FINDING MISSING BENEFICIARIES

Kimberly A. Whaley[*]

1. Introduction

In general, estate trustees have a duty to administer an estate in accordance with the terms of the governing testamentary document or under statutory rules of intestacy. Complications and questions can arise however when heirs or beneficiaries cannot be identified or even located. Questions such as: what happens when you cannot identify the beneficiaries? Who are the "issue" or "children" of the deceased? What action do you take if you can identify the heirs/beneficiaries but cannot locate them? Even in an era of social media and internet prevalence, finding a missing beneficiary can take time, money and a lot of investigative work. This article will review some of these issues that may arise, as well as some suggested steps that estate trustees can take to locate missing beneficiaries.

* Partner, Whaley Estate Litigation Partners. This article is intended to provide information only and is to be used only for guidance. This article does not purport to give legal advice and should not be considered exhaustive.

2. Legal Obligation of the Estate Trustee to Locate Missing Heirs

Estate trustees have a fiduciary duty and obligation to administer an estate. Equity imposes upon trustees a duty to disclose to beneficiaries the existence of a trust in a variety of circumstances. Where the enforcement of the trust requires that a beneficiary receive notice of the trust's existence, and the beneficiary would not otherwise have such knowledge, a duty to disclose will arise.[1]

Courts have imposed an obligation on a trustee to notify beneficiaries of the existence of a trust in the context of a family trust or a trust for minors: for example, in the cases of *Hawkesley v. May*,[2] *Brittlebank v. Goodwin*[3] and *Re Short Estate*.[4] More recently, the majority in the Supreme Court of Canada decision of *Valard Construction Ltd v. Bird Construction Co*.[5] confirmed a trustee's obligation to take the steps that an honest, prudent and reasonably skillful trustee would have taken to notify potential beneficiaries of the existence of the trust.

In *Re Short Estate*, the court stated that: "It was the duty of the defendant [executor] to endeavour to locate all of those who were to benefit under the will."[6] Without this duty, the beneficiaries would have no way of knowing of their entitlement under the will or on an intestacy, and they could not ensure the trustee respected their obligations and terms.

While the duty exists, there is little guidance on how far the estate trustee must go in order to advise the beneficiary. Section 24(1) of Onatrio's *Estates Administration Act*[7] provides some indirect guidance. This provision states that an estate trustee must make "reasonable inquiries" to search for children born "outside marriage" who may be entitled to inherit. "Reasonable inquiries" is not defined and to date no cases have interpreted this section of the legislation.

Section 24(2) goes on to further provide that an estate trustee will not be liable for failing to distribute property to a beneficiary if the estate trustee made inquiries and completed a search of the records of the Registrar General, which suggested no child exists.

1. *Valard Construction Ltd. v. Bird Construction Co*., 2018 SCC 8, [2018] 1 S.C.R. 224, 418 D.L.R. (4th) 1 (S.C.C.), at para. 19.
2. (1955), [1955] 3 All E.R. 353, [1956] 1 Q.B. 304, 3 W.L.R. 569 (Eng. Q.B.).
3. (1868), L.R. 5 Eq. 545.
4. [1941] 1 W.W.R. 593, 1941 CarswellBC 13 (B.C. S.C.).
5. 2018 SCC 8, [2018] 1 S.C.R. 224, 418 D.L.R. (4th) 1 (S.C.C.).
6. *Supra*, footnote 4, at para. 5.
7. R.S.O. 1990, c. E.22.

The Ontario *Trustee Act*[8] also provides some indirect guidance. Section 53(1) provides that before final distribution it is sufficient for an estate trustee to place a notice or advertisement to satisfy the requirement to notify creditors of the existence of the estate. However, s. 53(3) states that: "Subsection (1) does not apply to heirs, next of kin, devisees or legatees claiming as such." Therefore, an estate trustee must do more than simply advertise for missing beneficiaries before distributing an estate.

Some cases have concluded that the duty to make reasonable inquiries is determined by the particular circumstances of each case. For example, the size of the estate or the size of the beneficiary's share may affect the funds available to complete an exhaustive search. A small estate or bequest may not justify as extensive a search as would a large estate or bequest.[9]

2.1 Liability

If a disappointed beneficiary shows up after the estate has been distributed, the onus is on the estate trustee to demonstrate that they made reasonable inquiries in order to avoid potential liability in negligence.[10] In *Re Short Estate* the court held that casual inquiries by an estate trustee into the whereabouts of a beneficiary were not sufficient. The court found that:

> The defendant was negligent in not ascertaining the whereabouts of the infant plaintiff . . . if inquiry was made in this connection it was of the most casual kind . . . After all, a trustee does owe duties to a *cestui que trust* and one of the first of them is to let the *cestui que trust* know of his interest and something about the trust.[11]

A lawyer representing an estate trustee should advise their client to be diligent in locating heirs to relieve themselves of possible liability. Lawyers should put in writing to their estate trustee client that while the lawyer can assist them in their search for beneficiaries,

8. R.S.O. 1990, c. T.23.
9. See *Ashman, Re* (1907), 15 O.L.R. 42, 10 O.W.R. 250, 1907 CarswellOnt 93 (Ont. Weekly Ct.); *Jones v. British Columbia (Public Trustee)* (1982), 139 D.L.R. (3d) 292, 12 E.T.R. 83, [1982] 5 W.W.R. 543 (B.C. S.C.); *Tehan, Re* (1928), 35 O.W.N. 252 (Ont. Weekly Ct.); and *Davis, Re*, [1934] O.W.N. 62, 1934 CarswellOnt 147 (Ont. H.C.).
10. See *Short Estate, Re*, [1941] 1 W.W.R. 593, 1941 CarswellBC 13 (B.C. S.C.); *Atlantic Trust Co. v. McGrath* (1969), 8 D.L.R. (3d) 225, 1 N.S.R. (2d) 103, 1969 CarswellNS 31 (N.S. C.A.); and see Carol A Dalgado, "Locating Missing Beneficiaries" Estate Administration, Law Society of Upper Canada (now the Law Society of Ontario), June 9, 2006.
11. *Supra*, at para. 5.

the estate trustee is ultimately *personally* responsible for identifying and finding those persons who are to inherit.

3. Who Will Inherit? Who are the Beneficiaries?

The named beneficiaries in the will are entitled to inherit in accordance with the deceased's instructions. Those expressly named will be readily identified. When the will simply says to "my children" or to "my next of kin" or "issue", identification will be more complex.

The same complexity may arise in an intestate estate. In Ontario, the *Succession Law Reform Act*[12] sets out who is to inherit when an individual dies without a will, depending on the next of kin who survive the deceased.

3.1 Surviving Spouse and No Issue

Section 44 of the SLRA provides that where the deceased has a spouse, but no issue, the spouse inherits the entire estate of the deceased. "Spouse", however, only includes individuals who are married, and not common law spouses. Therefore, upon an intestacy, the estate trustee would have to identify and locate any married spouse of the deceased.[13]

3.2 Surviving Spouse and Issue

Where there is both a surviving married spouse and issue (of any degree), the spouse is entitled to what is called the "preferential share", which is currently $200,000.[14] If the estate exceeds $200,000, the residue is distributed according to the number and degree of surviving issue. For example, if there is only one child, the spouse takes one-half of the residue of the estate (on top of the preferential share), and the child takes the other half.[15] If there is more than one child (or a grandchild of a deceased child), the spouse takes one-third of the residue (on top of the preferential share) and the issue take the remaining two-thirds.[16] In this scenario, the estate trustee must identify not only married spouses, but also all the surviving issue of the deceased.

12. R.S.O. 1990, c. S.26 ("*SLRA*").
13. Also note that the surviving spouse may elect to make an application for their entitlement under the *Family Law Act*, R.S.O. 1990, c. F.3, for an equalization payment or take under the intestacy provisions of the *SLRA*.
14. O. Reg. 54/95, s. 1.
15. Section 46(1) of the *SLRA*.
16. Section 46(2) of the *SLRA*.

3.3 No Spouse, Surviving Issue

When there is no surviving spouse but surviving issue, the entire estate is to be shared equally among the issue who are of the nearest degree in which there are issue surviving the deceased.[17]

3.4 No Spouse, No Surviving Issue: Ascendants and Collaterals

No spouse and no issue? The estate then will be distributed to any surviving parent, or where both parents survive to each parent in equal shares.[18] No parents? The estate would then be distributed to any surviving brothers or sisters.[19] However, if there are any children of a deceased brother or sister, those children would take that deceased's share. Where no spouse, issue, parents, brothers or sisters survive, then the estate is divided equally among nieces and nephews.[20]

No nieces or nephews either? Then the estate is distributed to the next of kin who are the closest degree of kindred to the deceased. The *SLRA* sets out how the degree of kindred should be determined.[21]

Ultimately, where a person dies intestate in respect of property, and there is no surviving spouse, issue, parent, brother, sister, nephew, niece or next of kin, the property becomes the property of the Crown, and the *Escheats Act, 2015*[22] applies.

Descendants and relatives of the deceased conceived before and born alive after the death of the deceased shall inherit as if they had been born in the lifetime of the deceased and survived him or her.[23]

These salient provisions will arm an estate trustee with the category of people to locate: issues, nieces and nephews, sisters and brothers, and so on, however, how do you identify them? Or, if you have a name, how do you find them?

4. How to Identify the Beneficiaries

4.1 Steps in the Initial Search

The estate trustee should first try and identify the beneficiaries themselves before embarking on hiring professional assistance.

17. Section 47(1) of the *SLRA*.
18. Section 47(3) of the *SLRA*.
19. Section 47(4) of the *SLRA*.
20. Section 47(5) of the *SLRA*.
21. Section 47(6) and (8) of the *SLRA*.
22. S.O. 2015, c. 38, Sched. 4.
23. Section 47(9) of the *SLRA*.

When conducting their own investigation, estate trustees should keep careful and detailed notes of the steps taken and the results.

Consider contacting family, friends, neighbours, employers or co-workers of the deceased, including other professionals such as the deceased's lawyer or accountant, or other leads. Another suggestion would be to search all of the deceased's social media accounts. Consider searching Twitter, Facebook, LinkedIn, Instagram and Snapchat, to name but a few, to learn who the deceased may have "friended" or connected with and attempt to discover whether any of those individuals have information as to the identity of the next of kin of the deceased.

Another option is to investigate historical or current public records at the Office of the Registrar General (Ontario). Generally, the estate trustee has the authority to request information with respect to death, birth and marriage records.[24] The Archives of Ontario also has several self-help research guides.[25]

Additionally, there are several genealogical websites and search engines that may assist in identifying beneficiaries.[26] If none of these options produce results, examining the personal effects of the deceased may produce leads, including review of correspondence, diaries and so on.

4.2 A Professional Researcher

An estate trustee may wish to consider hiring a professional researcher or a genealogist to assist if their own efforts fail to identify the names of any next of kin. Accredited researchers may be able to access databases not available to the estate trustee.

Ultimately, when hiring assistance in identifying beneficiaries, the responsibility lies with the estate trustee. The estate trustee should review any information or report that the professional researcher provides, ask probing questions, provide guidance and interactive support. Expenses for the researcher can be paid out of the estate, but they must be reasonable.

5. Once Identified: How to Locate Beneficiaries?

Once you have identified any beneficiaries and know their name(s), how do you find them? There are many options, but a

24. See website https://www.orgforms.gov.on.ca/eForms/start.do?_ga=2.78036308.1778740699.1558098929-346482206.1558098929.
25. Archives of Ontario, Research Guides: www.archives.gov.on.ca/en/access/research_guides.aspx.
26. For example, www.ancestry.ca.

simple Google search, Canada 411 or social media search may be successful. Consider also checking the collections of the Archives of Ontario[27] and Library and Archives Canada.[28]

The estate trustee should also consider advertising online or in newspapers located where the deceased resided, where the next of kin live, or where it is believed or known that the missing beneficiary has lived. The notice should provide as much detail as possible about the deceased to assist in the identification of possible next of kin.

The estate trustee ought to exercise caution and be live to "heir hunter" firms that keep an active eye on probate cases so as to locate missing heirs with the goal of convincing them to enter into a contract for a percentage of their inheritance (as high as 40%). There was a television series called "Heir Hunters"[29] that appeared on BBC from 2007-2017, which followed the work of probate researchers from a number of different firms in England and showed their attempts to locate missing and unknown beneficiaries before the British Treasury lawfully collected their money.

If the missing beneficiary is possibly located overseas, consider contacting the local consulate or embassy. The estate trustee could also consider hiring a private investigator to locate the missing individual. However, consider the reasonability of the cost involved, and keep records of efforts and all results of the private investigator. The responsibility for conducting due diligence in the search for the missing beneficiary still resides with the estate trustee.

6. Missing Beneficiaries and No Death Certificate: Now What?

The estate trustee has completed the searches and has come up empty handed. Some time has passed and it is likely that the missing beneficiary is deceased, but there is no death certificate. What next?

6.1 Declarations of Death Act

Pursuant to the *Declarations of Death Act, 2002*[30] an "interested person", which includes an estate trustee named in the missing person's will or a person in possession of property owned by the individual, may apply to the Superior Court of Justice for an order that a missing individual be declared legally dead. Under s. 2(3) of the Act, the court has authorization to declare that an individual has

27. See website: www.archives.gov.on.ca/en/index.aspx.
28. See website: www.bac-lac.gc.ca/eng/Pages/home.aspx.
29. See https://en.wikipedia.org/wiki/Heir_Hunters.
30. S.O. 2002, c. 14, Sched.

died if the person has disappeared "in circumstances of peril" or has disappeared for seven years or more.

On such an application, the court must be satisfied that:

> (a) the individual disappeared in circumstances of peril or has been missing for seven years or more;
> (b) the applicant has not heard of or from the individual since the disappearance or during the seven-year period;
> (c) to the applicant's knowledge, after making *reasonable inquiries*, no other person has heard of or from the individual since the disappearance or during the seven-year period;
> (d) the applicant has no reason to believe that the individual is alive; and
> (e) there is sufficient evidence to find that the individual is dead.[31]

If on an application under the *Declarations of Death Act, 2002* the court is not satisfied that there is sufficient evidence to justify an order declaring an individual to be dead, the court may make an order under the *Absentees Act*.[32]

The case of *Wasylyk v. Wasylyk*[33] provides a detailed exploration of the history of making a declaration under the *Declarations of Death Act, 2002*. In that decision, Michael Wasylyk had not been seen or heard from by his family in 16 years. His stepmother and the estate trustee for his late father's estate brought an application under the *Declarations of Death Act* for a declaration that Michael had died. The father had died intestate and his children were to share in the assets of the estate (beyond the $200,000 to which the wife was entitled). Michael's inheritance was worth approximately $37,000 and his portion had to be paid out before the estate administration could be completed.

Justice Morgan completed a detailed analysis of the English common law and American case law dealing with a declaration that a missing individual is dead, noting that the onus on the applicant to make "reasonable inquiries" into the whereabouts of the missing person is aimed at preventing the Act's misuse. There must be safeguards in place, otherwise this Act could be used by an unscrupulous individual to transfer property into another's ownership.

Justice Morgan observed that:

> Thus, while the court ought not hold the applicant's onus under the Act so high as to require that "the party seeking to establish the presumption

31. Section 2(4) and (5) [emphasis added].
32. R.S.O. 1990, c. A.3.
33. 2012 ONSC 7029, 86 E.T.R. (3d) 67, 224 A.C.W.S. (3d) 236 (Ont. S.C.J.).

> [of death] be a wealthy mind-reader". . . it only makes sense that the facts surrounding the person's disappearance be shown to suggest death and not be susceptible to alternative explanation, *Eagle v. Emmet*, 4 Brad.117 (NY Surr Ct, 1856).[34]

Michael was last seen by his family in 1996. His sister testified that on the last occasion that she saw him, Michael was selling off his possessions and was preparing to "go away somewhere". Her impression was that something was wrong, but Michael would not explain himself. He also went to say "goodbye" to other family members. The family never filed a missing persons report, nor did they call the police. However, the applicant's step-mother hired a private investigator, who completed a short investigation with "obvious gaps" and came up empty handed. He noted he did not have the resources to follow up on some leads (including to make some phone calls to the United States). The investigator concluded that it was "quite possible that Mr. Wasylyk has also moved further south into Mexico, which seems to be the current place of choice to hide from other people in Canada". The private investigator's report also stated that Michael was "currently not an incarcerated inmate, nor has he been under the Ministry [of Corrections] control, *recently*".[35]

Justice Morgan found that while Michael clearly vanished from his family and home, the circumstances of his departure in 1996 left open questions and that his actions suggested "flight" rather than "death". The private investigator's investigation was not thorough, there was no investigation by the police, no news coverage of the disappearance and no publication of any kind of his disappearance.

Justice Morgan dismissed the application, but concluded that what was required was some public notification of the search for Michael, perhaps in the form of a newspaper notice in one of the national newspapers, and some follow-up questions of title to Michael's house along with some phone calls to the small number of similarly named persons in the United States. Given the size of the estate, Justice Morgan did not expect the search to extend to Mexico. The applicant was permitted to reinstate the application once all "reasonable further steps" had been taken.

In *Puffer v. The Public Guardian and Trustee*,[36] Robert Puffer disappeared on June 26, 2007, after informing his sister that he was leaving to go to the cottage. The following day his brother called the

34. *Supra*, at para. 13.
35. *Supra*, at paras. 21 and 22 [emphasis added].
36. 2012 ONSC 3579, (*sub nom.* Puffer, Re) 80 E.T.R. (3d) 285, 216 A.C.W.S. (3d) 1055 (Ont. S.C.J.).

cottage but there was no answer. He then travelled to the cottage and could not find Robert. The brother did notice that a green kayak was missing. The sister contacted the police and notified them that Robert was missing. A website was launched to assist police with the investigation, but there were no "useful leads". The brother tracked down Robert's bank accounts and concluded that there had been no activity since the day he disappeared. Posters of Robert and the missing kayak were posted around cottage country and there was significant media coverage, including articles in the Globe and Mail, Toronto Star, Cottage Life magazine and other local newspapers. Robert's profile was posted on, "North America's Missing Person" website, and on the "GTA's Most Wanted on Rogers Cable Network". None of this produced any information about Robert's location.

The Ontario Provincial Police found Robert's vehicle with his glasses, a sleeping bag and clothes. It was not locked. The police concluded that the arrangement of the seats and the shape "of the ark of sand" in the vehicle indicated that Robert had transported the kayak to the dock near where the vehicle was parked. The OPP searched for Robert and the missing kayak by ground, with underwater divers, by air and by boat. In December 2008, the brother and sister hired a private investigator, who failed to find any evidence of Robert's location or financial footprint either in Canada or the United States.

In 2012, five years after his disappearance, Robert's brother commenced an application under the *Declarations of Death Act,* seeking an order declaring that his brother had died on the day he disappeared. Robert had $760,000 worth of assets.

Based on all of the efforts made by the brother and sister to locate Robert, Justice Lederer had "no difficulty in finding that reasonable inquiries were made and that neither the applicant nor any other person [had] heard of or from Robert",[37] and that there was no reason to believe that Robert was alive. However, since it had not been seven years, the court had to be convinced that Robert disappeared "in circumstances of peril" which meant in a "situation of serious and immediate danger". Taking a kayak into the water was not placing oneself in immediate danger. Nevertheless, the brother provided evidence that Robert had been diagnosed with generalized anxiety disorder, and obsessive-compulsive disorder, and had tried to take his own life by overdosing on alcohol and pills in 2006. In treatment afterwards, Robert told his doctor that if he

37. *Supra*, at para. 12.

was going to kill himself, he would "sedate himself with medication and walk into a lake". In the months leading up to his disappearance his family was worried he was suicidal. However, when he was discharged from a hospital stay shortly before he disappeared, there was a "lack of any suicidal ideation". There was also no suicide note, or any other direct statement or demonstration of the decision to die by suicide.

In a similar case, *Poole v. Poole*,[38] the individual had severe depression, had attempted suicide in the past, his psychiatrist felt that he was at risk of harming himself, he told his psychiatrist that the next time he attempted suicide he would do it right and no one would find him, and he left his affairs in order with a suicide note.

Justice Lederer distinguished *Poole*, and concluded that:

> In this case, as much as it may appear that Robert Alan Puffer has died and as much as it may seem that there is little to be gained by failing to declare him dead, this situation does not comply with the requirements of the *Declarations of Death Act, 2002*. To my mind, it has not been demonstrated that, at the time he disappeared, on a balance of probabilities, Robert Alan Puffer was in circumstances of peril as called for by that legislation. The fact that he had, on one occasion in the past, taken sleeping pills that could have killed him, the fact that his family was concerned and had not long before placed him in a hospital to be assessed is not enough to conclude he was suicidal and, thus, in a circumstance of peril. The discharge notes tend to confirm this conclusion. This does not change because his car was found in a parking lot near the water and that there was some indication of the missing kayak being taken from the car to the water. There is not enough here to show he went out on the water with the intent of killing himself.[39]

Justice Lederer declined to make an order declaring Robert to be dead, but had no difficulty finding that he was an absentee under the *Absentees Act*, and appointed his brother as committee of his property.

6.2 Absentees Act

Under the *Absentees Act*,[40] an "absentee" means "a person who, having had his or her usual place of residence or domicile in Ontario, has disappeared, whose whereabouts is unknown and as to whom there is no knowledge as to whether he or she is alive or dead". Upon

38. (2008), 65 C.C.L.I. (4th) 283, 41 E.T.R. (3d) 223, 2008 CarswellOnt 4103 (Ont. S.C.J.).
39. *Puffer*, *supra*, at para. 29.
40. R.S.O. 1990, c. A.3, s. 1.

application, the court may declare the person an "absentee". Such an application may be made by several individuals including next of kin, a creditor, married spouse or "any other person".[41]

The court may then make an order for the custody, care and management of the property of the absentee, and a committee may be appointed for this purpose. The committee has the same powers and is subject to the same duties as a guardian of property under the *Substitute Decisions Act, 1992*.[42] The committee is also specifically authorized to expend monies for the purposes of locating the absentee and in ascertaining whether he or she is alive or dead.[43]

In *Re Lu*,[44] the applicant's husband disappeared on October 30, 2007. In 2008, the wife brought an application to have her husband declared an "absentee". Neither the wife nor the daughter had contact with Mr. Lu and he had not contacted anyone else in his family. As well, he missed several important holidays with the family, which was atypical for him. On the application, the wife filed a newspaper article as part of her evidence, which suggested that the police thought Mr. Lu was a loan shark and had been killed. The wife also testified that the car her husband normally drove had gone missing.

Brown J. (as he then was) was satisfied that the evidence demonstrated that "due and satisfactory inquiry" had been made into his whereabouts, that he had disappeared, his whereabouts were unknown and there was no knowledge if he was dead or alive, and declared him an "absentee". The wife was appointed committee.

The Ontario Court of Appeal has warned, however, that the *Absentee Act* "is not intended to cover cases in which a man for his own purposes conceals himself".[45] As was the case with the Hakze sisters from Canada who had been missing for decades (since the 1980s), but were recently found alive and well in the United States. They had left due to "family turmoil" and simply wanted to "move on". They changed their names and were happily living in another country, and did not realize that they had been reported missing.[46]

41. Section 2(2).
42. S.O. 1992, c. 30.
43. *Absentees Act*, ss. 6-7.
44. (2008), 43 E.T.R. (3d) 153, 169 A.C.W.S. (3d) 906, 2008 CarswellOnt 5342 (Ont. S.C.J.).
45. *McCarthy, Re* (1923), 53 O.L.R. 482, [1923] O.J. No. 156 (Ont. C.A.), at para. 10.
46. See CBC article, "2 Alberta sisters missing for decades found in U.S. by Lethbridge police", at https://www.cbc.ca/news/canada/calgary/alberta-missing-women-found-lethbridge-hakze-sisters-police-missing-cold-case-1.4006836.

6.3 Advice and Direction from the Court: Application to Ascertain Heirs

The estate trustee may have to consider bringing an application for advice and directions from the court, and obtaining protection of a court order, before distributing the assets of the estate when a beneficiary or beneficiaries cannot be identified or located. The application to ascertain heirs of an estate is commenced either by the estate trustee or by one or more of the alleged heirs by way of Notice of Application pursuant to rule 14.05(3)(a), (b) and (d) of the *Rules of Civil Procedure*.[47]

In this regard, the applicant should provide the court with an affidavit setting out detailed information about the deceased, including date of death, value of the estate, date on which the Certificate of Appointment was granted, a comprehensive list of the various searches conducted and the outcome of those searches, along with any supporting material such as birth certificates, marriage certificates, death certificates, and so on. Preparing a family tree as evidence of the estate trustee's knowledge of the beneficiaries would be wise and would assist the court. The estate trustee should maintain a neutral position at the hearing.

6.4 "Benjamin Orders"

The Benjamin Order is derived from the Chancery decision in *Benjamin, Re*.[48] In that case, the testator was survived by 12 children. A thirteenth, Philip, had disappeared while on vacation, after he was suspected of having embezzled money from his employer. The court noted that the onus to provide that Philip survived was on his administration. The burden was not discharged. There was no reason why Philip would continue to absent himself in the circumstances. An order was made which permitted the distribution of the estate as if Philip had predeceased the testator.

The *Benjamin* case has been followed in other cases including in *Green's Will Trusts, Re*[49] and in the Canadian decision of *Wieckoski Estate, Re*.[50]

In *Wieckoski*, on a motion the Public Guardian and Trustee sought direction as to whether or not sufficient steps had been taken to locate any potential issue of Chester Wieckoski and, if sufficient steps had been taken, whether the estate could be distributed on the

47. R.R.O. 1990, Reg. 194.
48. [1902] 1 Ch. 723 (Eng. Ch. Div.).
49. (1984), [1985] 3 All E.R. 455 (Eng. Ch. Div.).
50. 2013 SKQB 297, 91 E.T.R. (3d) 305, 428 Sask. R. 53 (Sask. Q.B.).

ground that no such issue now existed. The court considered that the sufficiency of inquiries made to find missing beneficiaries depends on the facts and that the following questions may assist in determining the adequacy of those enquiries:

- Why is the question being asked? Is there specific evidence that there is or may be a missing beneficiary, or does the question arise . . . as a result of the circumstances?
- How much time has elapsed since the death of the testator?
- What are the specific steps that have been taken, and over what period of time, to answer the question?
- Who has conducted the enquiries? Were they appropriately qualified to investigate the matters at issue?
- Do the enquiries take due account of matters such as the possible location of the beneficiary or of potential evidence as to the matter at issue?
- Is it possible that pursuing further avenues of enquiry, or deferring the decision, might result in a claim or generate further information? What is the cost and delay associated with pursuing those avenues, and what is the likelihood they may succeed?
- What is the amount at stake?[51]

The court was satisfied that sufficient enquiries had been made to identify the beneficiaries of the estate. A research firm was retained and there appeared to "be no issues that have not been investigated by well qualified genealogists". Enquiries were made in all "appropriate jurisdictions, including extensive searches in Poland". As well, all of the leads disclosed by the evidence were appropriately followed up. The court made an order "consistent with the form of order made in *Benjamin, Re*" that the applicant was permitted to distribute the estate on the basis that the applicant had conducted thorough and extensive searches that had produced no evidence of other beneficiaries.

Kapousouzian Estate v. Spiak[52]

This decision involved a motion for opinion, advice and direction of the court by an estate trustee. The named beneficiaries were cousins of the deceased and all siblings. Three of the four beneficiaries predeceased the testator. However, the testator's will did not

51. *Supra*, at para. 23.
52. 2014 ONS*C* 2355, 240 A.C.W.S. (3d) 1051, 2014 CarswellOnt 7387 (Ont. S.C.J.).

provide for a gift over if any of the four named beneficiaries predeceased the testator.

It is a general rule that where a residual gift lapses, it passes on an intestacy. This rule is subject to two exceptions: (1) where the residual gift is a class gift; and (2) where there is a contrary intention found in the will. The court found that there was no class gift to the named beneficiaries. And while the court found *some* evidence to support a contrary intention, the court concluded that the evidence was not sufficient to find an intention that the lapsed residuary gifts should devolve upon the named beneficiaries. Therefore, pursuant to s. 47(6) of the *SLRA*, the residue was to be divided "among the next of kin of equal degree of consanguinity to the intestate equally without representation".

The estate trustee had made extensive efforts to locate any other relatives of the deceased and identified two next of kin, maternal first cousins of the deceased who lived in Bulgaria. Over two years had passed since the testator died and all other efforts by an investigator did not turn up any other living relatives. It had not been possible to identify any living blood relatives other than the one living named beneficiary: "The prospect of locating other living blood relatives appears very unlikely, given that the search for records of persons named Kapousouzian in Greece has not yielded any positive result."[53]

The estate trustee conducted inquiries through the testator's known friends and through the persons named in the will. With the assistance of a qualified investigator in Bulgaria and counsel in Greece, extensive efforts, including archival searches, phone calls and social media contact, were made in a targeted manner. The court concluded that the Bulgarian cousins appeared to be the deceased's closest identifiable next-of-kin, and that the estate trustee "discharged his duty to ascertain and locate [the testator's] next of kin who would take on an intestacy". The court was also satisfied that this was an appropriate circumstance to make a Benjamin Order permitting a distribution of the intestate portions of the estate to the Bulgarian cousins equally on the basis that they were the only surviving next of kin.

53. *Supra*, at para. 9.

Steele v. Smith[54]

In this decision, the estate trustee bought an application seeking a Benjamin Order which would permit him to distribute the residue of the estate as if one of the named beneficiaries had predeceased the testator. The court quoted from Graham Virgo,[55] commenting on the use of a Benjamin Order:

> Whilst it is true that the effect of making a Benjamin order is simply to protect the trustee and to enable trust property to be distributed without having to wait until what might be unprovable can be proved, the order may sometimes have substantive effects on the beneficial interest; if a trustee does distribute trust property on the assumption that a beneficiary is dead and that beneficiary then comes forward, the beneficiary will not be able to recover the property if it has been dissipated or has been sold to a bona fide purchaser for value. In such circumstances, the beneficiary cannot sue the trustee for breach of trust, because he or she will be protected by the *Benjamin* order. The only hope will be to bring a personal claim against the recipient of the trust property [under the rule in *Ministry of Health v. Simpson*, [1951] A.C. 51]. But the real advantage of the *Benjamin* order is that it allows trust property to be distributed whilst leaving open the possibility of the lost beneficiary coming forward and claiming what is rightfully his or hers if any property remains undistributed.[56]

In this case the testator left 60% of her estate to be divided equally among her three brothers and should they predecease her, their portion was to be divided between her two nieces. Two of her brothers predeceased her. The third, who was born in 1925, could not be located despite the estate trustee's extensive efforts. Those efforts included online searches, contacting family members and employing a UK tracing company.

The Public Guardian and Trustee suggested that the missing brother's share be paid into court while the estate trustee took further steps to find him. The Public Guardian and Trustee noted that the missing brother had a son who was apparently conceived during an illicit affair between the missing brother and his sister-in-law. The son was given up for adoption after his birth. The Public Guardian and Trustee suggested contacting the sister-in-law or the son for information. The estate trustee however noted that the record showed that the son's half-brother was contacted, and he

54. 2018 ONSC 4601, 294 A.C.W.S. (3d) 669, 2018 CarswellOnt 12315 (Ont. S.C.J.).
55. Graham Virgo, *The Principles of Equity and Trusts*, 3rd ed. (Oxford University Press, Oxford, 2012).
56. *Steele v. Smith*, at para. 7.

advised that his mother (the sister-in-law) did not want to speak about the missing beneficiary and that the son she gave up for adoption had no information about his father.

Justice Rady granted a Benjamin Order and was satisfied that the estate trustee had "gone to extensive lengths to determine [the missing beneficiary's] whereabouts". Also, that there was "no reason now why he would choose not to be found. He may well have had a reason at one time (i.e. the discovery of his affair . . . by his brother . . . who threatened him). However, [the brother] died long ago."[57]

In Justice Rady's view, the estate trustee had "exhausted the available avenues of inquiry" and there was no evidence that further efforts would yield positive results. There was "really no useful purpose to be served by paying the funds into court where it is highly unlikely they would be claimed".[58]

7. Conclusion

The steps that an estate trustee must take to identify and locate missing beneficiaries will depend on the facts and circumstances of that individual case. However, the estate trustee must with certainty establish the steps taken, which means documenting all efforts made in order to prove that reasonable efforts were exhausted, and there was no negligence in attempts undertaken to locate the beneficiaries. Further, if an application must be brought either for advice and/or directions, or pursuant to the *Declarations of Death Act* or *Absentees Act*, the estate trustee must be able to provide evidence of the searches conducted and investigative tools used.

57. *Supra*, at para. 10.
58. *Supra*, at para. 11.