



**RESEALING FOREIGN GUARDIANSHIP ORDERS IN ONTARIO
THE EVIDENTIARY THRESHOLD IN WILL CHALLENGES
ONTARIO'S VALIDATING PROVISION IN S. 21.1(1)
ESTATES CASE LAW UPDATES**

**Prepared for Colloquium Sudbury 2023
October 18-20, 2023**

**Bryan Gilmartin
WEL Partners**

www.welpartners.com

Table of Contents

Resealing Foreign Guardianship Orders in Ontario	3
The Evidentiary Threshold in Will Challenges	24
Ontario’s Validating Provision in s. 21.1 (1)	28
Estates Case Law Updates	28



**RESEALING FOREIGN GUARDIANSHIP ORDERS IN ONTARIO:
*PRESCRIBING A SOLUTION TO THE LEGISLATIVE GAP***

**Prepared for Colloquium Sudbury 2023
October 18-20, 2023**

**Bryan Gilmartin & Brett Book
WEL Partners
www.welpartners.com**

CONTENTS

I. INTRODUCTION	1
THE PROBLEM IN ONTARIO	1
THE CURRENT REGIME	2
II. THE GROWING NEED	3
FOREIGN OWNERSHIP IN CANADA	3
III. ANALYZING THE LEGISLATIVE GAPS	4
SECTION 86 OF THE SUBSTITUTE DECISIONS ACT.....	4
CARIELLO V FATHER PERRELLA	5
ACADEMIC INSIGHTS ON THE INEFFECTIVENESS OF S 86.....	8
IV. PROPOSED SOLUTIONS	10
A) LEGISLATION IN CANADIAN PROVINCES	10
Yukon’s Approach	11
Saskatchewan’s Approach.....	12
Nova Scotia’s Approach	14
The Northwest Territories’ Approach.....	15
B) THE ENFORCEMENT OF NON-MONETARY JUDGMENTS	16
V. CONCLUSION	19

I. INTRODUCTION

In our modern society, people and their assets have become more mobile. As a result, it is a reality that now, more than ever, individuals are assuming ownership of property in multiple jurisdictions. This has led to some frequently travelling between jurisdictions, often spending portions of the year in one and the remainder in another. These scenarios are most common amongst older adults, especially those who have retired from the workforce. What's more, the growing population in Canada is rapidly aging and experiencing heightened levels of cognitive decline and disability. All of this has led to an increased need for interjurisdictional approaches to substitute decision-making.

Research indicates that a significant number of foreign nationals, especially from the United States of America, currently own property in Canada. Unfortunately, in Ontario, the current laws which govern powers of attorney, guardianship, and other substitute decision-making mechanisms have yet to adequately adapt to our increasingly globalized world.

The Problem in Ontario

In Ontario, matters concerning the recognition of powers of attorney (“**POAs**”) and guardianship orders are governed by sections 85 and 86 of the *Substitute Decisions Act* (the “**SDA**”)¹. Despite the SDA allowing for a relatively easy recognition of POAs and guardianship orders from other Canadian provinces, it features substantial gaps where it concerns guardianship orders from outside of Canada.

The practical concerns stem from the fact that attorneys and guardians are acutely involved in virtually all aspects of an incapable person's life including the management of property, personal finance, and personal care. A financial institution may refuse to act on a foreign POA for property if it is not satisfied that the POA is recognized in Ontario. As a result, an incapable grantor may have no recourse in this situation without a court order.

The practical barriers also concern personal and real property of an individual under guardianship. As Ontario's legislation has not fully adapted to the constraints and

¹ SO 1992, c 30 [SDA].

demands of modern society, an incapable person under foreign guardianship with property in Ontario may be faced with a difficult task. They may be required to bring a *de novo* application for guardianship in Ontario; bringing with it the prohibitive considerations of time and cost in addition to the practical consideration of who to appoint as guardian.

The current regime

Under the *SDA*, section 86 provides a mechanism for recognizing foreign guardianship orders made outside the province. The provision applies to any court order from outside Ontario that appoints a person, to have “duties comparable to those of a guardian of property or guardian of the person,” and for another person who is at least 16 years old. This section holds that an order of this nature can be resealed, on application to the court, if:

The order was made in another province or territory of Canada, or the order was made in any other jurisdiction prescribed by the government of Ontario (SO 1992, c 30 at s 86(2)). [emphasis added].

Pursuant to subsection 86(4) of the *SDA*, a resealed order:

- (a) has the same effect in Ontario as if it were an order under this Act appointing a guardian of property or guardian of the person, as the case may be;
- (b) is subject in Ontario to any condition imposed by the court that the court may impose under this Act on an order appointing a guardian of property or guardian of the person, as the case may be; and
- (c) is subject in Ontario to the provisions of this Act respecting guardians of property or guardians of the person, as the case may be. (SO 1992, c 30 at s 86(4)).

The problem with section 86 lies in the fact that Ontario yet to prescribe any jurisdictions, even though section 90(g) of the *SDA* authorizes the Lieutenant Governor in Council with the power to do so.

Other Canadian provinces and territories have developed their own legislation which can be looked to for solutions. For example, Yukon’s legislation prescribes a full list of jurisdictions. Saskatchewan, Nova Scotia, and the Northwest Territories on the other hand offer criteria which can be applied to a guardianship order from any jurisdiction.

II. THE GROWING NEED

Foreign Ownership in Ontario

In Canada, ownership of property by non-Canadian owners comes with a significant feature: many of these owners are holding multiple properties, some in multiple Canadian jurisdictions. In 2020, approximately 3.5 per cent of homeowners in Canada were non-resident owners, representing roughly 340,735 owners. Over 1 in 10 (10.2 per cent) of these non-resident owners held multiple properties in the same region. Effective January 1, 2022, the federal government imposed a two-year ban on non-residents purchasing residential property.² Notably, recreational property such as cabins, cottages, and other vacation homes have been exempted from the prohibition.³

Terry Rees, Executive Director of the Federation of Ontario Cottagers, shares that historically, the American owners of property in Ontario “came here to vacation with their steamer trunks in the Muskokas in the 1800’s, or they came to Frontenac and eastern Ontario to hunt and fish. There are still a lot of people from upstate New York, Pennsylvania, Ohio, whose families came to Canada a long time ago and have a longstanding stake here.”⁴ These days, its not just cottage country that is particularly popular amongst American buyers.⁵ As shared by McGrath, approximately 9 per cent of residential properties in Fort Erie (a small Niagara-region town on the U.S. Canadian border) are owned by Americans.⁶

In 2020, there were 187,325 non-resident homeowners in Ontario, 19,120 (10.2 per cent) of whom owned multiple properties.⁷ Where it concerns the ownership of condominiums,

² *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, SC 2022, c 10, s 235.

³ Prohibition on the Purchase of Residential Property by Non-Canadians Regulations, P.C. 2022-250, 2 December, 2022, SOR/2022-250, Canada Gazette, Part II, vol. 156, no. 26.

⁴ John Michael McGrath, “Ontario’s hottest hot spot for foreign-owned homes is Fort Erie?” (June 27, 2018), *TVO Today*, accessed online: <http://www.tvo.org/article/ontarios-hottest-hot-spot-for-foreign-owned-homes-is-fort-erie>

⁵ See Canadian Press, “75% of Americans who owns Canadian recreational properties made purchase after foreign buyer ban: survey” (November 29, 2022), accessed online: <https://www.cp24.com/news/75-of-americans-who-owns-canadian-recreational-properties-made-purchase-after-foreign-buyer-ban-survey-1.6173678> where the authors cite a report from Royal LePage indicating that out of 1,506 U.S.

⁶ *Ibid.*

⁷ Statistics Canada, “Canadian Housing Statistics Program” (2020), accessed online: <https://www.statcan.gc.ca/en/subjects-start/housing>.

non-residents accounted for 6.5 per cent of all purchases in 2020.⁸ Of these non-residents, persons aged 55 and older were overrepresented among homeowners relative to their share of the population. In Ontario, 57.1 per cent of non-resident owners in 2020 were over the age of 55.⁹

III. ANALYZING THE LEGISLATIVE GAPS

Section 86 of the Substitute Decisions Act

Resealing is a process whereby the court will confirm a Grant of Probate from another jurisdiction. Historically, resealing is derived from the concept and process of resealing letters of probate from other provinces, territories, and the United Kingdom. In Ontario, an appointment of an estate trustee, with or without a will, can be resealed if it was made in the United Kingdom, another province or territory of Canada, or “any British possession,” and the Ontario court is provided with:

- (a) two certified copies of the document under the seal of the court that granted it, or the original document and one certified copy under the seal of the court that granted it;
- (b) the security required by the Estates Act; and
- (c) such additional or other material as the court directs.¹⁰

Section 86 of the *SDA* applies to any court order from outside of Ontario that appoints a person to have “duties comparable to those of a guardian of property or guardian of the person,” and for another person who is at least 16 years old.¹¹

Orders of this nature can be resealed on application to the court if the order was made in another province or territory of Canada, or, if the order was made in any other jurisdiction prescribed by the government of Ontario.¹²

An application for the resealing of a foreign guardianship order must include both a copy of the foreign order that either bears the foreign court’s seal or has been certified by some

⁸ Better Dwelling, “Foreign Buyers Own 1 in 10 Recently Built Condos in Canada, 1 in 20 Homes in Total” (January 8, 2022), accessed online: <https://betterdwelling.com/foreign-buyers-own-1-in-10-recently-built-condos-in-canada-1-in-20-homes-in-total/>

⁹ Joshua Gordon and Joanie Fontaine, “A profile of residential real estate investors in 2020” (May 23, 2023), *Statistics Canada*, accessed online: <http://www.150.statcan.gc.ca/n1/pub/46-28-0001/2023001/article/00002-eng.htm>

¹⁰ RRO 1990, reg 194 at R 74.08.

¹¹ SO 1992, c 30 at s 86(1).

¹² SO 1992, c 30 at 86(2).

officer of that court, and a certificate stating that the order has not been revoked and is of full effect.¹³

Importantly, section 86 provides that once an order has been resealed, it has the same effect in Ontario as a guardianship order made under the SDA, and is subject to any SDA provisions or court-imposed conditions with respect to an Ontario guardianship order.¹⁴

As discussed, section 90(g) of the SDA authorizes the Lieutenant Governor in Council to make a list of prescribed jurisdictions for the purposes of section 86.15. However, currently there are no prescribed jurisdictions.

Because of this, section 86 appears to be of limited use in addressing contentious guardianship proceedings which involve orders from outside of Canada. While section 86 allows for any guardianship order made in Canada to be resealed, it appears to be completely ineffective with respect to an order made anywhere else. Without a list of prescribed jurisdictions or criteria to be applied in an application to reseal a foreign guardianship order, the SDA effectively provides no mechanism whatsoever for the recognition of a non-Canadian order.

While there are two known reported cases in which section 86 has been examined,¹⁶ only one of those cases deals with the resealing of a guardianship order from outside of Canada. Despite holding that section 86 did not apply on the facts of the case, the 2013 decision of *Cariello v. Perrella*, provides a thorough overview of the legislative gap inherent in section 86 of the SDA.

Cariello v Father Perrella

The problem was most recently addressed in the Ontario Superior Court decision in *Cariello v Father Perrella*.¹⁷ In that case, an application to reseal a foreign guardianship order under section 86 of the SDA was unsuccessful.

¹³ SO 1992, c 30 at 86(3).

¹⁴ SO 1992, c 30, at 86(4).

¹⁵ SO 1992, c 30 at s 90(g).

¹⁶ See *Re Durity Estate*, 1996 CarswellOnt 5933 (Ont. Gen. Div.) [*Re Durity*]; *Cariello v. Perrella*, 2013 ONSC 7605 (Ont. S.C.J.).

¹⁷ 2013 ONSC 7605 [*Cariello*].

Father Michele Perrella immigrated to Canada from Italy in 1969. Despite attaining Canadian citizenship, Father Perrella remained an Italian citizen and in 2001, returned to Italy where he executed a Consular Declaration stating that his return was intended to be permanent.¹⁸ By 2010 he was officially registered as an Italian citizen living in Italy.¹⁹

A year later, Father Perrella flew to Toronto for a temporary visit. Unfortunately, he suffered a medical incident during his stay which led to a decline in his cognitive function.²⁰ As a result, Father Perrella refused to board his return flight home and was placed in a long-term care facility in Toronto where it was determined that he exhibited signs of advanced dementia.²¹

Father Perrella purportedly executed POA documents which appointed two of his long-time friends in Toronto.²² In the meantime, Father Perrella's brother brought an application for guardianship appointment in Italy. The Italian court appointed a lawyer, Maria Cariello as his interim guardian.²³ Ms. Cariello traveled to Toronto for the purpose of asking the Ontario Superior Court to reseal the Italian guardianship order, or at least set aside the purported POAs.²⁴ The long-time friends agreed that the POAs should be set aside, but asked the court to order that one of them be appointed his guardian of property and person.²⁵ Justice Mesbur determined that not only could the court not reseal the Italian guardianship order but also that Father Perrella's purported POAs were likely invalid.

Where it concerned Justice Mesbur's conclusion on the court's inability to reseal the Italian order, Her Honour held that because the Ontario government had not made Italy a prescribed jurisdiction for the purposes of section 86, the court had no authority to reseal the order. Justice Mesbur summarized this conclusion as follows:

It seems to me that unless and until Ontario creates a list of "prescribed jurisdictions" there is simply no legislative basis on which I can apply s. 86. This is not a case where the

¹⁸ *Cariello, supra* at para 9.

¹⁹ *Ibid.*, at para 10.

²⁰ *Ibid.*, at para 15.

²¹ *Ibid.*, at paras 23-24.

²² *Ibid.*, at para 21.

²³ *Ibid.*, at para 39.

²⁴ *Ibid.*, at para 40.

²⁵ *Ibid.*, at para 48.

statute inadvertently fails to deal with an issue. Here, the province has simply failed to take the regulatory steps necessary to create a list of prescribed jurisdictions to which s. 86 would apply. I have no idea of the province's intentions in that regard. I fail to see how I can simply assume Ontario would designate Italy as a prescribed jurisdiction when it finally creates a list of prescribed jurisdictions under the SDA. I have no basis to conclude that Ontario has any intention of having s. 86 apply to any jurisdiction other than another Canadian province or territory. Section 86 cannot apply.²⁶

With respect to the question of whether the Ontario court had jurisdiction to appoint a guardian for Father Perrella, Justice Mesbur noted that neither Canada, nor Italy, had implemented the *Hague Convention on the International Protection of Adults*.²⁷ Without an international agreement in place to govern the issue of jurisdiction, Her Honour turned to the general conflict of law rules with respect to "matters of a person's status," including capacity.

This analysis turned on the question of where Father Perrella was domiciled as those laws were in fact, the determining factor in this sort of matter. Although Father Perrella has previously made Ontario his domicile, it was determined that at the time of his incapacity, he was domiciled in Italy. The evidence demonstrated his clear intention to permanently remain domiciled in Italy, his registration as an Italian resident, and the fact that the majority of his assets and family members were in Italy.

It was the view of Justice Mesbur that "since Fr. Perrella is domiciled in Italy it is the Italian court that must take the jurisdiction to determine his capacity and ancillary matters arising from that determination."²⁸

Despite Her Honour declining to reseal the Italian guardianship order, the court ultimately recognized Ms. Cariello's authority to make decisions with respect to Father Perrella's property and personal care. Rather than relying on section 86 of the SDA, Justice Mesbur reasoned that Ms. Cariello's authority could be recognized because Father Perrella had no valid substitute decision-making arrangement in Ontario and the Ontario court declined jurisdiction with respect to his capacity, deferring jurisdiction to the Italian court that appointed Ms. Cariello.²⁹

²⁶ *Ibid.*

²⁷ *Ibid.*, at para 51.

²⁸ *Ibid.*, at para 77.

²⁹ *Ibid.*, at paras 85-87.

At first glance, the *Cariello* decision is potentially confusing. While the specific application under section 86 of the SDA was unsuccessful, the court still delivered the applicant's desired outcome. This was due to the particular facts of the case which surrounded an incapable person who resided outside of Ontario who was clearly visiting the province on a temporary basis when a medical incident rendered him incapable.

In our increasingly mobile world, it is highly plausible that a similar situation may negatively impact a person whose domicile is not so easily established outside of Ontario, and the Ontario court in that situation finds that it does have jurisdiction with respect to that person's capacity. In such a situation, the gaps in section 86 that are discussed in this paper could easily prevent the foreign order from having any effect in Ontario. This may result in the need for a new order, or even a conflicting order like the one sought by the respondents in *Cariello*. The fact that the situation resolved itself in *Cariello* does not eliminate the broader problem.

If the government of Ontario had intended to allow for the resealing of guardianship orders from outside of Canada, it could have completed the regulation that the statute demands. Its failure to do just that may indicate a possible intention to address the issue at a later time given that the government has created a tool by which it can do so. In the meantime, section 86 does continue to have some effect in allowing for the resealing of guardianship orders made in other parts of Canada. In any event, it would likely best if the legislature, rather than the courts, undertake to resolve the issue of the recognition of foreign guardianship orders.

Academic Insights on the Ineffectiveness of s 86

In 2005, the British Columbia Law Institute (“**BCLI**”) prepared a report on the recognition of adult guardianship orders from outside the province. The report highlights how “[t]he increasing mobility of persons and wealth makes it inevitable that from time to time issues will arise concerning adult guardianship orders made outside the province, the extent to which they should be given effect, and the machinery for doing so.”³⁰

³⁰ "British Columbia Law Institute Report on the Recognition of Adult Guardianship Orders from outside the Province" (2005) 31:3 Commw L Bull 129 at 134 [BCLI].

In regard to non-Canadian orders, the report recommends a confirmation procedure along the lines of one that currently exists for the ‘resealing’ of foreign probate orders. The BCLI report also offers insight into the choice to prescribe jurisdictions, noting that “[g]iven the degree of judicial oversight embodied in the resealing procedure we do not believe the concept of ‘prescribed jurisdictions’ serves a useful purpose and would abandon it.”³¹

In 2017, in his article *Foreign Guardians of Property and the Ontario Substitute Decision Act*,³² Matthew Furrow argues that “[i]t may seem desirable for the Ontario legislature to create a list of prescribed foreign jurisdictions to which s. 86 should apply.”³³ Furrow goes on to say that “... this would be a mixed blessing to foreign guardians. The effect of prescribing a foreign jurisdiction as being subject to s. 86 would make it easier for a guardian there to deal with real property in Ontario, but would impose a greater burden than before where personal property is concerned.”³⁴

Furrow argues that “[e]ven if the legislature did enact a regulation specifying certain foreign jurisdictions to which s. 86 were to apply, the *SDA* remains silent on how other foreign guardianships should be recognized.”³⁵

Furrow contemplates that “the legislature should strongly consider reviving the previously clear distinction in treatment between real property and personal property where extra-provincial and foreign guardianships are concerned.”³⁶

In his article, Furrow closely examines predecessor legislation to the *SDA* and concludes that these actually contained limited provisions permitting the gathering of certain assets by foreign guardians. There is no equivalent to these sections in the modern *SDA*. However, the solution proposed in this article contemplates the Ontario government adopting similar legislation from other provinces where there is a requirement that a proposed guardian has to state the income and profits of the estate and set out the assets, debts and credits of the adult.

³¹ BCLI, *supra* at 141.

³² (2017) 37:1 *Est Tr & Pensions J* 20 [Furrow].

³³ Furrow, *supra* at 38.

³⁴ *Ibid.*

³⁵ Furrow, *supra* at 34.

³⁶ *Ibid.*, at 39.

The authors cited above appear to agree that not only is there a clear gap in the legislation but also, that the proposed solution to simply prescribe a list of jurisdictions does not serve a useful purpose and may actually contribute to rather than ameliorate the problem.

Furrow is adamant that prescribing a foreign jurisdiction would make it easier to deal with real property in Ontario but would lead to barriers where personal property is concerned. To this end, his solution of reviving the previous distinction in treatment between real property and personal property is not without merit. Echoing his thoughts, this article argues that legislation already exists in other provinces which requires a proposed guardian provide the court with particulars of the adult to be under guardianship and their estate. If the government of Ontario wishes to address the current issue with section 86 of the *SDA*, these suggestions should all be evaluated equally.

IV. PROPOSED SOLUTIONS

In proposing the ideal solution to the legislative gap inherent in section 86 of the *SDA*, the following will explore existing legislative approaches that are available in select Canadian provinces. After a thorough examination of the potential to adopt some of these approaches in Ontario, the following will address the novel suggestion of enforcing a foreign non-monetary order along the lines of the “real and substantial connection” test which was adopted and expanded by the Supreme Court of Canada (“**SCC**”).

a) Legislation in Canadian Provinces

There are four Canadian provinces and territories which have legislation in place which Ontario can look to in its evaluation of section 86 of the *SDA*: Yukon, Saskatchewan, Nova Scotia and the Northwest Territories. Yukon offers the most straight-forward and simple solution: a list of prescribed jurisdictions. The other three, however, have developed criterion for resealing a guardianship order from a foreign jurisdiction.

Barring legislative amendments to close the gap in section 86, it is plausible that in any event, a creative litigant will eventually resort to a novel solution such as the enforcement of a foreign non-monetary order pursuant to the real and substantial connection test which was first adopted by the SCC in *Morguard Investments Ltd v De Savoye*³⁷ and further

³⁷ 1990 CanLII 29 (SCC), [1990] 3 SCR 1077 [*Morguard*].

expanded by the Court in *Pro Swing Inc v Elta Golf Inc.*³⁸ The following will take a closer look at these proposed solutions.

Yukon's Approach

The Yukon Territory takes a similar approach to Ontario's legislation; however, its government has prescribed a list of jurisdictions in which a foreign guardianship order can be resealed.

Section 56 of Yukon's *Adult Protection and Decision-Making Act*³⁹ provides the following:

56 Orders from outside Yukon

- (1) In this section, "foreign order" means an order of a court made outside Yukon that appoints a person to carry out duties comparable to those of a guardian.
- (2) Any person may apply to the Supreme Court for an order resealing a foreign order that was made
 - (a) in a province or territory of Canada; or
 - (b) in a jurisdiction outside Canada prescribed by the regulations.
- (3) The Supreme Court may order the foreign order to be resealed if the applicant files with the court
 - (a) a copy of the foreign order bearing the seal of the court that made it or a copy of the foreign order certified by the registrar or other officer of the court that made it; and
 - (b) a certificate signed by the registrar or other officer of the court that made the foreign order stating that the order has not been revoked and is of full effect.
- (4) A foreign order that has been resealed
 - (a) has the same effect in Yukon as if it were an order made under this Act appointing a guardian;
 - (b) is subject in Yukon to any condition imposed by the Supreme Court that the Supreme Court may impose under this Act on an order appointing a guardian; and
 - (c) is subject in Yukon to the provisions of this Act respecting guardians.

Pursuant to subsection 56 (2)(b), Yukon's *Adult Protection and Decision-Making Act* provides that any person may apply to the Supreme Court of Yukon for an order resealing

³⁸ 2006 SCC 52 (CanLII), [2006] 2 SCR 612 [*Pro Swing Inc.*].

³⁹ SY 2003, c 21, Sch A.

a foreign order that was made either in another Canadian province or territory or in a jurisdiction prescribed by the regulations.

Yukon's regulations are found in its *Adult Protection and Decision-Making Regulation*⁴⁰ which provide that for the purposes of subsection 56(2), a person may apply to the Supreme Court for an order resealing a foreign order that was made in Australia, Austria, Belgium, Denmark, Ireland, England, Finland, France, Germany, Iceland, Italy, The Netherlands, New Zealand, Northern Ireland, Norway, Portugal, Scotland, Spain, Sweden, Switzerland, any state of the United States of America, and Wales.⁴¹

While Yukon has taken the step to regulate select jurisdictions, the territorial government has not provided any rationale behind the jurisdictions selected nor have they provided a process for considering, evaluating, and adding new ones. This notable feature of Yukon's legislation begs the question of whether this regime actually closes the legislative gap that is experienced in Ontario. By creating a fixed list and not criterion for resealing, it is arguable that there is still a practical barrier in that some countries are not recognized. For example, it has been reported that many Canadians, especially those from the Mennonite community, frequently travel between Canada and Paraguay, a country that is not found on Yukon's prescribed list of jurisdictions.⁴²

Saskatchewan's Approach

Saskatchewan features legislation which may actually provide a suitable solution to the problem faced in Ontario. Rather than prescribing a closed list of specific jurisdictions from which a guardianship order can be resealed, Saskatchewan has developed comprehensive criteria that can be effectively applied to a guardianship order from any jurisdiction.

⁴⁰ YOIC 2005/78.

⁴¹ YOIC 2005/78 at s. 18.

⁴² See Government of Canada, "Canada-Paraguay relations" (September 27, 2022), accessed online: [https://www.international.gc.ca/country-pays/paraguay/relations.aspx?lang=eng](https://www.international.gc.ca/country-pays/paraguay/rerelations.aspx?lang=eng) where it is reported that "Canada and Paraguay have a robust bilateral relationship, reinforced by strong people-to-people ties. This is reflected in the 15,000 to 20,000 Canadians in Paraguay, most of them members of the Mennonite community.

Pursuant to section 65.1 of Saskatchewan's *The Adult Guardianship and Co-decision-making Act*,⁴³ an applicant for resealing is required to:

- (a) produce to and deposit with a local registrar of the court the foreign order to be resealed;
- (b) pay the prescribed fees;
- (c) in the case of an applicant who has duties comparable to those of a property guardian:
 - (i) provide the local registrar of the court with an accurate inventory of the estate of the adult in Saskatchewan so far as this information has come to the knowledge of the applicant:
 - (A) stating the income and profits of the estate; and
 - (B) setting out the assets, debts and credits of the adult; and
 - (ii) if property in Saskatchewan belonging to the estate is discovered after the filing of an inventory pursuant to subclause (i), provide the local registrar of the court with an accurate inventory of the estate immediately on the property being discovered; and
 - (iii) verify by affidavit every inventory required pursuant to this clause; and
- (d) serve a copy of the application in accordance with section 65.3.⁴⁴

As part of the resealing application, Saskatchewan requires applicants to serve a copy of the application upon the following parties:⁴⁵

- (a) the adult;
- (b) the nearest relatives within the meaning of section 5, except any nearest relative who has consented in the prescribed form to the order requested in the application;
- (c) the member of the Executive Council responsible for the administration of The Child and Family Services Act if the adult is receiving services pursuant to section 10 or 56 of The Child and Family Services Act;
- (d) the personal decision-maker in Saskatchewan of the adult;
- (e) the property decision-maker in Saskatchewan of the adult;
- (f) any attorney under a power of attorney given by the adult, if known;
- (g) any proxy under a health care directive made by the adult, if known;

⁴³ SS 2000, c A-5.3 [AGCA].

⁴⁴ AGCA, *supra* at s 65.1.

⁴⁵ Pursuant to subsection 65.3(3), if the court considers it appropriate to do so, the court may dispense with service on all or any of the persons mentioned in clauses (1)(a) to (j).

(h) any supporter nominated by the adult pursuant to section 9 of The Personal Care Homes Regulations, 1996, if known;

(i) any person who acts as a trustee for the purpose of administering financial benefits on behalf of the adult, if known; and

(j) the public guardian and trustee.

A court in Saskatchewan may also require a guardian to file one or more bonds, in the prescribed form, with the local registrar of the court. If the court requires a bond to be filed, the court shall then determine the amount of that bond. As part of the application process, no bond will be required if the value of the adult's estate does not exceed the prescribed amount or a certificate is produced from an officer of the foreign court, stating that security in a sufficient amount has been given in the foreign jurisdiction.⁴⁶

On an application for resealing and after any hearing that the court considers necessary, Saskatchewan's legislation also allows for the court to determine whether it is in the best interests of the adult to require a review of the resealed foreign order and, if required, specify the period within which the review is to take place.⁴⁷

Saskatchewan's criterion is ultimately useful because of its flexibility and simplicity. The process is not onerous and appears to allow for a straightforward application on resealing. Rather than a closed-list of jurisdictions which is only applicable to the countries selected, this criterion can be applied to nearly any valid guardianship order from any foreign jurisdiction.

Nova Scotia's Approach

Nova Scotia, through its *Adult Capacity and Decision-making Act*,⁴⁸ takes a similar approach to Saskatchewan. Notably, the legislation in Nova Scotia also carries the requirement that if the guardianship is with respect to property, the applicant must provide an inventory of the incapable person's property in the province to the court, and update that inventory as needed.

⁴⁶ AGCA, *supra* at s 65.2.

⁴⁷ *Ibid.*, at s 65.1(6).

⁴⁸ SNS 2017, c 4 [ACDA].

Nova Scotia also provides the court with the discretion to require the applicant to account or report, and apply for a review of the order, however, subsection 4 (b) of the *ACDA* provides that the court may impose any terms, conditions or limits on the order as the court considers appropriate.

Similar to Saskatchewan, a court in Nova Scotia may not reseal a foreign guardianship order until it has received a certificate from an officer of the foreign court confirming that the order is in effect and until the court has received any necessary bond. A bond may not be necessary in Nova Scotia if the court chooses to dispense with the requirement if the court receives a certificate from an officer of the foreign court stating that security in a sufficient amount has been provided there.⁴⁹

The Northwest Territories' Approach

Similar to legislation in Saskatchewan and Nova Scotia, the Northwest Territories' legislation provides a list of parties who must be served a copy of the application and requires the applicant to produce a valid certificate from the court in the foreign jurisdiction.

Pursuant to subsection 15(3)(a) of the *Guardianship and Trusteeship Act*,⁵⁰ the Northwest Territories provides the court with the discretion to make any conditions, restrictions, modifications or additions that the court may impose or make in resealing a foreign guardianship order. The *Act* also provides that where the court makes an order under subsection 15(3), the court shall specify the time within which the resealed order must be reviewed by the Court and that time must not extend past the earlier of the date provided for review by the terms of the resealed order or the date for review required by the *Act* (although the *Act* itself does not prescribe any required time limits for review).⁵¹

The approach of Saskatchewan, Nova Scotia, and the Northwest Territories present a viable solution that, if adopted in Ontario, would appear to completely resolve the issues raised in the *Cariello* decision with respect to the *SDA*.

⁴⁹ *ACDA*, *supra* at s 65.

⁵⁰ SNWT 1994, c 29 [*GTA*].

⁵¹ *GTA*, *supra* s 15(5).

b) The Enforcement of Non-Monetary Judgments

While there has not been a representative case on resealing a foreign guardianship order to date, the SCC has developed a test which allows courts to recognize judgments in one province which were ultimately made in another. That test which developed under the context of the enforcement of monetary judgments, has since been expanded to recognize the enforcement of non-monetary judgments as well. Under this test, it is arguable that a litigant could bring a foreign guardianship order before an Ontario court for the purpose of enforcing or resealing the order pursuant to the caselaw that has developed. In fact, as will be discussed, in 2020 the Ontario Superior Court of Justice partially recognized an order of the Supreme Court of the State of New York in a temporary guardianship application in Ontario.

In *Morguard*,⁵² the SCC established the “real and substantial” connection test with respect to whether the courts of one province should recognize judgments made in other provinces. The *Morguard* decision dealt with an attempt to enforce a monetary judgment of an Alberta court in British Columbia. The SCC in reaching its determination, upheld the BC decision which heavily criticized the old rules of enforcement.

In a case comment published in the *Advocates’ Quarterly*, Black and Swan articulate how the decision in *Morguard* leaves a practical question unanswered: the appropriate enforcement regime for truly foreign judgments. The author’s note that within the *Morguard* decision, the SCC recognizes that the world has changed since the enforcement rules described were developed in 19th century England and that “[a]ccommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.”⁵³ Black and Swan conclude their

⁵² *Morguard, supra*.

⁵³ *Morguard, supra* at p 234.

case comment by opining that “there would, however, be little practical difficulty in extending the *Morguard* test to cover judgments of the courts of other countries.”⁵⁴

In 2003, the test was expanded by the SCC in *Beals v Saldanha*⁵⁵ to apply to judgments made by courts outside of Canada. In that decision, it was recognized that the law needed to adapt to the increasing movement of people across borders. This reasoning is analogous to the central argument of this paper: that increased mobility and ownership of property across borders has led to an amplified need for interjurisdictional approaches to substitute decision-making.

The decisions cited above stand for the proposition that the real and substantial connection test can be applied to monetary judgments made by courts in other provinces and other jurisdictions outside Canada.

Where it concerns non-monetary judgments, the 2006 SCC decision in *Pro Swing Inc v Elta Golf Inc.*⁵⁶ further extended the real and substantial test to apply to non-monetary judgments, albeit with some caution. In that decision, the majority carefully stated that, “courts must be cautious to preserve their nation’s values and protect its people.”⁵⁷

In *The Bank of Nova Scotia Trust Company v. Pernica*,⁵⁸ the court recognized an order of the Supreme Court of the State of New York to the extent that it related to providing funds to the incapable person’s temporary guardian for the purpose of taking care of the well-being of the incapable person.

On July 10, 2019, Justice Knipel of the Supreme Court of the State of New York made an order which appointed Ms. Mock as temporary guardian of Ms. Ida Rubin with broad powers to investigate her whereabouts and return her to New York. Justice Knipel found it was in Ida’s best interest and for her personal safety to have a temporary guardian appointed forthwith. Ms. Mock was attempting to obtain the funds ordered in the July 10 order from Scotiabank, the trustee of the \$100 million spousal trust for Ida. Scotiabank

⁵⁴ Vaughan Black & John Swan, "New Rules for the Enforcement of Foreign Judgments: *Morguard Investments Ltd. v. De Savoye*" (1991) 12:4 *Advoc Q* 489 at 507 [Black & Swan].

⁵⁵ 2003 SCC 72 (CanLII), [2003] 3 SCR 416 [*Beals*].

⁵⁶ *Pro Swing Inc.*, *supra*.

⁵⁷ *Ibid.*, at para 64.

⁵⁸ 2020 ONSC 67 [*Pernica*].

was ordered by Justice Knipel to pay funds for Ida's well-being and authorized by his honour to pay up to \$250,000. Two of Ida's adult children challenged the recognition of the July 10 order in the Ontario Superior Court of Justice. Scotiabank brought its own application.

Justice Conway, writing on behalf of the Superior Court, found the order to be broad and only focused on the portions to be performed in Ontario. These portions included the payment of money by Scotia and the ability for Ms. Mock to access Ida's medical and confidential records in Ontario.⁵⁹

Justice Conway held that the test for recognizing a foreign judgment is clear: pursuant to *Pro-Swing*, the court must ask whether the New York Court had jurisdiction to make the order. In this case, Justice Conway concluded that the answer was yes.⁶⁰ Next, Justice Conway had to determine whether the order was final, holding that pursuant to *ProSwing* at para. 94, "the concept of final does not mean the order must be the final step in the proceeding."⁶¹ The issue to be determined by Justice Conway concerned whether the order cannot be varied or abrogated, regardless of whether under appeal.⁶² Justice Conway concluded that the order requiring Scotia to pay the temporary guardian is clear, final and easily administered by the court.⁶³ His honour held that there was no merit to the defences to the recognition of the order and that there was nothing to substantiate fraud or denial of natural justice in the New York proceeding or public policy.

Ultimately, the order in *Pernica* was recognized but only to the extent that it related to Scotia's funding of Ms. Mock (the temporary guardian) for \$250,000 US and the funding of legal counsel. Justice Conway did not, however, recognize provisions of the order

⁵⁹ *Pernica*, *supra* paras. 8-9.

⁶⁰ Ida was in New York when the guardianship application was started. Lawyers were representing Ida in the proceedings. The New York court had traditional presence-based jurisdiction. Ida had been living in New York with her daughter for some time so there was no issue that a real and substantial connection existed.

⁶¹ *Pernica*, *supra* at para. 5.

⁶² See *Continental Casualty Company v. Symons*, 2015 ONSC 6394, at para 36 citing the *Four Embarcadero Venture v. Kalen*, 1988 CanLII 4828 (ON SC), 1988 CarswellOnt 412.

⁶³ Justice Conway held it was final due to expert evidence provided, the fact that the order made a conclusive determination that Ida needed to have a temporary guardian, the fact that the order is clear and direct that Scotia is to make payments to the temporary guardian, and the fact that Ida's guardianship requirements may change is inherent in any guardianship order.

which grant the temporary guardian with the right to seek the medical and confidential information of Ida.

In the event that the government of Ontario does not elect to make changes to fill the gap in s 86 of the *SDA*, it is very possible that more litigants may eventually explore the novel option of attempting to enforce a non-monetary judgment in an application for the resealing of a foreign guardianship order, much like the applicants in the *Pernica* decision did.

Saskatchewan's legislative approach permits a foreign guardianship order to be resealed if it meets what appears to be a very basic set of criteria. Adopting the approach taken in Saskatchewan avoids the complications that may arise by simply prescribing a closed-list of jurisdictions. Any review ahead of proposed amendments, however, should consider the approach already taken in Nova Scotia and the Northwest Territories, which allows courts the discretion to impose any terms, conditions or limits on the order as the court considers appropriate.

In canvassing the legislation of other provinces and contemplating the analyses set forth by the BCLI and Furrow, it is clear that the proposed solution to prescribe a list of jurisdictions may fall short of completely addressing the legislative gap inherent in section 86 of the *SDA*. For this reason, it appears to be more appropriate to develop criteria that can inform and guide courts through the process of resealing a foreign guardianship order.

V. CONCLUSION

As it stands, Ontario's *SDA* creates a legislative gap where it concerns the recognition of foreign guardianship orders in the province. Section 86 of the *SDA* provides the mechanism to recognise such orders and for the Lieutenant Governor in Council to prescribe jurisdictions but none have yet been added. As this article has explored, when one examines this gap with consideration for Canada's increasingly mobile and aging population, the issue is likely to become a more pressing.

In determining what Ontario's criteria may or should look like for recognising foreign guardianship orders, helpful guidance can be gained from examining existing legislation already available in Saskatchewan, Nova Scotia, and the Northwest Territories.

From an evaluation of existing legislation, the Ontario government could best service the legislative gap in section 86 by developing criteria that can be utilized by courts in applications for resealing foreign orders for guardianship.

Many of the suggestions and recommendations have come from practitioners who deal with the legislative gap directly in their practice. As a result, any review of the *SDA* should include a thorough evaluation and consultation process. Having said that, future amendments undertaken by the government of Ontario should not only evaluate what these other provinces are doing but should also consider some of the academic recommendations that are available and discussed in this article.

Developments to the Minimal Evidentiary Threshold: Estates Update

In Ontario, a person challenging the validity of a Last Will and Testament is required to meet a ‘minimal evidentiary threshold’ before the courts will grant any orders that the testamentary instrument be proved in solemn form.

This requirement was firmly established in the Court of Appeal decision of *Neuberger v. York*.¹ More recently, the Court of Appeal affirmed the principles of *Neuberger* in *Johnson v. Johnson*.²

The minimal evidentiary threshold

The minimal evidentiary threshold applies to a party bringing an action under Rule 75 of the *Rules of Civil Procedure*.³ Rule 75.01 empowers an estate trustee or any person appearing to have a financial interest in an estate to make an application under rule 75.06 to have a testamentary instrument that is being put forward as the last will of the deceased “proved in such manner as the court directs”, meaning in solemn form.

In *Neuberger*, the Court of Appeal provided guidance on how the court is to exercise their role under rule 75, stating:

An interested person must meet **some minimal evidentiary threshold** before a court will accede to a request that a testamentary instrument be proved. In the absence of some minimal evidentiary threshold, estates would necessarily be exposed to needless expense and litigation. In the case of small estates, this could conceivably deplete the estate. Furthermore, it would be unfair to require an estate trustee to defend a testamentary instrument simply because a disgruntled relative or other potential beneficiary makes a request for proof in solemn form.⁴ (emphasis added)

What is meant exactly by the ‘minimal evidentiary threshold’? The Court of Appeal provides that the estate trustee or interested person must “adduce, or point to, some evidence which, if accepted, would call into question the validity of the testamentary instrument that is being propounded”.⁵ In other words, for a testamentary instrument to be proven in solemn form, a litigant must produce enough evidence for the court to bring it into question.

Thus, in *Neuberger* the Court clarified that just because someone has an interest in an estate, it does not give them the prima facie right to have a testamentary instrument proved in solemn form. It is a matter of judicial discretion: “the court has a discretion

¹ 2016 ONCA 191 (“*Neuberger*”).

² 2022 ONCA 682 (“*Johnson*”).

³ RRO 1990, Reg 194.

⁴ *Neuberger* at para 88

⁵ *Ibid*, para 89

whether to order that a testamentary instrument be proved as well as a discretion over the manner in which the instrument is proved”.

A year later, Justice Myers. provided further clarity on the meaning of the ‘minimal evidentiary threshold’ in *Seepa v. Seepa*:

At [the] preliminary stage, the issue is not whether the applicant has proven his or her case but whether he or she ought to be given tools, such as documentary discovery, that are ordinarily available to a litigant before he or she is subjected to a requirement to put a best foot forward on the merits.⁶

Justice Myers is helpful in providing further clarity on the scope of judicial discretion permitted under the *Rules* when applying the minimal evidentiary threshold. His Honour stated that “the court ought to measure the evidence adduced by the applicant challenger against the evidence answered by the proponent of the will and assess what, if any, processes are required to resolve any conflicts that the court cannot fairly resolve on the record before it”⁷. In so doing, the court must fashion a process which provides fair and just resolution, and that meets the goals of efficiency, affordability and proportionality.⁸

Ultimately the minimal evidentiary threshold is one dictated by judicial discretion and guided by public policy considerations. The aim is to protect Estates from needless expense and litigation and to uphold the special responsibility the court have to protect the testator’s intentions.

Recent developments

The recent Ontario Court of Appeal decision in *Johnson*, affirmed the minimal evidentiary threshold test established in *Neuberger*. In *Johnson*, the applicant alleged that the deceased was incapable of making a new Will and that she was unduly influenced. In her application the applicant sought disclosure of the deceased’s medical, financial and solicitor records from the deceased’s estate.

The Application judge, Justice Heather Williams, employed the minimal evidentiary threshold framework from *Neuberger* to dismiss the Application. Her Honour found that the applicant’s evidence was not enough to meet the evidentiary threshold and call into question the validity of the deceased’s Will.

The applicant appealed to the Ontario Court of Appeal. The Court of Appeal found that the application judge had correctly applied the *Neuberger* framework and dismissed the appeal. The appellate court refused to reweigh the available evidence submitted by the applicant and respondents as factual findings by the application judge are owed considerable deference.

⁶ 2017 ONSC 5368 (“*Seepa*”) at para 35.

⁷ *Seepa* at para 39.

⁸ *Seepa* at para 39.

The Court of Appeal found that the applicant's evidence, even if accepted, was not sufficient enough to call into question the validity of the deceased's Will and that the respondent's evidence was successful in answering the challenge.

Ultimately, the Court of Appeal echoed the finding of Justice Heather Williams, that granting disclosure of the deceased's records would defeat the practice purpose of the minimal evidentiary threshold to not subject the estate to deplete estates because of 'disgruntled relatives'.

Post-Johnson

Since *Johnson*, there have been several cases that have applied the minimal evidentiary threshold test in estates disputes, including outside of Ontario.

In *White v. White*,⁹ the court employed the the minimal evidentiary threshold framework. In *White*, Justice Myers highlighted the ONCA decision of *Johnson* and the need to balance discovery and cost as well as citing the public policy concerns that one must not be entitled to deplete the estate for frivolous claims.

Justice Myers also raised the question of how the newly added s.21(1) of the *Succession Law Reform Act*¹⁰ will intersect with the minimal evidentiary test in light of *Johnson*.¹¹ Section 21(1) provides that:

Court-ordered validity

21.1 (1) If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the will of the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it had been properly executed or made. 2021, c. 4, Sched. 9, s. 5.

However, his Honour does not continue to opine in this instance.

In another recent case decided post-*Johnson*, the 2023 Ontario Superior Court decision in *Giann v. Giannopoulos*,¹² was described as "the classic situation, seen ever day in estates court, where one child is preferred by a deceased parent ostensibly to reward extra effort committed by the child to care for the parent."¹³ In *Giannopoulos*, the applicants sought orders granting them access to their late father's financial records, his lawyers' files, and his medical records which they submit are relevant to their father's

⁹ 2023 ONSC 3740 ("*White*").

¹⁰ RSO 1990, c S.26.

¹¹ *White* at para 37.

¹² 2023 ONSC 5412 [*Giannopoulos*].

¹³ *Giannopolous*, *supra* at para. 9.

capacity and the role of their sibling in obtaining a will change and other related transactions.¹⁴

The court in *Giannopoulos* looked at the decision in *Neuberger* for the proposition that an interested person must meet some minimal evidentiary threshold before a court will accede to a request that a testamentary instrument be proved. Justice Myers determined that based on *Neuberger*, there is a burden on an applicant to adduce or point to some evidence which, if accepted, would call into question the validity of the will but also, an opportunity for the respondent estate and beneficiaries to answer the applicant's evidence. If the respondent "successfully answers" the applicant's evidence, the claim will not proceed.¹⁵

There was evidence that the deceased in *Giannopoulos* was extremely sad and demotivated after his wife died.¹⁶ His medical records demonstrated that he was suffering some cognitive impairment in 2019. However, the applicants agreed that neither depression nor early dementia is incapacity.¹⁷

Overall, Justice Myers concluded that, as in *Johnson*, the evidence supports a conclusion that the deceased suffered age-appropriate decline and symptoms of dementia.¹⁸ However, His Honour held that apart from the applicant's cherry-picked medical notes from 2019, there was no evidence that the deceased lacked capacity when he signed his new will in 2021. The motion and application for directions were dismissed.

In Alberta, the Court of Appeal adopted the minimal evidentiary threshold from *Neuberger* and *Johnson* in its decision in *Duhn Estate*.¹⁹ In *Duhn*, there was no challenge to the last Will of the deceased, Alice Jean Duhn. Instead two of her children sought an order for full disclosure of her *inter vivos* transactions in the context of a passing of accounts. Justice Eidsvik adopted the approach in *Neuberger* and deliberated whether the minimal evidentiary threshold has been met concerning a lack of capacity or the existence of fraud or suspicious circumstances. Her Honour found that the Applicants had not met the evidentiary threshold to displace Alice Duhn's privacy to transactions prior to death. This decision was upheld in the Alberta Court of Appeal, where the court cited *Johnson*, and considered whether the litigant ought to be given the tools

The more recent Alberta decision in *Estate of Gow*,²⁰ also applied *Neuberger*, *Seepa* and *Johnson*. In *Gow*, the court was faced with an order to set aside a grant of probate and order a trial to dispute the validity of a Will. The court dismissed the application and found that the applicants had not met the minimal evidentiary threshold.

¹⁴ *Ibid.*, at para. 11.

¹⁵ *Ibid.*, at paras. 18-19.

¹⁶ *Ibid.*, at para. 67.

¹⁷ *Ibid.*, at para. 71 & 73.

¹⁸ It was noted that like Mrs. Johnson, Mr. Giannopoulos's health had its setbacks, including specific bouts of ill health in 2019 and later in 2021.

¹⁹ 2022 ABCA 360 ("*Duhn*").

²⁰ 2022 ABKB 750 ("*Gow*")

Conclusion

The Superior Court and Court of Appeal decisions in *Johnson* reaffirms the minimal evidentiary threshold test as articulated in *Neuberger* and reminds potential litigants that cogent evidence is required at the outset of estates litigation lest their challenge be dismissed by the court.

Even in a case like *Giannopoulos*, where there was some evidence of cognitive decline, suspicions and assertions of wrongdoing need to be supported by evidence which meets to the minimal threshold. Where suspicions are raised, the responding parties will be given an opportunity to answer fully and completely.

A Fixed and Final Intention: Section 21.1(1) of the SLRA, Ontario’s validating provision

On February 16, 2021, the government of Ontario introduced Bill 245, the *Accelerating Access to Justice Act*. Amongst other amendments, the Bill added to the *Succession Law Reform Act*,¹ section 21.1(1), a validating provision for wills similar to that which exists in other Canadian provinces.

Despite the changes coming into force and effect later that year in November, it was nearly two years before a representative case was brought before Ontario courts. In that decision, *Grattan v. Grattan*, an unsigned and unwitnessed draft will was declared valid and fully effective, despite its noncompliance with section 4 [2] of the *SLRA*.

After the release of the *Grattan* decision, the Ontario Superior Court of Justice released three more decisions dealing with section 21.1(1) of the *SLRA*.

On September 21, 2023, the Ontario Superior Court of Justice released another decision which addresses the validating provision in section 21.1(1).

Case	Holding
<p><i>Grattan v. Grattan</i>, 1 February 2023, Ontario 22-054 (ONSC). * unreported decision</p>	<p>Decision of the Honourable Mr. Justice J.M. Johnston.</p> <p>Deceased met with a solicitor and provided instructions to prepare a will which bequeathed the residue of her estate to her surviving brother. They met once, a draft copy was prepared and returned to the solicitor with minor corrections. Dates were canvassed for a follow-up appointment to formally execute the will, however the Deceased died 15 days later.</p> <p>Johnston J. concluded on a balance of probabilities that 15-day delay did not constitute evidence of a change in the Deceased’s testamentary intentions nor give rise to an inference she changed her intentions. Pursuant to s. 21.1(1), the will was declared valid and fully effective despite non-compliance with s. 4[2].</p>
<p><i>Cruz v. Public Guardian and Trustee</i>, 2023 ONSC 3629 June 6, 2023</p>	<p>Decision of Hon. Mr. Justice FL Myers</p> <p>Deceased prepared his own will, which was clearly drafted and clearly expresses his testamentary intentions but was unsigned and unwitnessed. The will was given to the executor in a sealed envelope asking the executor to get the will witnessed.</p>

¹ R.S.O. 1990, c. S.26 [SLRA].

	<p>Myers J. declared the will valid and fully effective under s.21.1(1) holding that, “It purports to be a will. It is signed in the deceased’s hand. The deceased just blew the formalities. Fixing this type of mistake is precisely what s. 21.1 seems to be for”²</p>
<p><i>White v. White</i>, 2023 ONSC 3740 June 20, 2023</p>	<p>Decision of Hon. Mr. Justice FL Myers</p> <p>Applicant engaged a lawyer in 2021 to help his mother update her will. He emailed the lawyer on July 10, 2022 to book a consultation appointment. There were several conversations over the ensuing weeks and an appointment was set to finalize the updated will on August 16. On the morning of the appointment, the Deceased suffered a stroke and was hospitalised. Despite attempts by the solicitor to finalise in hospital, the Deceased passed away on August 22, 2022. The Applicant argued the draft will being prepared might be an expression of his mother’s intention to revoke or alter her 2014 will and that if so, the court might recognize the draft will under s. 21.1 of the SLRA. Myers J. held that a draft will does not meet the threshold for the need for a court-ordered will to record “a deliberate or fixed and final expression of intention as to the disposal of the deceased’s property on death.”³</p>
<p><i>Vojska v. Ostrowski</i>, 2023 ONSC 3894 June 29, 2023</p>	<p>Decision of the Hon. Mr. Justice FL Myers</p> <p>Deceased died on September 9, 2022. Prior, the Deceased attended a lawyer’s office on October 7, 2011 to sign new wills and POAs with her husband. A total of six documents were prepared to be signed. A lawyer and law clerk witnessed the signing ceremony. The lawyer, in the midst of signing all documents, did not sign the Deceased’s will. Everyone intended all documents were properly signed and witnessed. Myers J. held that, “it is hard to imagine a more textbook example of a case for which the new power was intended.”⁴</p> <p>Despite the human error, s. 21.1(1) was applied and the will was declared to be valid and fully effective as if it had been properly executed or made.</p>
<p><i>Groskopf v. Rogers et al</i>, 2023 ONSC 5312 September 21, 2023</p>	<p>Decision of the Hon. Madam Justice A.D. Hilliard</p> <p>Deceased died on February 11, 2022. Sometime in 2004, the Deceased completed a fill-in-the blanks style document in her own handwriting. In pre-</p>

² *Cruz*, *supra* at para. 9.

³ *Estate of Young*, 2015 BCSC 182 at para. 35.

⁴ *Vojska*, *supra* at para. 12.

printed text, the document begins by stating “This is the Last Will and Testament”. The document itself was signed but not dated. There are no witnesses, however, the document does name an Executrix and an alternate. Specific bequests are set out and provision is made for the division of the residue of the estate.

The alleged will was discovered in a lock box in the home where the Deceased was living at the time of her death alongside other handwritten notes and instructions to the Executrix on how to deal with the distribution of the estate as well as a document entitled “Estate Planning and Inventory.”

Despite the objections of the respondent brother, that the purported will was a draft which did not represent a fixed and final intention on the part of the Deceased, the court found that the document should be validated as the last will and testament of the Deceased.

Notable Estates Cases from 2023

Ontario Superior Court of Justice Decisions

Cases

<i>Marttunen v. McDevitt</i>	1
<i>Di Santo v. Di Santo Estate</i>	2
<i>Dyal v. Dyal</i>	4
<i>Estate of Nordby</i>	5
<i>McKenzie v Morgan</i>	7
<i>Taetz v Mikolajewski</i>	9

***Marttunen v. McDevitt*¹**

The decision in *Marttunen* concerns the conduct of the Respondent while acting under a Power of Attorney for property for his mother. In 2018, his mother was diagnosed with dementia. The Applicant was made a co-attorney, however, denied knowing she was granted such authority at that time. In 2022, the Applicant commenced her application seeking, amongst other things, an order that the Respondent be required to pass his accounts for actions taken in his capacity as Attorney for Property of his mother.

At all material times, the Respondent was living in Alberta and his mother was living in Thunder Bay. The mother did not own a computer, had no knowledge of internet banking, and since her dementia diagnosis, has not been able to use an ATM (as she is unable to remember passwords). In July 2021, the mother had a bad fall and was admitted to Hospital. This led the Applicant to take a closer look at her mother’s finances. The Applicant discovered suspicious transactions in the amount of \$425,000.00, occurring between February 2015 and December 2021. Several of the transactions occurred in Fort Saskatchewan, Alberta. While the Respondent had lived in Fort Saskatchewan, there was no evidence the mother had ever visited him there.

¹ 2023 ONSC 208 [*Marttunen*].

The Respondent made attempts to explain the misappropriation through his affidavit. The court found he was candid in these materials, admitting that he took \$412,308.50 by way of cash withdrawals and internet banking transfers from the joint account he held with his mother. There was also a sum of \$31,665.54 which was noted as “undetermined” but were the Respondent’s responsibility to protect for his mother. He did not assert the funds were his in the first place. He admitted his mother said the funds were not a gift. He admitted he took the money for his own benefit. He admitted he did not tell her what he was doing or discussed it with her in any way. He described his actions under the power of attorney as “unfaithful”. He asked for forgiveness.

The court concluded that he held the sum of \$443,974.04 on a resulting trust for his mother. The court applied a number of equitable remedies in this case, including:

Ordering and declaring that any assets or funds held jointly between the Respondent and his mother are held in trust by the Respondent for the benefit of the mother and that the Respondent shall forthwith transfer or convey any funds or assets held jointly or in trust for the mother.

Di Santo v. Di Santo Estate²

The decision in *Di Santo* concerned the removal and replacement of the trustees under the Public and Private wills (the “Wills”) and the Vincent Di Santo 2003 Family Trust. The applicant was one of the three adult children of Vincent Di Santo (the “Deceased”).

During his lifetime, the Deceased built a successful construction business. While the Deceased was alive, he funded the applicant’s lifestyle. In fact, the motion judge found that the applicant had been permitted to live where he wanted and lead the life he wanted.³ On October 26, 2019, the Deceased passed away. His Wills provided the applicant with testamentary trusts for his lifetime, with an express provision of \$1000 per week in income for life and provided the trustees with the absolute discretion to pay

² 2023 ONCA 464 [*Di Santo*].

³ See *Di Santo*, *supra* at para. 6.

additional income and encroach on capital should they consider it appropriate to do so.⁴ The applicant successfully moved for further interim funding of professional fees and personal expenses, and the removal of the Trustees as trustees under the Wills and Family Trust and their replacement by CIBC Trust Corporation.⁵

The trustees challenged their removal and appealed to the Ontario Court of Appeal. The trustees, which included the brother and sister of the applicant, advanced two arguments on appeal. First, they argued the motion judge granted relief not sought by the applicant who they argue never sought their permanent removal.⁶ Second, they argued the motion judge erred at law by failing to consider whether it was necessary to order their replacement.

The Court of Appeal was not persuaded to interfere with the motion judge's order on the basis that the applicant had not sought the trustees' permanent removal. The Court referenced that the motion judge, writing in her endorsement of April 6, 2022, held that "a permanent removal of the Trustees has always been sought." The Court also did not agree that the motion judge failed to consider whether it was necessary to replace them and held that the trustees in fact, conceded that the motion judge cautioned herself that the threshold for the removal of a trustee is a high one and that the court will not lightly interfere with the testator's choice of estate trustee.⁷ What's more, the Court recognized that the motion judge concluded that "the Trustees are either in a position of conflict, have acted unilaterally or cannot objectively exercise their discretion."⁸

The Court of Appeal held that the motion judge considered the relevant factors and that the trustees failed to identify any error of law or palpable and overriding error. As such,

⁴ The court noted that "while the value of the estate is significant, the value of the assets in the Family Trust far exceeds the value of the estate which, as a result of an estate freeze in 2003, held the outstanding common shares of the two major business entities of the Deceased: Di Santo Holdings Ltd. ("DSHL") and 1555656 Ontario Inc. ("155").

⁵ See *Di Santo v. Di Santo Estate*, 2022 ONSC 1644.

⁶ Rather, the trustees argue that the applicant had only sought their removal pending final resolution or settlement of his application challenging the Wills and seeking a declaration that he is a dependant of the deceased, for the purpose of Part V of the *Succession Law Reform Act*, R.S.O. 1990, c. S. 26.

⁷ *Di Santo*, *supra* at para. 25.

⁸ *Ibid.*, at para. 29.

the appeal was dismissed. The parties agreed that each shall be entitled to \$80,000 in costs, payable out of the estate and the Family Trust.

Dyal v. Dyal⁹

In *Dyal*, the applicant sought a declaration that the August 28, 2000 Will of the deceased is the deceased's valid last will as well as an Order requiring the respondent to vacate a property of the estate and pay occupation rent. The respondent, who produced a different version of the deceased's will, requests a declaration that neither of the wills submitted are valid and an intestacy should result. The respondent also sought to buy out the applicant's interest in the estate property as a residual beneficiary so he could remain living there.

The deceased died on January 15, 2021 and was predeceased by his wife. Together, the deceased and his wife had two sons, the applicant and the respondent. The deceased and his wife owned a primary residence and an investment residence. In 2016, reverse mortgages were placed on both properties. The applicant alleged that the respondent influenced his parents to take out the mortgages. The respondent did not deny the allegations nor did he cross-examine the applicant regarding same. Both properties were held in joint title. When the wife died, the deceased became the owner of both properties by way of survivorship. In 2020, the properties were transferred to the applicant who submitted that he held the properties in trust for the beneficiaries of the deceased's estate. By March of 2020, the applicant, in his personal capacity and as the power of attorney for the deceased, sold one of the properties. The applicant used the proceeds of the sale to pay off the reverse mortgages, however, had to take out a line of credit registered against his home to pay off the remaining \$87,404 in mortgage debt. The estate was left insolvent.

While the respondent argued that he had lived at the property in question for the past 30 years and maintained that it was his parents' wish that he remain there during his lifetime, there was no evidence to support that this was the true wishes of the deceased. The Court held that the respondent must vacate the property in question. The court looked to

⁹ 2023 ONSC 4322 [*Dyal*].

jurisprudence in *Broos v. Broos*,¹⁰ *Filippelli Estate*,¹¹ and *Bergmann v. McMahon*¹² for guidance on occupation rent and determining an appropriate quantum of rent to be paid.¹³

The court noted that the respondent's position in defending the application was "both confusing and untenable," and that it was "a moving target for the Applicant who responded as professionally as possible in the face of ever-changing positions taken by the Respondent."¹⁴ The court held that the Original 2000 Will of the deceased was valid, that none of the handwritten notes made by the deceased before or after executing the Original 2000 Will were to be considered testamentary instruments, and that the respondent has no right to occupy the property in question and must not only vacate but also, must pay occupation rent in the amount of \$80,000.

Estate of Nordby¹⁵

In *Estate of Nordby*, the penalty for a finding of contempt pursuant to *Rule* 60.11¹⁶ was addressed in a passing of accounts case where patience with the responding party had clearly worn thin.

Pursuant to *Rule* 60.11, a contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on a motion to a judge in the proceeding in which the order to be enforced was made. This notice must be served personally and not by an alternative to personal service and should include an affidavit in support.

In *Estate of Nordby*, the Office of the Children's Lawyer ("OCL") brought an application in their capacity as the litigation guardian for the minor child and grandson of the respondent estate trustee. In that case, the respondent failed to respond to multiple requests from the

¹⁰ 2009 CanLII 68463 (Ont. S.C.).

¹¹ 2017 ONSC 4923, 33 E.T.R. (4th) 88.

¹² 2010 ONSC 993, 54 E.T.R. (3d) 49 [*Bergmann*].

¹³ The court, pursuant to *Bergmann* held that an assessment of quantum may be based on the best evidence available. In this case, that evidence was the email of a real estate agent who provided his opinion on the calculation of fair market value rent for the property in question.

¹⁴ *Dyal*, *supra* at para. 79.

¹⁵ 2023 ONSC 821 [*Nordby*].

¹⁶ *Rules of Civil Procedure*, RRO 1990, Reg 194, r. 60.11.

OCL for him to provide an accounting of estate assets. An order was obtained requiring the respondent to file accounts of the estate, however, this was not complied with. As a result, the OCL brought a motion for contempt. The respondent, despite being provided an extension of time to pass his accounts, did not purge his contempt. The OCL sought a penalty of 30 days imprisonment and costs of the motions.

Reviewing the Penalties for Contempt

In *Estate of Nordby*, the court looked at caselaw which dealt with the potential penalties for contempt of a court order in the context of estates litigation. The court notably looked at authoritative case law on the matter, including the decisions in *Poulie v Johnston*¹⁷ where a sentence of four months imprisonment for contempt was imposed and *Langston v Landen*¹⁸ where the Honourable Madam Justice Greer sentenced an estate trustee to 14 months imprisonment for contempt of various orders including failing to pass accounts.

In *Poulie*, the court applied legal principles for a finding of contempt, noting that one of the key principles to be applied in a sentence, even for civil contempt, is deterrence. In *Poulie*, LeMay J. cited McLachlin J. (as she then was) in *United Nurses of Alberta v Alberta (Attorney General)*¹⁹ who noted that “[b]oth civil and criminal contempt of court rest on the power of the court to uphold its dignity and process ... the rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect.”²⁰

The decision in *Langston* held that:

[p]roper penalties make the public sit up and take notice. The word goes out into the community that the Court will not tolerate disobedience of its Orders. In this case, the “community” is specific as well as general in nature. The specific community is that of estate trustees and other trustees, as well as persons in positions as fiduciaries, persons acting under powers of attorney or other positions of trust.²¹

The *Langston* decision is illustrative of some of the most egregious conduct demonstrated by an executor. In that case, a rogue executor failed to probate a will and embarked on a

¹⁷ 2022 ONSC 5186 [*Poulie*].

¹⁸ 2010 ONSC 6993 [*Langston*].

¹⁹ 1992 CanLII 99 (SCC), [1992] 1 SCR 901.

²⁰ *Poulie*, *supra* at 45.

²¹ *Langston*, *supra* at para. 43.

campaign of fraud and deceit, depleting millions of dollars from an estate worth over \$24 million. Over the course of seven years, the executor helped himself to estate assets, purchasing a mansion in Toronto's Forest Hill neighborhood, leasing luxury cars for all of his family members, purchasing season's tickets to the Toronto Maple Leafs and Raptors, and living an extravagant lifestyle at the expense of the estate. The fraud was discovered in 2004 when the Ontario Securities Commission investigated the executor for insider trading involving a company owned by the estate. At the time of discovery, there was less than \$1 million left.

Analysis

The OCL had been requesting an accounting of estate assets for over five years. When they were able to obtain a court order mandating the accounting, there was a long-standing breach of the order. The estate trustee demonstrated a disregard for his obligation as an estate trustee and a willful disregard for a court order. The respondent was sentenced to five days imprisonment, however, the court granted the respondent's request to file passing of accounts within 60 days of the judgment. Costs were ordered to be paid by the respondent, personally, in the amount of \$2500.

McKenzie v Morgan²²

The decision in *McKenzie* concerned an application to determine whether an attorney for property could sell one of the grantor's properties. While the attorney argued that the sale was ultimately necessary to support the grantor, the property in question had been granted to the respondent as a life leasehold interest in the grantor's Last Will and Testament.

The court in *McKenzie* looked at ss. 36 and 35.1 of the *SDA* which prohibits of a guardian of property and an attorney for property from disposing of property that is the subject of a specific testamentary gift in the person's will unless it is necessary to comply with the

²² 2023 ONSC 1457 [*McKenzie*].

guardian's duties or unless it is a gift of the property to the person entitled to receive it under the will and the gift is permitted under s. 37 of the *SDA*.

The court found that the grantor's Will contemplates a specific testamentary gift in the form of a life leasehold interest to the Respondent. In order to determine whether an attorney for property can dispose of property that is the subject of a testamentary gift, the court had to first look to the duties generally and then examine the anti-ademption provisions of the *SDA*:

[73] Section 38 of the *SDA* provides that s. 32 (except subsections (10) and (11), and sections 33, 33.1, 33.2, 34, 35.1, 36 and 37 also apply, with necessary modifications, to an attorney acting under a continuing power of attorney if the grantor is incapable of managing property or the attorney has reasonable grounds to believe that the grantor is incapable of managing property. This provision is disjunctive. These provisions apply where there is actual incapacity or reasonable grounds to believe that the grantor is incapable with respect to property (see *McDougald Estate v. Gooderham*, 2005 CanLII 21091 (ONCA), at para. 49).

[75] Where a Will contains a bequest that is not among the testator's assets when he dies, the gift is said to have adeemed and it fails (*McDougald Estate v. Gooderham*, *supra*, at para. 1).

[76] Section 36 of the *SDA* changes that rule. It sets out consequences if a guardian of property disposes of property that is subject to a specific testamentary gift. It provides:

36 (1) The doctrine of ademption does not apply to property that is subject to a specific testamentary gift and that a guardian of property disposes of under this Act, and anyone who would have acquired a right to the property on the death of the incapable person is entitled to receive from the residue of the estate the equivalent of a corresponding right in the proceeds of the disposition of the property, without interest.

(2) If the residue of the incapable person's estate is not sufficient to pay all entitlements under subsection (1) in full, the persons entitled under subsection (1) shall share the residue in amounts proportional to the amounts to which they would otherwise have been entitled.

(3) Subsections (1) and (2) are subject to a contrary intention in the incapable person's will.

[77] Section 35.1 permits the disposable of when it is necessary to comply with the duties of the guardian. It provides:

35.1 (1) A guardian of property shall not dispose of property that the guardian knows is subject to a specific testamentary gift in the incapable person's will.

(2) Subsection (1) does not apply in respect of a specific testamentary gift of money.

(3) Despite subsection (1),

(a) the guardian may dispose of the property if the disposition of that property is necessary to comply with the guardian's duties; or

(b) the guardian may make a gift of the property to the person who would be entitled to it under the will, if the gift is authorized by section 37.

In *McKenzie*, it was determined that the sale of the property was not, in fact, necessary to support the grantor. The court held that the attorney's figures regarding the grantor's assets were not reliable and that the respondent failed to explore other reasonable options for the grantor's care.

This was an important decision for lawyers advising clients and individuals acting under a power of attorney for property to be aware of. Pursuant to section 36 of the *SDA*, there are consequences if a guardian of property disposes of property that is subject to a specific testamentary gift. Anyone who would have acquired a right to the property on the death of the incapable person is entitled to receive from the residue of the estate the equivalent of a corresponding right in the proceeds of the disposition of the property, without interest. Where the residue is insufficient, the entitled persons shall share the residue in amounts proportional to the amounts they would have otherwise been entitled.

Taetz v Mikolajewski²³

The decision in *Taetz* dealt with the court's inherent jurisdiction to remove a trustee and some of the principles that guide the court's discretion. In that case, the estate trustee's lack of disclosure ultimately led to his removal.

The court's jurisdiction to remove a trustee is derived from section 37 of the *Trustee Act* which provides that:

²³ 2023 ONSC 4635 [*Taetz*].

37 (1) The Superior Court of Justice may remove a personal representative upon any ground upon which the court may remove any other trustee, and may appoint some other proper person or persons to act in the place of the executor or administrator so removed. R.S.O. 1990, c. T.23, s. 37 (1); 2000, c. 26, Sched. A, s. 15 (2).

In *Taetz*, the deceased died testate on February 5, 2022. She was survived by her daughter (the “Applicant”) and her son (the “Respondent”). The children were both estranged from each other.

The Deceased’s Will, dated April 20, 2017, bequeathed her home and all of its contents to the Applicant, with the residue to be shared equally between the Applicant and Respondent. The Respondent and his spouse were living with the Deceased during the last period of her life. The Respondent was also the Deceased’s attorney for property and personal care. Despite the Applicant’s requests, the Respondent failed to provide the Applicant with meaningful information regarding the administration of the estate. It was only after the issuance of the Applicant’s application and exactly one week before the trial that the Respondent provided this information.

According to his sworn statements, the Respondent filed the Deceased’s tax returns for 2019-2022 but has not paid the taxing owing (\$7,877). What’s more, he did not insure the Deceased’s home and admitted that he does not have time to take care of it. The Respondent’s affidavits also indicated that the estate has two Registered Retirement Income Funds accounts of which the Respondent was the beneficiary, the estate had one unregistered Guaranteed Investment Certificate account that was deposited into the estate account, the Deceased held a joint bank account with the Respondent as Power of Attorney with the amount of \$2,454.50 which was transferred to him, and the estate owes him \$6,500 for a roof that was not completed.²⁴

At the hearing, counsel for the Respondent read an email which revealed that the Respondent had a tenant living in the nanny suite of the Deceased’s home for which he had been charging \$120 per month for rent since October 2022. While the Respondent

²⁴ *Taetz*, *supra* at para. 14

intended on paying back the rental income to the estate, he recognized that the rental amount was well below market value rent.²⁵

The Law

The court in *Taetz* cited section 37(1) of the *Trustee Act* as authorizing a judge to remove an executor. Next, the court looked to the 2010 Ontario Superior Court decision in *Johnson v Lanka*.²⁶ In that decision, Justice Patillo outlined authoritative caselaw on the principles that guide the court's discretion to remove an estate trustee, holding that these can be summarized as follows:

1. The court will not lightly interfere with the testator's choice of estate trustee;
2. Clear evidence of necessity is required;
3. The courts main consideration is the welfare of the beneficiaries; and
4. The estate trustee's acts or omissions must be of such a nature as to endanger the administration of the trust.²⁷

Analysis

The court found the Respondent to be lacking credibility in regard to the roof repairs but also was found to have compromised the only asset of the estate, the deceased's home, by failing to properly insure it. The court in *Taetz* concluded that there was past misconduct on the part of the Estate Trustee who did not act in the interest of the beneficiaries. While the court did not find inordinate delay, it did find a consistent pattern of non-disclosure. As a result, the court held it was likely the misconduct would continue in the future. The court held that in order to ensure the beneficiary is aware of the details of the estate and ensure her interests are protected, a change of estate trustee is necessary.

²⁵ *Ibid.*, at para. 16 where it was reported that the tenant was a personal friend of the Respondent.

²⁶ 2010 ONSC 4124 [*Lanka*].

²⁷ See *Radford v. Radford Estate*, 2008 CanLII 45548 (ON SC), [2008] O.J. No. 3526, 43 E.T.R. (3d) 74 (S.C.J.), paras. 97-113, per Quinn J.; and *St. Joseph's Health Centre v. Dzwiekowski*, 2007 CanLII 51347 (ON SC), [2007] O.J. No. 4641, 2007 CarswellOnt 7642 (S.C.J.), paras. 25-30, per Cullity J. [page263]; See, too, *Weil (Re)*, 1961 CanLII 157 (ON CA), [1961] O.R. 888, [1961] O.J. No. 602 (C.A.); *Consiglio Trusts (No. 1) (Re)*, 1973 CanLII 681 (ON CA), [1973] 3 O.R. 326, [1973] O.J. No. 2022 (C.A.).

As a result, the Respondent was removed as estate trustee, the Applicant appointed as succeeding estate trustee, and the Respondent was ordered to transfer all records and property belonging to the estate (including the keys to the deceased's home) and to bring an application to pass his accounts within 45 days.