate.

The key points to consider when advising the client:

- Is it an insolvent estate or have steps been taken to have the estate declared bankrupt?
- What is the size of estate and the complexity of the creditors' claims?
- What is the executor's level of competency in administering a complex estate

[*Where the executor chooses to proceed*]

- What are the debts of the estate?
- How should those debts be paid?
- If a claim is brought, what should the executor plead in response?
- When in doubt, before paying any debts or satisfying any claims, seek the advice of the court.