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Estate Litigation Update 2013:

Potpourri of Recent Developments You Should Know About

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***INTRODUCTION**

This paper will briefly highlight some recent cases and developments in estates and trust litigation, as well as relevant changes to the *Rules of Civil Procedure*. Topics include: the use of summary judgment in Will challenges; expert evidence; elder financial abuse litigation; capacity proceedings; passing of account applications and the use of funding orders in dependency claims under the *Succession Law Reform Act*. The intent of this paper is to provide a high-level, quick synopsis of a selection of developments for general civil litigation lawyers. At the end of this paper we provide you with links to resources on our website for a more in-depth review of some of these topics.

1. SUMMARY JUDGMENT AND WILL CHALLENGES

A summary judgment motion is increasing becoming a useful and effective strategy to stop a frivolous Will challenge in its tracks. Recently, there has been an increased measure of success in the use of summary judgment motions in the context of Will challenge cases.

The very recent Ontario Court of Appeal case of ***Orfus Estate v. The Samuel and Bessie Orfus Family Foundation***[1] provides a good overview of the application of a summary judgment motion and the "full appreciation" test set out in the Court of Appeal case of ***Combined Air Mechanical Services Inc. v. Flesch***[2] in a the context of a Will challenge claim.

As a reminder, under the "full appreciation" test, the motion judge must ask: "*Can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial*?"[3] In *Orfus*, the motion judge granted the summary judgment motion before the *Combined Air* decision was released. On appeal to the Ontario Court of Appeal, the appellant submitted, among other things, that based on the "full appreciation" test set out in *Combined Air*, summary judgment was not appropriate.

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[1] 2013 ONCA 225 ("*Orfus*").
[2] 2011 ONCA 764 ("*Combined Air*").
[3] *Ibid*. at paras. 50-51.

Orfus was a Will challenge claim commenced by a daughter whose mother had removed her as a beneficiary under her Will. The daughter received only a nominal $1,000.00 from her mother's substantial estate. The daughter challenged the validity of two Wills and a codicil made by her mother and claimed that her mother lacked testamentary capacity; did not know and approve of the contents of the Wills and codicil; and, that her sister, who lived with her mother and was her caregiver for many years, unduly influenced her mother to sign the testamentary documents.

The motion judge granted the summary judgment motion commenced by the estate trustees to set aside the daughter's notice of objection and for a declaration that the Wills and codicil were valid. The motion was argued over three days with 20 witnesses giving evidence. The examinations of the witnesses produced over 1700 pages of evidence and approximately 5000 pages of exhibits.

The motion judge concluded that there was "no genuine issue requiring a trial" and that the mother had testamentary capacity, knew and approved her Wills and codicil, and that there was no undue influence.

On appeal, the Court confirmed that summary judgement is available in Will challenge cases.[4] While the motion judge decided this case under the new Rule 20 (which came into effect on January 1, 2010) which gives judges expanded powers on motions for summary judgment, (including weighing evidence, assessing credibility and drawing reasonable inferences) he decided it two months before *Combined Air* was released. The appellant submitted that the full appreciation of the evidence and issues in *Orfus* could only be achieved at trial. She relied on the following passage from *Combined Air*:

> *"In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial."* [5]

[4] *Orfus*, *supra* note 1 at para. 44, citing *Smith Estate v. Rotstein*, 2011 ONCA 491, discussed below.

[5] *Combined Air, supra* note 2 at para. 51.

The appellant argued that credibility was at the heart of the Will challenge dispute and that the motion judge was required to make highly contested findings of fact on a record "replete with conflicting evidence".[6]

Justice Laskin, on behalf of the Court, did not agree, and made the following observations:

- "*The size of the record standing alone, or even the number of witnesses standing alone is not sufficient reason to send a case to trial.*[7]
- *Orfus was not a case where many witnesses said one thing and many witnesses said something else. Of the 20 witnesses, only three proffered evidence for the appellant: the appellant herself and two doctors. One doctor's evidence was ruled inadmissible.*[8] *The other doctor did not meet with the mother to assess her testamentary capacity and simply criticized some aspects of a capacity assessment. And some of the appellant's evidence was inadmissible as it was not corroborated and the rest was inconsistent with the testimony of the other 17 witnesses.*[9]
- *Thus, Laskin J. concluded that the motion judge was not required to make contested findings of fact on conflicting evidence.*[10]
- *After reviewing the evidence provided, the Court also concluded that this was not a case where credibility was genuinely in issue.*[11]
- *Finally, Laskin J. concluded that an examination of the evidence relating to the question of whether the mother had testamentary capacity shows why it would not be in the interest of justice to order a trial. The potential evidence on capacity came from four doctors and two lawyers. Of the four doctors, one is dead, one did not see the mother, and one remembers nothing. The remaining doctor and the two lawyers were consistent in their opinion that the mother had testamentary capacity*."[12]

The Court dismissed this ground of appeal and held that the motion judge had a "full appreciation" of the evidence and the issues needed to decide this case by summary judgment.

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[6] *Orfus*, *supra* note 1 at para. 49.
[7] *Orfus*, *supra* note 1 at para. 51.
[8] Further discussed below in this paper under "Expert Evidence".
[9] *Orfus*, *supra* note 1 at para. 53.
[10] *Orfus*, *supra* note 1 at para.54.
[11] *Orfus*, *supra* note 1 at para.56.

This case will be helpful to Will challenge cases going forward, especially for its commentary on the evidence provided. Often a voluminous record will be a deterrent to a successful summary judgment motion, however, that was not the case in this matter. The decision also confirms that courts will generally prefer available medical evidence and the evidence of the drafting lawyer and witnesses to the execution of a will or codicil over that of self-interested offspring.

Therefore, if your case has compelling evidence from reliable professionals that supports a finding of capacity, the use of a summary judgment motion to dismiss a frivolous Will challenge you may prove to be a successful strategy.

The 2010 Will challenge case of ***Smith v. Rotstein***[13] is also an instructive decision. Justice D. Brown of the Ontario Superior Court of Justice commented on the role of the Notice of Objection and Orders Giving Directions in summary judgement motions. As observed by the Court, a summary judgment motion can be brought before or after an Order for Giving Directions has been obtained which sets out the issues to be tried and requires the parties to exchange pleadings etc.[14] In *Smith*, however, only a "boilerplate" Notice of Objection had been served, generally setting out claims of undue influence and testamentary incapacity. The Notice of Objection was never amended, or withdrawn. No Order Giving Directions had ever been obtained. The Court found that the Notice of Objection was sufficient on its own as a pleading and granted partial summary judgment as such. However, this decision was decided under the "Old" Rule 20, which restricted a motion judges' powers to assess the quality and cogency of the evidence on a summary judgment motion. Justice Brown stated that "*I strongly anticipate that in future summary judgment motions under New Rule 20 the failure of an objector to provide detailed reasons for his or her objection may well operate as a factor in a court's assessment of whether a genuine issue requiring a trial exits*."[15] The Will challenger appealed to the Ontario Court of Appeal[16] and the summary judgment finding was upheld and leave to appeal to the Supreme Court of Canada was subsequently denied.

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[12] *Orfus*, *supra* note 1 at para. 55.
[13] 2010 ONSC 2117 ("*Smith*").
[14] *Smith*, *supra* note 13 at para. 40.
[15] *Smith*, *supra* note 13 at para. 42
[16] 2011 ONCA 491.

In the 2013 Superior Court of Justice case of ***Lund v. Rossiter***,[17] also a Will challenge case, Justice Pollak reviewed jurisprudence to answer the question of whether a summary judgment motion was available in the context of an Application as opposed to an Action. The Court concluded that the "*jurisprudence standing for the proposition that it may be appropriate to consider summary judgment motions in estate matters features distinct facts: namely, the Court had already decided the issues in dispute and the procedure to be used to decide the issues raised in the Application*."[18] Justice Pollak opined that a summary judgment motion may not be available in all estate applications, but only those where the issues for trial and procedure have already been determined.

In *Lund*, while the *issues* in dispute were determined on the consent of the parties, there was no agreement by the parties, nor a decision by the Court, on the *procedure* to be followed. Also the issue that the respondents wanted to be raised on a summary judgment motion (a limitation period issue) was not an issue that had been identified in the application to be "tried".[19] Accordingly, Justice Pollak found that a summary judgment motion was not appropriate in this case. Her Honour also went on to find that even if a summary judgment motion was appropriate, the Court could not have had a "full appreciation" of the case at this early stage of the litigation as required by the Ontario Court of Appeal in *Combined Air*.[20]

Another recent summary judgment Will challenge case is that of ***Trotter v. Trotter***.[21] Audrie and Ty Trotter had five children and extensive property which included farmlands, rental property, residential property, a corporation and a holding company. When the father died in 1996, he had a mirror Will with his wife. The wife subsequently re-wrote her Will four times between 1999 and 2005 and made some *inter vivos* gifts to one of her children, John, including the farm land and residential property before her death in 2008. In her Last Will and Testament the mother left the majority of her assets, including the remaining property, to the same son, John, and $50,000.00 to two of her children. In her earliest Will, the mother had named all five of her children to share in the properties.

[17] *Lund v. Rossiter*, 2013 ONSC 1338 ("*Lund*").
[18] *Ibid*. at para. 18.
[19] *Ibid*.
[20] *Lund, supra* note 17 at para. 20.
[21] 2013 ONSC 1182 ("*Trotter*").

Three of the Trotter's children brought (among other things) a Will challenge claim alleging the mother did not have testamentary capacity to make her 2005 Will and that John had unduly influenced their mother. John moved for summary judgement to dismiss their claim. The parties presented affidavits and transcripts from cross-examination on those affidavits as evidence for the motion.

At the five day hearing, the responding parties (on the motion) agreed that their was no evidence of testamentary incapacity so Justice Eberhard granted partial summary judgement dismissing this part of the claim, leaving only the issue of undue influence by John.

The Court observed that the party resisting summary judgment is expected to put his or her "best foot forward", "present its best case or risk losing" or "lead trump or risk losing".[22] Also that the motion judge is entitled to assume that the parties have:

> *each advanced their best case and that the record contains all the evidence that the parties respectively will advance at trial. The responding party may not rest on the allegations or denials in the pleadings but must set out in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial. The essential purpose of the rule is to isolate and then terminate claims and defences that are factually unsupported*.[23]

Justice Eberhard agreed that undue influence could be discerned by circumstantial evidence, however, found that the responding party had only presented "*bald allegations*" of undue influence by their brother.[24]

When reviewing the evidence, the Court concluded that the mother was "*a feisty, informed, independent spirited woman who had valid reasons for doing what she did. When I make the observation she was nobody's fool I am troubled by the thought that some of her children are stepping forward to say otherwise. They do so on what I find to be bald allegations based far more on their opinion that John is a liar than meagre evidence that is too equivocal to demonstrate such an accusation*."[25] The Court concluded that the Will challenge claim should be dismissed on the summary judgement motion: "*Without having to place any reliance on John's evidence which the Responding Party disputes as incredible, I find that the record before*

[22] *Trotter*, supra note 21 at para. 26, citing *Pallon v. American Home Assurance Co.* (1991) 3 O.R. (3d) 59 at 61 (Ont.CA), *Pizza Pizza Ltd v. Gillespie* [1990] O.J. No. 2011, and *1061590 Ontario Ltd v. Ontario Jockey Club* [1995] O.J. No. 132.
[23] *Trotter*, *supra* note 21 at para. 26
[24] *Trotter*, *supra* note 21 at paras. 119& 149.
[25] *Trotter*, *supra* note 21 at para. 149.

me gives a full appreciation of what [the mother] wanted for herself and how she went about making it happen. There is no genuine issue requiring a trial."[26]

Some lessons learned from these cases include: that a summary judgment motion may not be available in all estate applications; when bringing a summary judgment motion on a Will challenge case you must always put your best foot forward; if alleging undue influence you will need to have a full evidentiary record; and that a summary judgment motion is still a good tool to dispose of a frivolous Will challenge litigation.

2. EXPERT EVIDENCE IN ESTATES, TRUSTS, AND CAPACITY LITIGATION

As litigators it is important to always evaluate the role of expert evidence in each case. In estate, trust and capacity litigation, expert evidence will play a key role in determining capacity, testamentary capacity, as well as capacity to make personal care and financial decisions. This expert evidence will come from neurologists, capacity assessors, family and emergency room doctors, handwriting experts etc. When capacity is at issue, a high standard for expert evidence should be met. This section of the paper will discuss the relevant factors and standardthat your expert evidence must meet. A sampling of recent cases will be examined:

Briefly: The Mohan Test and Goudge Report

According to the test set out by the Supreme Court of Canada in ***R. v. Mohan***,[27] expert evidence will only be admitted where it is:

(1) relevant;
(2) necessary in assisting the trier of fact;
(3) not otherwise subject to an exclusionary rule; and
(4) given by a properly qualified expert.

However, even where these requirements are met, the evidence may be rejected if its prejudicial effect on the conduct of the trial outweighs its probative value.[28] The "Mohan Test" remains the leading determinative test in the use of expert evidence. However, subsequent jurisprudence has confirmed that before the proposed evidence can be found necessary to the

[26] *Trotter*, *supra* note 21 at para. 180.
[27] [1994] 2 S.C.R. 9 ("*Mohan*").
[28] *R.v.D.D*. [2000] 25 S.C.R. 275 at para. 11

trier of fact it must be reliable. The court must be satisfied that the expert evidence meets certain standards of scientific reliability.[29]

In 2008 *The Goudge Inquiry into Pediatric Forensic Pathology in Ontario* released a report (the "Goudge Report")[30] which focused on recommended changes to pediatric forensic pathology and its use in our justice system in Ontario. It also made helpful recommendations on the use of experts in all forms of litigation. Recommendations from that Report included:

- "*experts' reports be not only accurate but also clear, plain and unambiguous;*
- *experts must comply with the standards of their professional colleges;*
- *experts should adopt an evidence-based approach; and*
- *experts should identify areas of controversy that may be relevant to their opinions and place their opinions in that context."* [31]

In capacity and estate litigation, including Will challenge cases, expert reports should be questioned if they fail to meet any of these recommendations and criteria. There is a duty on counsel to test expert opinion through vigorous cross-examination, including questions that:

(a) test the reliability of the witness;
(b) the scientific theory or technique on which the expert draws his or her opinion;
(c) whether there is serious dispute or uncertainty about the science;
(d) whether the expert has considered alternative expert explanations;
(e) whether the language used by the expert is appropriate; and
(f) whether the expert can express the opinion in a way that the trier of fact will be able to reach an independent opinion as to the reliability of the expert's opinion.[32]

Recent Case Law

In the case of ***Orfus Estate***,[33] discussed above, the Ontario Court of Appeal looked at the use of expert evidence in a Will challenge where the testator's capacity was questioned. The

[29] *See R. v. K.(A.) (1999) 137 C.C.C. (3d) 225 (Ont. C.A.); R*. v. Trochym, 2007 SCC 6; and *Re Truscott* (2007) 225 C.C.C. (3d) 3d 321 (Ont. C.A.).
[30] The Honourable Stephen T. Goudge, Commissioner, "Inquiry into Pediatric Forensic Pathology in Ontario: Report" (September 2008), online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/index.html>. ("Goudge Report")
[31] Goudge Report, *supra* note 30 at pp.72-74
[32] Goudge Report, *supra* note 30 at p.495.
[33] *Orfus*, *supra* note 1.

challenger of the Will and respondent on the summary judgment motion sought to tender two voicemail messages by a doctor and capacity assessor as opinion evidence of her mother's lack of testamentary capacity. The doctor/capacity assessor had met with the testator prior to her executing a Will in 2004. After the meeting the doctor telephoned the testator's lawyer twice, leaving two voicemail messages. In the first voicemail message the doctor said that he "had the impression" that the testator was not capable of making a Will but "may be capable of making a codicil".[34] In a second voicemail message, which was left two days later, the doctor said that "except for a crude knowledge of her physical assets, she knew very little about the rest" but that she "did know her relationships".[35] The doctor offered to meet again with the testator but another meeting never took place. The doctor kept no file of his meeting with the testator and no notes of that meeting. At the summary judgment motion the doctor testified that he had no memory of the meeting at all or what led to his impression of incapacity. The motion judge ruled that both voicemail messages were inadmissible as they were not reliable either as hearsay evidence or as expert opinion evidence.

The challenger of the Will appealed this finding of inadmissibility. The Court of Appeal agreed with the motion judge. The challenger principally sought to rely on the doctor's voicemail messages as expert evidence showing her mother's lack of testamentary capacity. However, as opinion evidence the two messages lacked reliability. Under the *Mohan Test* for the admission of expert opinion evidence the voicemail messages had to meet the requisite reliability criterion. As found by the motion judge (and agreed to by the Court of Appeal) the voicemail messages lacked reliability as there was a "total absence of any evidence, or even recall, of what [the doctor] did to form that impression" that the testator was incapable of making a will.[36] Also, that in the "absence of a reliable scientific foundation for the proffered opinion evidence, the opinion itself necessarily lacks reliability".[37] While it may seem that the challenger was reaching a bit in attempting to get the voicemails admitted as evidence, this case provides a helpful reminder and overview of the test to meet when attempting to proffer expert evidence.

See also the case of ***Re Kaptyn Estate***,[38] where Justice Lederer rejected expert opinion proffered by a doctor and capacity assessor on the testamentary capacity of the deceased in a

[34] *Orfus*, *supra* note 1 at para. 64.
[35] *Orfus*, *supra* note 1 at para. 65.
[36] *Orfus*, *supra* note 1 at para. 69
[37] *Orfus*, *supra* note 1 at para. 69.
[38] 2008 CanLii 53123 (ONSC) ("*Kaptyn*").

Will challenge case. The doctor opined that due to the complexity of the estate, and the Wills and codicils drafted, there could not be certainty that testamentary capacity was present. In other words, the level of cognition required to be "capable" bore a direct relationship to the complexity of the testator's situation. The more complex, the higher level of cognition he or she required, and the Wills and codicil in this case were very complex.[39] The Court found that while the doctor may be an expert in geriatric psychiatry and testamentary capacity, he did not have the training or experience to come to conclusions which define a Will as "complex", independent of any consideration other than his own reading of the Will.[40] The Court found that the doctor relied on assumptions and understandings that were not justified by the evidence to come to his expert conclusions.[41]

For further information on the use of expert evidence in estates and trust litigation, reference "*But We Went to Law School Because We Can't Do Math or Science: Expert Evidence in Trust, Estate and Capacity Litigation*" by Clare Burns and Erin Pleet, presented at the LSUC's 13th Annual Estates and Trust Summit, 2010; and "*Expert Evidence in Trust and Estate Litigation*" by Eric Hoffstein and Ira Stuchberry presented at the LSUC 2013 Six-Minute Estates Lawyer.

3. ELDER FINANCIAL ABUSE LITIGATION

Elder law, and specifically the area of elder abuse, is an emerging area of litigation that all lawyers should be cognizant of, regardless of the type of law that they practice. Often lawyers will come into contact with older adults, either as clients or through their files and it is important to keep an eye out for signs of elder abuse.

According to the Canadian Department of Justice, financial abuse is the most commonly reported type of abuse against older adults.[42] However, the Department also stated that it is difficult to estimate the prevalence and incidence of elder abuse in Canada due to factors such as under-reporting.[43] Financial abuse can include anything from procuring and using joint accounts, to forgery or abuse involving a Power of Attorney document, to sharing an older

[39] *Kaptyn, supra* note 38 at para. 106
[40] *Kaptyn, supra* note 38 at para. 102.
[41] *Kaptyn, supra* note 38 at para. 118.
[42] Department of Justice, *Backgrounder Elder Abuse Legislation*, online: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32716.html
[43] *Ibid*.

adult's home without paying a share of the expenses, to misusing or stealing an older adult's assets.[44] Often the financial abuse is at the hands of a family member who the older adult is dependent upon and who has influence or control over the victim.[45] Financial abuse can also be inflicted by a caregiver, service provider, or other person in a position of power or trust.[46]

The courts are taking elder financial abuse cases very seriously and are giving them the attention that they deserve. This section will review some recent civil and criminal elder abuse financial cases.

Civil

Many of the civil cases reflect situations of financial abuse through the misuse and abuse of power of attorney for property documents.

In ***Nguyen-Crawford v. Nguyen***,[47] a daughter accompanied her mother to her mother's lawyer's office where her mother executed powers of attorney appointing her daughter as her attorney. Before executing the documents, the daughter translated them to her mother, whose primary language was Vietnamese. The siblings later sought a declaration that the powers of attorney were invalid on the basis that the daughter, whom the mother lived with at the time, and on whom she was substantially dependent, exercised undue influence over her and was the only person who translated both the documents and the lawyer's advice concerning them.

The Court found that the daughter did not meet the "high evidentiary burden" necessary to uphold the documents and demonstrate that her mother knew what she was signing; or, that the powers of attorney were clear a expression of her wishes at the time. Consequently, the powers of attorney were held to be of no force and effect. In the Court's view, the presumption of capacity to execute the documents was rebutted by the evidence which showed that the attorney daughter exercised undue influence over her mother at the time. Interestingly, the evidence of undue influence was that:

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[44] Government of Canada, Seniors Canada, *Facts on Financial Abuse of Seniors*, online: http://www.seniors.gc.ca/c.4nt.2nt@.jsp?lang=eng&cid=158
[45] Ontario Provincial Police, *Tip Sheet on Abuse of Older Adults*, online: http://www.opp.ca/ecms/files/250363255.6.pdf
[46] Government of Canada, Seniors Canada, *Facts on the Abuse of Seniors*, online http://www.seniors.gc.ca/c.4nt.2nt@.jsp?lang=eng&cid=155

(a) the mother was dependent upon her daughter;

(b) the daughter provided the only translation of the drafting solicitor's legal advice and the power of attorney documents themselves (which, in turn, conferred on the daughter extensive powers to act on her mother's behalf); and, somewhat perplexingly; and

(c) the daughter and her husband used the mother's funds as if they were their own.

This latter point (c) is somewhat peculiar given that the misappropriation of the mother's funds was not contemporaneous with the execution of the power of attorney documents, but took place two years later.

Importantly, in *obiter*, there was some discussion of the fact that since the drafting solicitor failed to obtain an independent translator for the grantor/mother before the documents were executed, the solicitor may have failed to discharge her duty of care, and could have been found negligent. The attorney daughter had attempted to argue that such a finding was a condition precedent, so to speak, to finding the powers of attorney documents invalid. The Court did not agree with the daughter's submission, but did suggest that the drafting solicitor's notes, records and testimony would have been useful had it provided positive evidence that the documents and advice were independently translated.

On the issue of solicitor's negligence, the Court did refer to the similar case of *Barbulov v. Cirone,*[48] and noted that "[t]here was no comment as to whether the solicitor had breached his duty to the donor/father by failing to have the power of attorney translated to him by an independent translator." Unfortunately, the Court did not delve further into the issue on the basis that there was no evidence to support any finding on that issue, since it lacked as evidence, the drafting solicitor's notes, records and testimony.

The case of *Nguyen-Crawford v. Nguyen* sends a clear message to drafting solicitors who attempt to draft documents for grantors with little command of the languages spoken by the drafting solicitor. Care should be taken to ensure that qualified, independent translators are obtained— and not from those who stand to benefit from the document itself. Would-be

[47] 2010 CarswellOnt 9492 (S.C.J.).
[48] 2009 CarswellOnt 1877 (S.C.J.).

attorneys ought to be equally vigilant, if they do not wish to have the document they later act pursuant to, challenged on the basis of the grantor's lack of capacity to grant the power.

Other notable recent cases of elder financial abuse are ***Zimmerman v. McMichael***[49] and ***Juzumas v. Baron***.[50]

In *Zimmerman*, a trusted friend and former crown attorney befriended an elderly couple and on the very night that the husband passed away he took the wife to sign power of attorney documents appointing himself as her sole attorney. When the attorney was ordered to pass his accounts it became clear that he had treated himself to a large portion of the widow's assets, including spending money on exotic trips, clothing and limousines. In the end, the attorney never provided proper accounts as ordered, much of the widow's money went missing permanently, and the attorney was ordered to pay over $1 million to the estate of the widow which included repayment of funds misappropriated and costs.

In *Juzumas* a younger woman befriended an elderly widower and slowly infiltrated herself into his life as his caretaker, eventually convincing him to marry him. She promised that she would look after him and preyed on his vulnerability by assuring him that she would not put him in a nursing home. The predator wife manipulated him financially and eventually had the elderly widower's home transferred into her son's name by convincing her husband to sign papers which he likely did not read or understand. With the help of a concerned neighbour the elderly widower was able to successfully sue his financial abuser, obtain a divorce, and he was granted substantial indemnity costs.

Criminal

While there is not one specific offence of "elder abuse" or "elder financial abuse" created by the *Criminal Code*, there are various sections that an abuser could be charged under for elder financial abuse, including the following provisions:

- Theft by a Person Holding a Power of Attorney (s. 331);[51]
- Theft (s. 322);[52]

[49] *Zimmerman v. McMichael Estate*, 2010 ONSC 2947 and 2010 ONSC 3855 (costs).
[50] *Juzumas v. Baron*, 2012 ONSC 7220.
[51] See *R. v. Kaziuk*, 2011 ONCJ 851.
[52] See *R. v. Webb*, 2011 SKPC 181.

- Criminal Breach of Trust (Conversion by Trustee) (s. 336);
- Forgery (s. 366);
- Extortion (s.346);
- Fraud (ss. 386-388); and
- Neglect: Failure to Provide the Necessaries of Life (s. 215); and
- Criminal Negligence (s. 219).

An interesting and notable criminal case which provides a good overview of the elements of the charge under s.215 (Neglect: Failure to Provide the Necessaries of Life) is the case of ***R.v. Kos-Rabcewics-Zubkowski***.[53]

Monica Kos was charged with assault and failing to provide the necessaries of life for her elderly mother Halina Kos. The questions to be asked to determine the elements of a charge under s.215 are as follows:

i) Is there proof beyond a reasonable doubt that Halina Kos was unable, by reason of age, illness, or insanity to withdraw herself from the charge of Monica Kos?

ii) Is there proof beyond a reasonable doubt, that the life of Halina Kos was endangered or that her health was likely to be injured permanently, by the failure of Monica Kos to provide the necessaries of life?

The leading case on this offence is the case of *R. v. Naglik*, [1993] 3 S.C.R. 122 in which a parent was charged with not providing the necessaries of life to a child (the more common fact scenario of when this charge is laid).

In *Naglik* the Supreme Court of Canada held that s.215 "punishes a *marked departure* from the conduct of a reasonably prudent parent in circumstances where it was *objectively foreseeable* that the failure to provide the necessaries of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health of a child." [emphasis added][54]

Since 1996, when Halina had a stroke, Halina appointed her daughter as an attorney under a POA for Property and a POA for Personal Care. The evidence showed that the daughter had

[53] 2010 ONCJ 780 ("*Kos*").

[54] *R. v. Naglik*, [1993] 3 S.C.R. 122 (CanLII) at p.12.

actually been supporting herself financially with Halina's investments, house and other real estate which she had sold, unknown to her mother. The evidence also revealed that each day the daughter forced the mother out of her own house to sit on the front porch all day long in extreme temperatures, both winter and summer. Neighbours observed that the elderly woman would be sitting in a white plastic chair and would not be wearing a hat, scarf or gloves in the winter.

The daughter admitted that she had care of her mother at the material time. However, the daughter denied that she had a duty to provide the necessaries of life to her mother as she was not being detained and was free to go back to a nursing home that she had once been living in. Based on the medical evidence presented at the trial the Court concluded that Halina Kos did not have the capacity, mentally or physically to extricate herself from the care of her daughter.

The Court also held: “that based on "the evidence of neglect, i.e., the long periods of time that the mother was outside in the heat and he cold by the neighbours, the filthy house, the rotting food, the urine soaked mattress that the danger of freezing, frostbite or other injury was foreseeable and that Monica Kos is guilty…of failing to provide the necessaries of life to Halina Kos and thereby endangered her life, or at a minimum, putting her in conditions that were likely to cause or endanger her health permanently."[55]

Unfortunately, there is no known reported sentencing decision.

Protection of Older Adults Act

Early this year in January, 2013 the *Protection of Older Adults Act* S.C. 2012, c. 29 was enacted. This *Act* amends the Criminal Code so that evidence that an offence had a significant impact on the victims due to their age and other personal circumstances, such as health or financial situation, will now always be considered as an aggravating factor for sentencing purposes. The Department of Justice stated that "*the amendments will help ensure the consistent application of the established sentencing practice, that violence against individuals who are vulnerable due to their age and other personal circumstances should be treated seriously. The Criminal Code already contains similar measures that denounce the abuse of*

[55] *R. v. Kos-Rabcewics-Zubkowski* 2010 ONCJ 780 at paras.37 and 55.

vulnerable persons. For instance, it states that the abuse of a person under the age of 18 is an aggravating factor at sentencing."[56]

It will be interesting to see how this new legislation will affect the sentences of perpetrators of elder financial abuse going forward.

4. CAPACITY PROCEEDINGS- Consent and Withdrawal of Medical Treatment

Capacity to consent to treatment is set out in the *Health Care Consent Act, 1996,* S.O. c. 2 Sched. A ("*HCCA*"). That in part legislation also sets out a procedure for indentifying substitute decision makers ("SDM's") for incapable persons, how SDM's should make decisions; and the available options should SDMs not be making proper decisions. The *HCCA* also provides rules with respect to "consenting to treatment, facilitating treatment for incapable persons, enhancing the autonomy of persons for whom treatment is proposed and promoting communication between health practitioners and their patients".[57]

A recent and notable case in this area is that of ***Friedberg et al v. Korn***[58] which dealt with an uncertainty in the interpretation of a "prior capable wish" made in a Power of Attorney of Personal Care ("POAPC") and the interplay between a treating physician's recommendation to withdraw treatment based on the prior capable wish and the discretion and opinion of the attorneys to continue treatment based on the incapable patient's orthodox religious views.

In this case, Mrs. Friedberg, was a devout orthodox Jewish 86 year old widow who suffered from dementia, hypertension, and hyperthyroidism. Mrs. Friedberg had been living in the community with a full time caregiver, until January of 2012 when she choked on some food while in Florida and suffered cardiac arrest. She was resuscitated but had sustained an anoxic brain injury leaving her in a persistent vegetative state. She was transferred to Baycrest Hospital in Toronto with a feeding tube and tracheotomy. While Mrs. Friedberg was not in extreme pain, she did not show any awareness and she required suctioning of her airway, without which she would die. After their mother's hospitalization, Mrs. Friedberg's children were notified of a Power of Attorney for Personal Care ("POAPC") executed by their mother in 2003.

[56] Department of Justice, *Backgrounder: Protecting Canada's Seniors Act*, online: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32826.html
[57] *Friedberg et al. v. Korn*, 2013 ONSC 960 ("*Friedberg*").

The POAPC contained an "end of life clause" which provided that if there "is no reasonable expectation of my recovery from physical or mental disability, I be allowed to die and not be kept alive by artificial or heroic measures."

The POAPC also included a decision-making clause for her attorneys which stated:

"I authorize and direct my attorneys. . .to make on my behalf all decisions with respect to my personal care if I am mentally incapable of makings such decisions . . .namely, . . .cessation or continuation of measures whereby my life may be artificially prolonged."

The POAPC was discussed between the attorneys and the treating medical team at Baycrest. The attorneys agreed to a "do not resuscitate" order but did not agree on the withdrawal of the treatment presently given to Mrs. Friedberg. The attorneys, who were also Mrs. Friedberg's children, believed that Mrs. Friedberg's overriding wish was to grant discretion in personal care decision making to them and that the "end of life" clause was contrary to Mrs. Friedberg's religious beliefs.

Due to the uncertainty regarding the scope and effect of the POAPC, Mrs. Friedberg's doctor applied to the Consent and Capacity Board (the "CCB") for directions pursuant to section 35 of the *HCCA*. At the hearing, evidence was presented by the following:

(i) the lawyer who drafted the POAPC for Mrs. Friedberg regarding her advice and instructions she provided to Mrs. Friedberg on the "end of life" clause;

(ii) Mrs. Friedberg's treating physician;

(iii) her family and friends: as well as her Rabbi, regarding her strict orthodox beliefs including the belief that all medical interventions available to prolong life must be performed unless the person is in extreme pain.

The CCB found that Mrs. Friedberg's intentions and wishes, as contained in the POAPC were clear and unambiguous, and expressed a prior capable wish. The CCB also found on the evidence presented that Mrs. Friedberg knew and approved of the contents of the POAPC. The CCB placed significant weight on the testimony of the drafting solicitor regarding her instructions and advice to Mrs. Friedberg.

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[58] *Friedberg et al. v. Korn,* 2013 ONSC 960.

The attorneys successfully appealed the CCB's decision to the Ontario Superior Court of Justice. In her analysis, Justice Carole Brown reviewed the case of *Barbulov v. Cirone*,[59] which sets out the questions that the CCB must answer when faced with a POAPC as follows:

"*The inquiry must always remain focused on the task mandated by the statute - does this document express the capable wishes of the person with respect to treatment in particular circumstances? To conclude that the document does, the CCB must be satisfied on the evidence that the grantor understood what he was doing through the document - i.e. he knew and approved of its contents and effects. If he or she did not, then I do not see how one could say that the power of attorney for personal care expressed the wishes of the person with respect to treatment, as required by section 5 of the HCCA*".

Justice Brown concluded that an inquiry had to be made into whether there was any "evidence of circumstances on which to conclude that Mrs. Friedberg did not know what she was doing through the document, i.e., she did not know or approve of the contents of the POAPC". Her Honour went on to opine that there was "substantial evidence" which caused her to doubt that Mrs. Friedberg understood what she was doing through her POAPC or that she knew and approved of the POAPC. This evidence included the drafting lawyer's evidence pertaining to her advice and explanation of the "end of life" clause, Mrs. Friedberg's religious values, the internal inconsistencies in the POAPC, and Mrs. Friedberg's language difficulties.[60] Justice Brown concluded that the CCB's finding was an error in law and fact and unreasonable in result. Her Honour ordered that the CCB's decision be quashed and that in its place the Court found that Mrs. Friedberg did not express a prior capable wish in the POAPC and therefore there was no prior capable wish applicable to her circumstance.

An educating aspect of this case is the commentary by the Court on the drafting solicitor's explanation and instructions on the "end of life" clause and the POAPC in general. The Court found that from a review of the drafting solicitor's notes the main purpose of her meeting with Mrs. Friedberg was to draft or change her will and the POAPC was ancillary. There was no evidence that she requested a POAPC specifically. Also, the "end of life" clause was the drafting solicitor's firm's boilerplate clause that was presented to every client without instructions as it was presumed that the majority of her client's wanted this provision.[61] At the hearing, the drafting solicitor had no personal recollection of her meeting with or instructions from Mrs. Friedberg and relied on her "general practice". Her file notes also made no reference to the "end

[59] (2009) 176 A.C.W.S. (3d) 1157 (Ont.S.C.J.) ("*Barbulov*").
[60] *Friedberg*, *supra* note 57 at para. 73.

of life" clause. The Court found that there was little or no evidence to suggest that Mrs. Friedberg understood the ramifications of the POAPC and end of life clause, and that the Board had erred in placing significant weight on the drafting solicitor's "general practice" evidence.[62] These comments appear to perhaps widen the scope of a drafting solicitor's duty on providing instructions on, and drafting POAPCs.

This case is also a helpful reminder as to the evidence and inquiries that need to be made in determining the validity of a "prior capable wish" of an incapable person.

5. PASSING OF ACCOUNTS APPLICATIONS - Rule Changes and Costs

As a reminder, a "passing of accounts" is when an estate trustee (or Trustee, Attorney for Property, or Guardian of the Property) presents the estate accounts to the beneficiaries and to the Court for approval. The Court will examine the accounts and either "pass" or approve the accounts, or not pass the accounts if the Court is not satisfied with the accounts or the administration of the estate. It is not legally mandatory for an estate trustee to pass his or her accounts, although some may choose to do so, in order to have the Court's approval, or they may be compelled to pass their accounts by a beneficiary. However, a court always has discretion to grant or refuse an order to pass accounts. Estate trustees do however have a duty to maintain the estate accounts as fiduciaries. This section will review recent rule changes and a couple of recent cases in the passing of accounts context.

Rule Changes

Firstly, important changes to the *Rules of Civil Procedure* took effect on July 1, 2012. These amendments can be found in Ontario Regulation 55/12 (O. Reg. 55/12). The jurisdiction and procedure for passing of account applications can be found in Rules 74.16 to 74.18 and Forms 74.44 to 74.51 of the *Rules of Civil Procedure*.

With respect to timing, the amendments now require that the Notice of Application to pass accounts must be served on an Ontario respondent at least 60 days before a scheduled hearing, which is up from the previous 45 days notice that was required.[63] If the respondent

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[61] *Friedberg*, *supra* note 57 at para. 82.
[62] *Friedberg*, *supra* note 57 at para. 89.
[63] *Rules of Civil Procedure,* R.R.O. 1990 Reg. 194 at Rule 74.18(4).

resides outside of Ontario, the Notice of Application must be served at least 75 days before a scheduled hearing, which was increased from the previous 60 days.[64] Also, a Notice of Objection must be served at least 30 days before the hearing which is up from the previous 20 days.[65] A response from the Office of the Children's Lawyer or the Public Guardian and Trustee must be served at least 30 days before the hearing, which is also up from the previous 20 day notice period.[66]

The amendments also codify the steps required to be undertaken when making a request for increased costs, and the time frame for making and opposing such a request. The precise materials to be filed with the court are set out at Rule 74.18(11),[67] and include a Request for Increased Costs and a Costs Outline to be served at least 20 days before a hearing, a supplementary record containing the Request and Costs Outline, as well as an affidavit setting out the responses received from each party (i.e. consent, objection, no response) and finally, the factors that contributed to the increased costs. The supplementary record must be served at least 10 days before the hearing.

The tariff for costs allowable on an uncontested passing has also been amended. The costs range from $2,500 for an estate having a value of less than $300,000, to $7,500 for an estate having a value of $3,000,000 or more (up from a range of $800 to $5,000).

It is also now permissible for the Court to grant judgment on a request for increased costs without the need for a hearing based on the materials required to be filed pursuant to the changes to Rule 74.18(11). The old rules required a hearing every time there was a request for increased costs.

Importantly, not only were there changes to the Rules but there were also significant changes to the corresponding forms. It is important to review the forms to ensure they are the most up to date and accurate forms.

For a review of the best practices on Orders Giving Directions/Motions for Directions in passing of account matters, access the paper entitled: “The Why, When and How of the Motion for Directions and Order Giving Directions” on our website at:

[64] *Ibid* at Rule 74.18(5).
[65] *Rules of Civil Procedure, supra* note 63 at Rule 74.18(7).
[66] *Ibid* at Rule 74.18(8).
[67] *Ibid* at Rule 74.18(11).

http://whaleyestatelitigation.com/resources/WEL_Motion_for_Directions_Order_Giving_Directions.pdf; and for a comprehensive paper on the "Passing of Fiduciary Accounts" access the link at:
http://whaleyestatelitigation.com/resources/WEL_2013_Fiduciary_Accoints_and_Court_Passings_w_Appendix.pdf

Costs in Passing of Account Applications

Costs play an important role in passing of account applications. At the end of the day, who is going to pay for a contested passing application? The estate? The estate trustee? Or the objecting beneficiaries? In estates litigation generally, courts are moving away from the "traditional" approach where costs are paid out of the estate, to a more modern approach which closely resembles the "loser pays" or costs follow the event premise, akin to rule, in civil litigation proceedings .

Two recent cases, discussed below, reveal scenarios where an objecting beneficiary, and an estate trustee will be personally liable for costs on a passing of account application.

In ***Scott Estate***[68], the estate trustee, a trust company, sought approval of its accounts on a passing of accounts application. One of the children of the deceased filed an objection for reasons which included a dispute about compensation, delay in distribution of cash legacies, the imprudent sale of land as well as other issues.

In the decision by the Honourable Justice J. James, the Court opined that the objector, though not agreeing with the discretion exercised by the estate trustee, had to yield to the fact that it was the testator's decision to grant power to the estate trustee which included broad discretionary powers. The Court ordered that the accounts be passed including the estate trustee's compensation claim which was charged in accordance with the fee agreement signed by the testator. The estate trustee sought an Order requiring the objector to pay legal costs due to the costs having been substantially increased by the numerous objections advanced by the objector. The Court agreed in part and ordered the objector to pay personally $2,000.00 plus HST in costs with the balance being ordered to be paid from the Estate, which represented about half of the objector's estimated costs. The Court opined that it is a valid consideration to hold that there are financial consequences to unnecessary and unsuccessful litigation.

[68] 2012 ONSC 2516 ("*Scott Estate*").

In ***Baldwin (Re)***[69] a settlement was reached after several days of hearing an application whereby the estate trustee admitted to the misappropriation of funds while acting as a fiduciary. The objectors sought costs on a substantial indemnity basis of approximately $87,000.00.

In analyzing the costs, the Honourable Justice Hourigan relied on Rule 57 of the *Rules of Civil Procedure*, the case of *Boucher v. Public Accountants Council for Ontario,*[70] and the principle that the court is bound by what is fair and reasonable given the expectations of the parties. Hourigan, J., also reviewed cases where an award of costs on a higher scale was warranted.[71]

Hourigan, J., had "*no hesitation in concluding that this case fell within those rare exceptions where costs on a higher scale are warranted*"[72] and ordered the estate trustee personally to pay the substantial indemnity costs of the objectors. Hourigan, J., based this costs ruling on the fact that the estate trustee engaged in a massive misappropriation, and while at first admitted to the misappropriation, thereafter denied any malfeasance under oath, failed to voluntarily produce an account, forced the other side to prove every aspect of the case and she failed, despite court order, to make proper production.

6. FUNDING ORDERS - In Dependancy Claims under the *SLRA*

A common claim in estate litigation is a claim for dependant's support under the *Succession Law Reform Act* R.S.O. 1990, c.s. 26 ("*SLRA*").

In brief, a dependant support claim is a claim made against the estate of a deceased person by a dependant who meets the definition of dependant and the test under the *SLRA*.[73] Support includes financial, physical and moral support as set out in the case law concerning dependant support claims. The deceased must have been providing support immediately before death, or must have been under a legal obligation to provide support either through statute, court order, or at common law. Often in these cases however, the dependant will not have the means to

[69] 2012 ONSC 7235 ("*Baldwin*").
[70] 2004 CanLII 14579 (Ont.C.A).
[71] See *Hunt v. TD Securities*, 2003 CanLII 3649 (ON.C.A.) and *McBride Metal Fabricating Corp. v. H&W Sales Co*., 2002 CanLII 41899 (Ont.C.A.).
[72] *Baldwin, supra* note 69 at para. 21.
[73] *SLRA*, sections 57 and 58.

fund expensive litigation against the estate. Accordingly, an interesting development in this area of litigation is the use of funding orders, in which the court will order that a certain amount be paid out of the estate (subject to repayment at the end of the litigation) to fund the interim legal fees and disbursements of the alleged dependant.

In January of this year, the Ontario Superior Court of Justice made such a funding order in the case of ***Kalman v. Pick et al***.[74] In this case, a 75 year old brought a dependant support claim against the estate of her deceased common-law spouse of 21 years. After spending over a year in litigation proceedings, the applicant brought a motion for a funding order. In reviewing the case law provided, Justice Carole Brown concluded that the Court does have a "general jurisdiction to award interim costs in a proceeding [sic], which general jurisdiction or power is inherent in the nature of the Court's equitable jurisdiction as to costs".[75] Her Honour went on to state that she was "satisfied that such jurisdiction is not limited exclusively to matrimonial cases, but has been recognized and applied in cases and involving commercial, constitutional, trusts and estates matters: *British Columbia (Minister of Forests) v. Okanagan Indian Band* [2003] S.C.R. 371; *Organ v. Barnett*, 1992 CarswellOnt 710."[76]

The test for such a funding order, includes three criteria that must be met by the moving party, namely:

(1) "impecuniosity or financial difficulties such that the party would otherwise not be able to proceed with the case;

(2) a *prima facie* case of sufficient merit to warrant pursuit; and

(3) special circumstances to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate."[77]

The deceased had supported the applicant by paying all daily and household expenses including condo maintenance fees, property taxes, utilities, insurance, weekly household money for the applicant, entertainment and travel abroad. Since her spouse's death the applicant was responsible for all of these expenses including the condo maintenance fees and utilities related

[74] 2013 ONSC 304 ("*Kalman*").
[75] *Kalman*, supra note 74 at para. 5.
[76] *Kalman*, supra note 74 at para. 5, see also estates and trust cases of *Kraus v. Valentini Estate*, 1993 CarswellOnt 2128 (Gen. Div.), *Zhao v. Ismail Estate (Trustee of)*, 2006 CarwsellOnt 8411, and *Perkovic v. Marion Estate*, 2008 CarswellOnt 5931 (S.C.J.).
[77] *Kalman*, supra note 74 at para. 5, see also *B.C. v. Okanagan* [2003] 3 S.C.R. 371.

to the condominium which they owned as tenants-in-common. She quickly depleted all of her savings and had to take out a line of credit. The respondents submitted that as the estate was paying an interim monthly support payment to the applicant this was sufficient and no further funding order was required. However, the applicant argued that the interim support was still inadequate given her age, inability to work, her ongoing living expenses as well as her mounting legal costs.

Justice Brown found in favour of the applicant and concluded that "given [the applicant's] current financial circumstances and the limited resources and her monthly obligations, were an interim order not made, the applicant's ability to prosecute her case would be prejudiced, or would depend on the generosity of her counsel."[78] Her Honour also concluded that the applicant met the remaining two criteria of having a *prima facie* case and special circumstances. Justice Brown made an order that expenses for legal costs on a partial indemnity basis in the amount of $50,000.00 and disbursements to a maximum of $10,000.00 be paid out of the Estate, to be accounted for and subject to the right of the trial judge to order that the applicant repay these funds.[79]

This case will be a helpful precedent for future motions for funding orders in similar dependancy claims and will hopefully provide access to justice to those dependants who may not have the funds to fight for their legal rights and the proper and adequate support that they deserve.

CONCLUSION

While the above is a simple overview of a selection of topics and updates that general civil litigators should know about in the estate *litigation* context, it should also be noted that estate *planning* is becoming more complex and difficult. There is a far reaching interplay of legislation, tax implications, pension provisions/plans, and many areas of the law have increased uncertainty.[80] There are also emerging areas of estate planning such as planning for your digital

[78] *Kalman*, supra note 74 at para. 11
[79] *Kalman*, supra note 74 at para. 12.
[80] For example see the case of *Carrigan v. Carrigan Estate*, 2012 ONCA 736, where the Ontario Court of Appeal's interpretation of the pre-retirement death benefit under s.48 of the *Pensions Benefits Act* contradicts standard practice in the pensions industry. The Ontario Government, in its budget released May 2, 2013 agreed to review the decision: See http://www.fin.gov.on.ca/en/budget/ontariobudgets/2013/papers_all.html

assets.[81] Each new area and potential uncertainty raised will lead to new and emerging areas of estate litigation which could affect all civil litigators. As estate planning and estate litigation become more complex, general litigators should not hesitate to contact practitioners who focus on and are specialists in the area of estate, trust and capacity litigation.

Whaley Estate Litigation Blog Site: http://whaleyestatelitigation.com/blog/

Whaley Estate Litigation Publications: http://whaleyestatelitigation.com/blog/published-papers-and-books/

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 *June 2013*

[81] See paper entitled: *"Digital Life After Death"* which can be accessed at: http://whaleyestatelitigation.com/resources/WEL_2013_%20Digital_Assets_24_4_13.pdf on our website