

2024 Key Decisions in Estate Litigation

Canadian Lawyer Webinar (November 6, 2024)

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Introduction

1. *The Estate of William Robert Waters v. Gillian Henry et al.*, 2024 ONSC 4190
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The Estate of William Robert Waters v. Gillian Henry et al., 2024 ONSC 4190

Were the *inter vivos* transfers of \$30 million dollars from an elderly man to his wife's caretaker a gift or were they subject to the presumption of resulting trust?



Facts

- William and his wife, Phyllis, hired Gillian to work as Phyllis's nighttime PSW
- William and Gillian began a romantic relationship for nine years, during which he provided her with over \$30 million
- The transfers of money were used by Gillian to buy property, jewelry, clothing and luxury vacations
- William depleted his funds on transfers to Gillian and began to take from Phyllis's own funds, specifically \$5.4 million dollars of her own money
- William was able to do this because he was Phyllis's attorney for property. Phyllis was left with approx. \$500,000 at William's death
- William's two estate trustee's commenced action against Gillian
- Gillian was ordered to return the \$2.85 million dollars on the basis that William had improperly gifted Phyllis's money to Gillian, and William's Estate was entitled to an 80% interest in the investment property due to the presumption of resulting trust



A gift?

The Court had to determine whether William intended to gift the funds to Gillian or whether the funds had been transferred to Gillian for her to invest on his behalf

The test to establish a gift is the following (*McNamee v. McNamee*, 2011 ONCA 533):

1. One must show the donor intended to donate the gift
2. That there was sufficient delivery of the gift, and
3. Acceptance of the gift

Remedies

William's estate trustees attempted to use the following remedies, all of which failed:

- Undue influence
- Unconscionable procurement
- *Ad Hoc* fiduciary claim
- Civil Fraud
- Claims against family members (claims are based on the doctrine of knowing receipt)
- Guarantee

The Presumption of Resulting Trust – Partially Successful

- Gillian was able to prove **that the transfers were intended as gifts** on the basis that William was aware that Gillian spent the money that he had transferred to her on lavish trips, luxury vehicles and properties
- William had “authorised every transfer” without an expectation of being repaid
- On this basis, there was no resulting trust that arose from these transfers or properties
- However, there was sufficient evidence that William intended to retain the beneficial interest in one investment property called ‘King of Hearts’
- He demonstrated a continued financial interest in King of Hearts through his accounting records and conversations with his advisors
- Therefore, there was a resulting trust for the purchase and renovation of this property

The Successful Claim - The Fiduciary Duty Claim

- William was Phyllis's attorney for property, so he owed Phyllis a fiduciary duty
- Gillian was Phyllis's caregiver, so she was in a fiduciary relationship with Phyllis
- Relationships where a fiduciary obligation arise possess the three general characteristics as per *Frame v Smith*:
 - The fiduciary has scope for the exercise of some discretion or power
 - The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests
 - The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion of power

Was Gillian Entitled to Keep Phyllis's Money if it was Given by William?

The Court stated Gillian was unable to keep Phyllis's money for the following reasons:

- 1) There was no donative intent;
- 2) Gillian and William acted unconscionably towards Phyllis; and
- 3) Gillian and William were in fiduciary relationships with Phyllis

Ihnatowych Estate v. Ihnatowych, 2024 ONCA 142

Is there more than one test for the
rectification of a will?



Facts

- The Deceased had two children, Markian and Ulana, and three grandchildren
- In 2009, the Deceased executed a will providing that 10% of the residue of his estate was distributable to his grandchildren & the balance of the residue of the Deceased's estate was to be distributed to the Deceased's issue, alive at the date of his death
- The Deceased has an estranged biological son, Alexander, who filed a Notice of Objection to Ulana's Application for a Certificate of Appointment of Estate Trustee
- Alexander believed he was entitled to an interest in the residue of the Deceased's estate under the will because he was the Deceased's biological child
- Ulana filed an Application to rectify the Deceased's will so as to exclude Alexander and his children. The Court granted Ulana's rectification request

When Will a Court Rectify a Will?

According to *Re Estate of Blanca Esther Robinson*, 2010 ONSC 3484 (“Robinson”), a court will only rectify a will “where there is no ambiguity on the face of the will, and the testator has reviewed and approved the wording” on the following three grounds:

- Where there is an accidental slip or omission because of a typographical error or clerical error
- Where the testator’s instructions have been misunderstood
- Where the testator’s instructions have not been carried out

The Requested Rectification by Ulana

The provisions of the Deceased's will that Ulana requested to be rectified by the Court included the following:

Grandchildren Clause:

- Ten percent (10%) of the residue of my estate is to be distributed ~~between my grandchildren~~ among the children of Markian Alexander Ihnatowych and Ulana Olha Gorgi alive at the date of my death, in equal shares per stirpes, and administered as set out below.

Residue Clause:

- The balance of the residue of my estate is to be paid and transferred to ~~my issue~~ Markian Alexander Ihnatowych and Ulana Olha Gorgi alive at the date of my death in equal shares per stirpes.

The Court's Decision

- The Court rectified the Deceased's will based on Ulana's requests
- The solicitor admitted that the will as drafted did not accurately reflect the Deceased's intentions and instructions
- The Court accepted the solicitor's evidence, which was supported by the Deceased's notes
- The Court applied the test set out in *Robinson*
- The Court held that it was permissible to rectify the will in the present circumstances and agreed that the rectification proposed by Ulana would carry out the Deceased's intention

The Appeal

- Alexander appealed, mainly on the ground that the Application judge failed to use the “new test for rectification” established in *Canada (A.G.) v. Fairmont Hotels Inc*, 2016 SCC 56 (“Fairmont”)
- The test set out in *Fairmont* stated the following:

“If by mistake a legal instrument does not accord with the true agreement it was intended to record ... a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties’ true agreement”
- The Ontario Court of Appeal (“ONCA”) stated that *Fairmont* did not create a new test and its holding followed the principles set out in *Robinson*. The ONCA dismissed the appeal for the following three reasons:
 - The Application judge correctly invoked the third factor in *Robinson* to enable rectification
 - The Court did not err by failing to apply the distinguishable test for rectification as set out in *Fairmont*
 - The evidence accepted by the Application judge was sufficient to establish grounds for the rectification of the Deceased’s will

Ingram v. Kulynych Estate, 2024 ONCA 678

Are equitable claims against an estate subject to the limitation period under the *Trustee Act*, and/or the *Real Property Limitations Act*? (“RPLA”)



Facts

- Mr. Kulynych (the “Deceased”), died in February 2017 a Last Will and Testament from 1989
- Ms. Ingram, the Applicant, alleged that she was the Deceased’s common law spouse from 1999 until the time of his passing. **The will left nothing to the Applicant**
- In March of 2024, the Applicant commenced an application against the Deceased’s estate for an equitable claim, by way of constructive or resulting trust for a share of the estate. The Applicant asserted Mr. Kulynych lived in her home while he rented his house, and she cared for him until his death
- The Applicant stated that the ten-year limitation period was applicable under s.4 of the *RPLA*
- The Estate Trustee (“ET”) argued that the Applicant was statute-barred according to s.38 (2)-(3) of the *Trustee Act*
- The Motion judge ruled that the ten-year limitation period under the RPLA applied leading the ET to appeal to the Court of Appeal (“ONCA”)

The Appeal

- The chief issue for ONCA was not the quality of the Applicant's equitable trust claim, but rather whether she was statute-barred from bringing it. Two applicable limitation periods were recognized:
 - 1) The two-year limitation period against an estate under section 38(3) of the *Trustee Act*; and
 - 2) The ten-year limitation period in relation to interest in property under section 4 of the *RPLA*.
- The ET claimed that s.38(2) of the *Trustee Act* applied and a decision in favour of the *Trustee Act* applying was in line with legislative policy

The Trustee Act v. The RPLA

The Trustee Act

Actions against executors and administrators for torts

38(2) Except in cases of libel and slander, if a deceased person committed or is by law liable for a wrong to another in respect of his or her person or to another person's property, the person wronged may maintain an action against the executor or administrator of the person who committed or is by law liable for the wrong.

Limitation of actions

38(3) An action under this section shall not be brought after the expiration of two years from the death of the deceased.

The RPLA

Limitation where the subject interested

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 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. R.S.O. 1990, c. L.15, s. 4..

The Courts Analysis: Statutory Interpretation

- ONCA asserted that the inclusion of equitable trust claims may fall within s.38 of the *Trustee Act*, but also to s.4 of the *RPLA* so the principle of statutory interpretation applied
- ONCA relied on the *Iskenderov* factors established from *Bank of Montreal v. Iskenderov*, 2023 ONCA 528, to determine the correct analytical path to follow when considering which limitation period should apply



The Courts Analysis: Statutory Interpretation Cont'd

- The following *Iskenderov* factors must be considered:
 1. The historical approach to the limitation periods in issue – including the legislative purpose of the relevant statutory limitation periods;
 2. The judicial approach to interpreting limitation periods in issue
 3. The nature of the relief sought in the action; and
 4. The language of the statutory limitation provisions.
- This analysis demonstrated that the *Trustee Act* was more specific to equitable trust claims against estates

The Court's Analysis Cont'd

- ONCA went through the history of the limitation period Act under both the *Trustee Act* & the RPLA
- ONCA underlined the legislative intent of "providing a remedy for a limited time, without indefinite fiscal vulnerability to the estate"
- ONCA discussed s.9 of the *Estates Administration Act* ("ECA") as evidence of the legislative intent of a shorter limitation period for estate claims
- S.9 of the ECA provides that in the absence of a registered caution, all real property not disposed of within **three years** of the Deceased's death automatically vests in those beneficially entitled to it
- ONCA stated that the Respondents were not conducting an equitable trust claim against the Deceased's real property, rather it was a claim against the estate's assets
- Lastly, the RPLA did not mention estate proceedings

Shannon v. Hrabovsky, 2024 ONCA 120

Does the discoverability principle apply to estate claims & does a limitation period run from the date of death of a testator?



Facts

- Andrew (the “testator”), had two children Glenn and Gayle. The testator executed three wills, in 2002, 2006 and 2007
- The 2006 Will made bequests that were more favorable to Glynn
- The 2007 Will disinherited Gayle and removed her as an executor
- Gayle did not receive a copy of the 2007 Will until 2015, a year after the testator had died. Gayle brought an application on the grounds that the testator did not have testamentary capacity to execute the 2007 Will
- Glen asserted Gayle’s claim was statute barred due to s.4 of the *Limitations Act*, 2002 S.O. 2002, c. 24, Sched. B (“the *Limitations Act*”)

Section 4 & 5 of the *Limitations Act*, S.O. 2002, c. 24, Sched. B

The Basic Limitation Period:

4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered

The Discoverability principle:

5 (1) A claim is 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 (a). 2002, c. 24, Sched. B, s. 5 (1).

The Court's Decision

- The Court found that the limitation period did not run from the date of the testator's death given Gayle did not know of the existence and contents of the 2007 Will
- Gayle had suspicions that a will had been executed in 2007, however, Gayle was never able to confirm that the will existed, or the will's contents until January 2015, after the testator's death
- On this premise, Gayle rebutted the presumption found in s. 5(2) of the Limitations Act which was that she had knowledge of the matters
- Gayle did not discover the claim until January 2015 and the two-year limitation period began running its course from then onwards

The Appeal

- What was the main issue on appeal?
- Glen (the “Appellant”) contended that the application judge should have found that Glynn’s application was statute barred by the limitations period found in s. 4 of the *Limitations Act*
- The Appellant sought to introduce fresh evidence, in the form of an affidavit, attached with a letter from 2014 as an exhibit that Gayle’s counsel received from the appellant’s counsel
- The letter outlined that the 2007 will had been executed by the testator
- The letter was used by the Appellant to demonstrate that Gayle was aware of the will’s execution in 2007

Analysis

- The appellants argued that the letter would have changed the conclusion on the limitation period running from January 2015 and instead to December 16, 2014, when the letter was sent to Gayle
- The Court of Appeal (“ONCA”) stated that the letter did not change the limitation clock from running
- ONCA asserted that whether Gayle had a suspicion or was made aware that the testator executed a will in 2007 was not sufficient information to commence a will challenge
- ONCA concluded that Gayle was not made aware of the 2007 Will’s contents, and it would have been unreasonable for her to commence litigation without such information
- ONCA ruled that the application judge did not make any reversible errors regarding the limitation period issue



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Barbieri v. White, 2024 BCCA 225

To what degree does solicitor-client privilege protect a relationship between an estate trustee and a beneficiary?
Can that privilege be waved?



Facts

- Lily (the “Deceased”), died in 2018. The Deceased’s will directed her daughter, Teresa and her son, Rick to act jointly as estate trustees
- During the probate proceeding, Rick filed a Notice of Application for Teresa’s removal as estate trustee
- Teresa and Rick agreed to a consent order, meaning Teresa would be removed as the estate trustee on the basis that Rick would provide up to date accounting bimonthly
- Rick stated that he and his counsel inadvertently disclosed privileged documents from October 2019 – May 2022
- The Court found that Rick had waived his solicitor-client privilege over all the privileged documents by signing the consent order
- However, the court asserted that Rick did not waive privilege on the legal advice given to him as an estate trustee or the legal advice included in the legal invoices

The Test for the Waiver of Privilege

An express waiver of privilege may be established where it is shown that the possessor of the privilege¹:

- a) knew of the existence of the privilege; and
- b) voluntarily evinced an intention to waive that privilege

If privileged communications were disclosed, the following test is used to determine if the disclosure was inadvertent²:

- a) whether the disclosure was in fact inadvertent, as opposed to repeated, careless or reckless;
- b) whether an immediate attempt was made to retrieve the documents; and
- c) whether preservation of the privilege in all of the circumstances would cause unfairness to the receiving party

The Appeal

- The substantive question for the Court of Appeal (“ONCA”) was whether solicitor-client privilege had been waived by Rick when he signed the consent order to account on a bimonthly basis



Analysis

ONCA asserted the following:

- Rick had waived his solicitor-client privilege through the consent order
- A waiver of privilege can't be used as a sword and a shield
- Rick's disclosure of privileged documents was "not inadvertent" but "careless, if not reckless"
- Solicitor-client privilege was not waived by Rick regarding the legal advice he had received in the invoices
- The Court erred by failing to order a redaction of the legal advice mentioned in the invoices
- Blanket solicitor-client privilege and its application in litigation was not addressed by ONCA

Levesque v. Klarenbach, 2024 SKKB 130

Can lawyers rely on inherent jurisdiction to
compel disclosure?



Facts

- The Applicant sought an accounting in the prescribed form under *The Powers of Attorney Act, 2002*, SS 2002, c P-20.3 and a significant amount of additional disclosure from the Respondent/Attorney for Property
- The accounting that the Respondent had previously provided was deemed insufficient by the Applicant
- The Applicant relied on the inherent jurisdiction of the Court as the basis for the additional accounting request
- The Court denied the Applicant's request on the basis that relying on the inherent jurisdiction of the Court was not sufficient authority

Issue

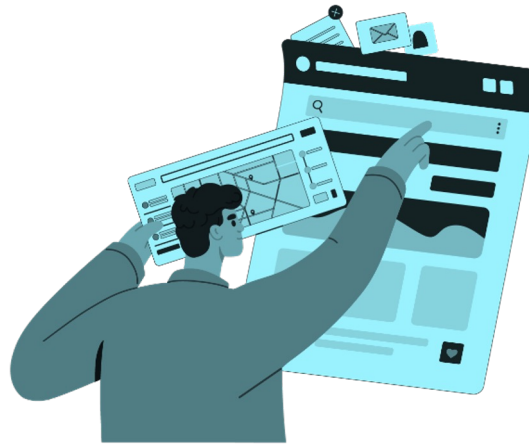
- The main issue brought to the Court was whether the Respondent was required to provide the documentation and/or information requested by the Applicant in light of all the relevant circumstances?
- Can counsel rely on the inherent jurisdiction of the Court when requesting additional disclosure?

Analysis

- “[A]s per the clear language of s. 55(1) ... a beneficiary is entitled to an accounting as a matter of course on making a reasonable request”
- What is defined as “reasonable” is fact and context specific
- The Court stated that the Applicant needed authority for the additional disclosure requests
- **“The inherent jurisdiction of the court is not a panacea.”** (para 25)
“... and it is to be used sparingly” (para 27)
- “Counsel cannot rely on it to request any remedy not specifically set out in a statute”

Drennan v. Drennan, 2024 ONSC 3905

Can inaction by a party during litigation result in substantial indemnity costs?



Facts

- The Deceased's daughter (the "**Applicant**") sought for the removal of the estate trustee – the Deceased's son
- During the hearing of the motion seeking the removal of the Estate trustee the Respondent was self-represented and did not file materials
- The Respondent ignored various Courts orders → created additional costs for the estate & allowed the mortgage of the Deceased's house to fall into arrears
- The Applicant was awarded costs on a substantial indemnity basis and the interest taken on the Applicant's loans to fund the litigation was awarded as a disbursement
- The Court ordered that the costs related to the mortgage enforcement was to be paid from the Respondent's share of the estate
- The Respondent was required by the Court to pay \$60,000 of the \$65,000 owing of the Applicant's costs

Issue

- Can the Court award costs on a substantial indemnity due to the Respondent's continued inaction and can the Applicant recover her loan interest as a disbursement ?

Analysis

“It seems that the Respondents just wanted to make scurrilous allegations and then to delay so as to hurt the applicant even if it prejudiced them. This is an abuse of the litigation process and deserving of enhanced costs. See: *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239 (CanLII) at para. 43”

Takeaways – 8 Important Lessons Learned for Litigation Counsel:

Takeaways

The Estate of William Robert Waters v. Gillian Henry

- A **reminder** for appropriate planning and documenting the transferor's intention - counsel should keep contemporaneous notes of discussions involving transfers
- Deed of Gift → demonstrates transferor's intention
- Court must give deference to the autonomy of the transferor even if the transferor's decisions are questionable to the public
- A donor may gift at his free will - balance between bargains and gifts

Takeaways Cont'd

Ihnatowych Estate v. Ihnatowych

This decision is a caution for drafting lawyers → demonstrates the importance of correctly documenting the testator's intention and wishes

- Vital to draft and keep contemporaneous notes taken during will instruction meetings
- Notes may be used as evidence in Court to demonstrate testator's intention
- Informs lawyers that there is only one test for the rectification of a will

Takeaways Cont'd

Ingram v. Kulynych Estate

A two-year limitation period against an estate under section 38(3) of the Trustee Act is applicable to equitable claims

- When in doubt of what limitation period is applicable to a claim must look at the intention of the legislation and to policy
- Legislative intent demonstrates that time is of the essence when it involves claims and the administration of an estate
 - Unfair to estate trustee and beneficiaries if administration is prolonged

Takeaways Cont'd

Shannon v. Hrabovsky

Serves as a **reminder and clarification** to lawyers that estate claims are subject to the discoverability principle found in s.5 of the Limitations Act

- The above was stated in *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, & reaffirmed in *Shannon*
- Suspicion that a will has been executed is not sufficient to begin a will challenge - must know the contents and bequests to commence a will challenge!
- ONCA suggests that is when the claimant first receives a copy of the will

Takeaways Cont'd

Barbieri v. White

- Barbieri serves as a **reminder to lawyers** that they must understand the consequences of signing consent orders and their impact on solicitor-client privilege
- Difficult to sign off or waive solicitor-client privilege over legal advice
- The court considers whether the parties' behaviour was reckless and/or careless when deciding whether disclosure of solicitor-client privilege was inadvertent
- **A caution to lawyers:** the more reckless and careless the behaviour, the more challenging it is to prove that the disclosure of solicitor client privilege was inadvertent

Takeaways Cont'd

Levesque v. Klarenbach

- This decision is a **caution to lawyers** that they cannot rely on the inherent jurisdiction of the Court to support a request for an accounting → counsel must cite authorities and remember their duties to the Court as officers of the court
- **Lawyers must also question** whether requesting additional disclosure is necessary, otherwise it may be labeled by the Court as a fishing expedition
- A fishing expedition → substantial indemnity costs (**Beware!**)

Takeaways Cont'd

Drennan v. Drennan

Serves as a caution to lawyers that scorched earth litigation → can be characterized as an abuse of the litigation process → substantial indemnity costs

- If party decides to not to comply with procedural requirements, ignore court orders, and intentionally delay proceedings the court will impose high costs
- Court will not accept inaction from a party involved in litigation
- Loan interest may be recoverable as a disbursement
- Lawyers **MUST** follow court orders and avoid delaying proceedings

QUESTIONS?

