



FINDING MISSING BENEFICIARIES

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1. INTRODUCTION

Generally, 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. However, complications and questions can arise when heirs or beneficiaries cannot be identified, or even located, such as:

- ❖ what happens when you cannot identify the beneficiaries?
- ❖ who are the “issue” or “children” of the deceased? and,
- ❖ 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. The purpose of this paper is to review some of these issues and suggest some steps that estate trustees can take to assist in locating missing beneficiaries.

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. For example, a duty to disclose arises when the enforcement of a trust requires that a beneficiary receive notice of the trust's existence, for without this notice the beneficiary would not otherwise have knowledge of this trust.¹

Historically, courts have imposed an obligation on a trustee to notify beneficiaries of the existence of a trust in the context of a family trust and/or a trust for minors: for example,

¹ *Valard Construction Ltd. v Bird Construction Co.*, [2018] 1 SCR 224, 2018 SCC 8 (CanLII) at para 19 [Valard].

see *Hawkesley v. May*²; *Brittlebank v. Goodwin*³; and, *Re Short Estate*⁴. More recently, with respect to a trustee's duty to disclose, in the Supreme Court of Canada decision of *Valard Construction Ltd v. Bird Construction Co.*⁵, the majority of the Court confirmed that a trustee is obligated 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, supra*, the court stated that, "[i]t was the duty of the defendant [executor] to endeavour to locate all of those who were to benefit under the will."⁶ This is, after all, a logical assertion as it is plausible that without notification from an estate by way of its trustee a given beneficiary may not know of the death of a testator/intestate, let alone any resultant entitlements, as was the case in *Re Short Estate*.

Despite there being little guidance in statute or caselaw on how far an estate trustee must go in order to fulfill their duty to disclose, there are some insights to be gleaned about what an estate trustee must do in order to advise a beneficiary of their entitlements. For example, subsection 24(1) of Ontario's *Estate Administration Act*⁷, provides that an Estate Trustee must make "reasonable inquiries" to search for children "born outside of marriage" who may be entitled to inherit. It should be noted that "reasonable inquiries" is not a defined term, and, to date, no case law has interpreted this section of the legislation. Additionally, subsection 24(2) of the *Estate Administration Act, supra*, provides that an Estate Trustee will not be liable for failing to distribute property to a beneficiary if the Estate Trustee has made inquiries and completed a search of the Registry General that suggested no such child exists.

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

² *Hawkesley v May* [1956] 1 Q.B. 304.

³ *Brittlebank v Goodwin* (1868) L.R. 5 Eq. 545.

⁴ *In re Short Estate*, [1941] 1 W.W.R. 593, 1941 CanLII 421 (BC SC) [*Re Short Estate*].

⁵ *Valard, supra* note 1.

⁶ *Re Short Estate, supra* note 4, p. 595.

⁷ *Estates Administration Act*, R.S.O. 1990, c. E.22.

of the beneficiary's share, may affect the funds available to complete an exhaustive search. Put another way, a small estate or bequest may not justify as extensive a search as a large estate or bequest would.⁸ Accordingly, if a disappointed beneficiary raises a claim after an 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.⁹ In *Re Short Estate*, *supra*, the court held that casual inquiries by an estate trustee into the whereabouts of a beneficiary were not sufficient to discharge their duty:

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.¹⁰

Additionally, with respect to liability, Ontario's *Trustee Act*¹¹ touches upon the duty of an Estate Trustee as it pertains to distribution of an estate vis-à-vis the estate's creditors. Subsection 53(1) of the *Trustee Act* provides, among other things, that once an estate is free and clear for distribution (i.e., it is free of notices from creditors of the estate) an Estate Trustee will not be held liable to an unknown creditor for the distribution. Put another way, an Estate Trustee will not be liable for distributing assets of an estate when, at the time of distribution, the Estate Trustee did not know of any creditor who may have an active claim against the estate.

Furthermore, subsection 53(3) provides that subsection 53(1), "does not apply to heirs, next of kin, devisees or legatees claiming as such". Thus, with respect to persons who claim in the capacity of beneficiaries or next of kin and therefore stand to benefit from the estate, the Estate Trustee will not be as shielded from liability. Therefore, although it is

⁸ See *Re Ashman* (1907), 15 OLR 42; *Jones v British Columbia (Public Trustee)*, [1982] 5 WWR 543 (BCSC); *Re Tehan* (1928) 35 OWN 252 (HCJ); and *Re Davis*, [1934] OWN 62 (HCJ).

⁹ See *Re Short Estate*, *supra* note 4; *McGrath v Atlantic Trust Co* (1969), 8 DLR (3d) 225; and Carol A. Dalgado, "Locating Missing Beneficiaries" Estate Administration, Law Society of Upper Canada (as it then was) June 9, 2006.

¹⁰ *Re Short Estate*, *supra* note 4, p. 595–596.

¹¹ *Trustee Act*, R.S.O. 1990, c. T.23.

not an obligation under the *Trustee Act*, it would behoove an Estate Trustee to make more than a cursory investigation into the creditors of an estate before its distribution.

Given the above with respect to liability and inquiries into beneficiaries and/or creditors of an estate, it is suggested that a lawyer representing an Estate Trustee advise their client to be diligent in locating heirs in order 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, 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?

Named beneficiaries in a Will are entitled to inherit in accordance with the deceased's instructions. Those expressly named are readily identifiable, while identification of those labeled as "my children," "my next of kin" or "issue" will be more complex.

3.1 Considerations when distributing an estate with a Will

3.1.1 Separated Spouses and Bill 245

Estate Trustees should be aware of the recent amendments to Part I of Ontario's *Succession Law Reform Act*, R.S.O. 1990, c. S.26¹². Bill 245, the *Accelerating Access to Justice Act, 2021*¹³, assented to April 19, 2021, is a large omnibus Bill that amends various Ontario statutes and regulations, including the *Succession Law Reform Act* as it relates to testate estates and separated spouses.

Prior to Bill 245 taking effect, section 17 of the *Succession Law Reform Act*, *supra*, provided that if the marriage of a testator is terminated or declared a nullity then the testator's Will shall be construed as if the former spouse had predeceased the testator such that any devises, bequests, appointments, or conferring of powers of appointments to the former spouse would be revoked. However, as of January 1, 2022, except where a contrary intention appears in a Will, section 17 is amended, adding section 17(3), that

¹² *Succession Law Reform Act*, R.S.O. 1990, c. S.26 [SLRA].

¹³ *Accelerating Access to Justice Act, 2021*, S.O. 2021, c. 4.

provides other specified instances of separation between married spouses that would have the same result, such as: living separate and apart for a period of 3 years; a separation agreement; court order; or a family arbitration award.

Bill 245 further amends the section 17 to include section 17(4) that now defines when a spouse is considered to be separated, including if,

❖ before the testator's death:

they lived separate and apart for three years as a result of the breakdown of the marriage;

they entered into a valid separation agreement under Part IV of the *Family Law Act*;

a court made an order with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage, or

a family arbitration award was made under the *Arbitration Act, 1991* with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage; and

❖ at the time of the testator's death, they were living separate and apart as a result of the breakdown of the marriage.

Estate Trustees should note that these amendments take effect in circumstances where a Will names a former spouse who has been separate but not divorced for at least three years prior to the death of the testator that must occur after December 31, 2021.

3.2 Considerations in the intestacy context

Similar to testate estates, complexity may arise in the distribution of an intestate estate. Thankfully, the *Succession Law Reform Act, supra*, sets out who is to inherit when an individual dies intestate (i.e., without a Will).

3.2.1 Separated Spouses

Spousal separation complicates the intestacy analysis. A spouse's entitlement to property does not apply when spouses are separated at the time of the deceased's death.¹⁴ For greater certainty, a spouse will be considered separated for this purpose if:

- ❖ immediately preceding the death of the deceased, due to a breakdown of the marriage the spouses lived separate and apart for a period of three years;¹⁵
- ❖ preceding the death of the deceased, the spouses entered into an agreement that forms a valid separation agreement under Part V of the *Family Law Act*, R.S.O. 1990 c. F.3;¹⁶
- ❖ preceding the death of the deceased, a court makes an Order with respect to the spouses' rights and obligations in settlement of their affairs arising from a breakdown of marriage;¹⁷ or
- ❖ preceding the death of the deceased, a family arbitration award is made under the *Arbitration Act, 1991*, S.O. 1991, c. 17, with respect to the spouses' rights and obligations in settlement of their affairs arising from a breakdown of marriage.¹⁸

3.2.2 Who qualifies as a "spouse"?

The term "spouse" only includes individuals who are legally married, and does not include common law spouses. Therefore, on an intestacy, an estate trustee would have to identify and locate any married spouse of a deceased.¹⁹

¹⁴ *Ibid*, s. 43.1(1).

¹⁵ *Ibid*, s. 43.1(2)(a)(i). See also, *SLRA*, *supra* note **Error! Bookmark not defined.**, s. 43.1 (2)(b).

¹⁶ *Ibid*, s. 43.1(2)(a)(ii).

¹⁷ *Ibid*, s. 43.1(2)(a)(iii).

¹⁸ *Ibid*, s. 43.1(2)(a)(iv).

¹⁹ 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 to take under the intestacy provisions of the *Succession Law Reform Act*, discussion of which is outside the scope of this paper.

3.2.3 The “preferential share”

Under the *Succession Law Reform Act, supra*, on an intestacy, a surviving spouse is entitled to claim a portion of the estate known as the “preferential share”, that is carved out of an intestate estate in priority to issue. The preferential share is a standard amount historically quantified as \$200,000, however, this amount was updated in 2021 when Ont. Reg. 121/21 amended Ont. Reg. 54/95 of the *Succession Law Reform Act, supra*, and increased the amount to \$350,000.00. The consequences of this amendment are that a surviving spouse of a deceased who died *before* March 1, 2021 is entitled to a preferential share of \$200,000, whereas the spouse of a deceased who died *after* March 1, 2021 is entitled to \$350,000.

Additionally, note that should an estate’s value exceed the value of the preferential share (i.e., \$200,000 or \$350,000, as the case may be) the residue of the estate²⁰ is distributed according to the number of surviving issue and their degree of separation from the deceased.

3.3 Summary of intestate distribution under Part II, Succession Law Reform Act

The following provides a non-exhaustive overview of intestate distribution under the *Succession Law Reform Act, supra*.²¹

²⁰ The “residue” of an estate is the property that forms an estate that is otherwise not gifted to a specific beneficiary.

²¹ For complete statutory provisions on division of an estate upon an intestacy, see Part II of the *SLRA, supra*.

Statutory Reference	Examples
<i>SLRA</i> , s. 44 <ul style="list-style-type: none"> ❖ spouse ❖ no issue 	Where the deceased is survived by spouse with no issue, the surviving spouse stands to inherit the entire estate.
<i>SLRA</i> , s. 46(1) <ul style="list-style-type: none"> ❖ spouse ❖ one child 	Where the deceased is survived by spouse and one child, the surviving spouse is entitled to take their preferential share and half of the residue of the estate while the child takes the other half of the residue.
<i>SLRA</i> , s. 46(2) <ul style="list-style-type: none"> ❖ spouse ❖ more than one child 	Where the deceased is survived by spouse and two children, the surviving spouse is entitled to take their preferential share and one third of the residue while the issue takes the remaining two-thirds in equal shares. ²² ***Note that in this scenario, the estate trustee must identify not only married spouses but also all surviving issue of the deceased.
<i>SLRA</i> , s. 47(1) <ul style="list-style-type: none"> ❖ no spouse ❖ surviving issue 	Where the deceased has no surviving spouse but has surviving issue, generally, 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.
<i>SLRA</i> , s. 47(3) <ul style="list-style-type: none"> ❖ no spouse ❖ no surviving issue ❖ one surviving parent 	Where the deceased has no surviving spouse, no surviving issue, but has one surviving parent, that sole parent stands to inherit the entire estate.
<i>SLRA</i> , s. 47(3) <ul style="list-style-type: none"> ❖ no spouse ❖ no surviving issue ❖ two surviving parents 	Where the deceased has no surviving spouse, no surviving issue, but has both parents surviving, each parent stands to inherit the estate in equal shares.
<i>SLRA</i> , s. 47(4) <ul style="list-style-type: none"> ❖ no spouse ❖ no surviving issue ❖ no surviving parents ❖ surviving siblings 	Where the deceased has no surviving spouse, no surviving issue and no surviving parents, the estate is to be distributed equally to any surviving sibling(s). If said sibling has predeceased the intestate, but has left issue, then the issue of the predeceased sibling will inherit in their stead.
<i>SLRA</i> , s. 47(5) <ul style="list-style-type: none"> ❖ no spouse ❖ no surviving issue 	Where the deceased has no surviving spouse, no surviving issue, no surviving parents and no surviving sibling(s), the

²² *Ibid*, s. 46(2).

	<ul style="list-style-type: none"> ❖ no surviving parents ❖ no surviving siblings ❖ surviving nieces or nephews 	estate is to be distributed equally among nieces and nephews.
SLRA, ss. 47(6) and 47(8)	<ul style="list-style-type: none"> ❖ no spouse ❖ no surviving issue ❖ no surviving parents ❖ no surviving siblings ❖ no surviving nieces or nephews 	Where the deceased has no surviving spouse, no surviving issue, no surviving parents, no surviving sibling(s) and no nieces or nephews born or surviving, the estate is to be distributed to the next of kin who are the closest degree of kindred to the deceased.
SLRA, s. 47(7)	<ul style="list-style-type: none"> ❖ no spouse ❖ no surviving issue ❖ no surviving parents ❖ no surviving siblings ❖ no surviving nieces or nephews ❖ no next of kin 	Where the deceased has no surviving spouse, no surviving issue, no surviving parents, no surviving sibling(s), no nieces or nephews born or surviving and no next of kin, the estate becomes property of the Crown and subject to the application of the <i>Escheats Act, 2015</i> , S.O. 2015, c. 38, Sched. 4.
SLRA, s. 47(9)	<ul style="list-style-type: none"> ❖ descendants and relatives conceived before, but born alive after, the death of the deceased 	Where the deceased has descendants and relatives who were conceived before the deceased's death, but born after the deceased death, that descendant and relative shall inherit as if they had been born in the lifetime of the deceased and had survived him or her.

The provisions of Part II of the *Succession Law Reform Act*, *supra*, tell an Estate Trustee which the category of people to locate (e.g., issue, nieces and nephews, siblings, etc.) However, it says nothing about how an Estate Trustee is to identify these people, or, even if the Estate Trustee has a name, how one can find them.

4. HOW TO IDENTIFY THE BENEFICIARIES?

4.1 Steps in the Initial Search

An Estate Trustee should first try and identify the beneficiaries themselves before embarking on hiring professional assistance. When conducting their own investigation, estate trustees should keep careful and detailed notes of the steps taken and the results.

As a suggestion, consider contacting family, friends, neighbours, employers or co-workers of the deceased, including other professionals such as the deceased's lawyer, accountant or other leads.

Another suggestion would be to search all of the deceased's social media accounts. Consider searching Twitter, Facebook, LinkedIn or Instagram, 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, an Estate Trustee has the authority to request information with respect to death, birth and marriage records.²³ Note that the Archives of Ontario also has several self-help research guides that may be useful.²⁴

Additionally, there are several genealogical websites and search engines that may assist in identifying beneficiaries (e.g., Ancestry²⁵).

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 a professional to identify 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

²³ See ServiceOntario's webpage, "Online Certificate Application" at https://www.orgforms.gov.on.ca/eForms/start.do?_ga=2.78036308.1778740699.1558098929-346482206.1558098929.

²⁴ See Ontario: Ministry of Public and Business Service Delivery, Archives of Ontario: Research Guides at http://www.archives.gov.on.ca/en/access/research_guides.aspx.

²⁵ See www.ancestry.ca.

interactive support. Expenses for the researcher can be paid out of the estate, but they must be reasonable.

5. IDENTIFYING BENEFICIARIES CONCEIVED AND BORN POSTHUMOUSLY

An Estate Trustee's duty to locate missing beneficiaries requires the Estate Trustee to consider whether there have been beneficiaries who were conceived and born posthumously.²⁶

On September 29, 2016, Ontario introduced Bill 28, All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016²⁷ which came into force on January 1, 2017. Bill 28 provides amendments to the *Succession Law Reform Act*, *supra*, that function to include a child conceived and born alive after a biological parent's death, upon meeting certain conditions set out in section 1.1 of the *SLRA*:

1.1 (1) The following conditions respecting a child conceived and born alive after a person's death apply for the purposes of this Act:

1. The person who, at the time of the death of the deceased person, was his or her spouse, must give written notice to the Estate Registrar for Ontario that the person may use reproductive material or an embryo to attempt to conceive, through assisted reproduction and with or without a surrogate, a child in relation to which the deceased person intended to be a parent.
2. The notice under paragraph 1 must be in the form provided by the Ministry of the Attorney General and given no later than six months after the deceased person's death.
3. The posthumously-conceived child must be born no later than the third anniversary of the deceased person's death, or such later time as may be specified by the Superior Court of Justice under subsection (3).

²⁶ See Kimberly A. Whaley and Matthew A. Rendely, "Posthumously-Conceived Children Born in Ontario: What are Their Rights and What Do Estate Trustees Need to Know" (2019), 38 *ETPJ* 328.

²⁷ *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2016, S.O. 2016, c. 23 - Bill 28.

4. A court has made a declaration under section 12 of the *Children's Law Reform Act* establishing the deceased person's parentage of the posthumously-conceived child. 2016, c.23, s.71 (6).

Estate Trustees should take note of this amendment and include a beneficiary conceived and born posthumously in their scope when searching for beneficiaries of an estate.

6. ONCE IDENTIFIED: HOW TO LOCATE THE BENEFICIARIES?

Once you have identified any beneficiaries and know their name(s), how do you find them? There are options, but a simple Google search, Canada 411 search, or social media search may be successful.

An Estate Trustee should also consider advertising online, in newspapers located where the deceased resided, where the next-of kin are likely to 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 (as high as 40%) of their inheritance. There was even a TV series called "Heir Hunters,"²⁸ that appeared on BBC from 2007-2017 that 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.

An Estate Trustee could also consider hiring a private investigator to locate the missing individual. However, once again, consider the reasonability of the cost involved, and keep records of the efforts and all the results of the private investigator. The responsibility for

²⁸ See https://en.wikipedia.org/wiki/Heir_Hunters.

conducting due diligence in the search for the missing beneficiary still resides with the estate trustee.

Consider also checking the collections of the “Archives of Ontario”²⁹ and “The Library and Archives of Canada”³⁰.

7. MISSING BENEFICIARIES, NO DEATH CERTIFICATE: NOW WHAT?

An 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?

7.1 *Declarations of Death Act, 2002, S.O. 2002, c. 14, Sched.*

Pursuant to the *Declarations of Death Act, 2002*³¹, an “interested person”, which includes an Estate Trustee named in that 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 section 2(3) of the *Declarations of Death Act, 2002, supra*, the Court is authorized to declare that an individual has died if the person disappeared “in circumstances of peril,” or, if the person has disappeared for seven years or more. If an Estate Trustee believes the missing beneficiary has deceased and wishes to pursue an Application to have them declared dead under section 2(3), then on such an application, the Court must be satisfied that:

²⁹ See <http://www.archives.gov.on.ca/en/index.aspx>.

³⁰ See <http://www.bac-lac.gc.ca/eng/Pages/home.aspx>.

³¹ *Declarations of Death Act, 2002, S.O. 2002, c. 14, Sched.*

- ❖ the individual has disappeared in circumstances of peril;
- ❖ the applicant has not heard of or from the individual since the disappearance;
- ❖ to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual since the disappearance;
- ❖ the applicant has no reason to believe that the individual is alive; and
- ❖ there is sufficient evidence to find that the individual is dead.³²

OR

- ❖ the individual has been absent for at least seven years;
- ❖ the applicant has not heard of or from the individual during the seven-year period;
- ❖ to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual during the seven-year period;
- ❖ the applicant has no reason to believe that the individual is alive; and
- ❖ there is sufficient evidence to find that the individual is dead.³³

7.2 Absentees Act, R.S.O. 1990, c. A.3

Under the *Absentees Act*³⁴, an “absentee” is 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 application, the Court may declare the person an “absentee.” Such an application may be made by various individuals including next of kin, a creditor, married spouse or “any other person.”³⁵

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*³⁶. The committee is also specifically authorized to expend

³² *Ibid*, s. 2(4).

³³ *Ibid*, s. 2(5).

³⁴ *Absentees Act*, R.S.O. 1990, c. A.3 [*Absentees Act*].

³⁵ *Ibid*, s. 2(2).

³⁶ *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 [*SDA*].

monies for the purposes of locating the absentee and in ascertaining whether he or she is alive or dead.³⁷

7.3 Declarations of Death Act, 2002 and Absentees Act in the Case Law

Examples of applications under the *Declarations of Death Act, 2002, supra*, and the *Absentees Act, supra*, follow.

***Wasylyk v. Wasylyk*, 2012 ONSC 7029**

For a detailed exploration of the history of making a declaration under the *Declarations of Death Act, supra*, the case of *Wasylyk v. Wasylyk*³⁸ is of assistance. 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 for a declaration under the *Declarations of Death Act, 2002, supra*, 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 preferential share 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 made 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 "[t]hus, 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 [of death] be a wealthy mind-reader' ... it only makes sense that the facts surrounding the

³⁷ *Absentees Act, supra* note 34, ss 6–7.

³⁸ *Wasylyk v. Wasylyk*, 2012 ONSC 7029 (CanLII) [*Wasylyk*].

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)."³⁹

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 making some phone calls to the United States). The investigator concluded that it was "quite possible that Mr. Wasylyk had 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 had he been under the ministry [of Corrections] control, *recently*" [emphasis added].

Justice Morgan found that while Michael clearly vanished from his family and home, the circumstances of his departure in 1996 left open questions and his actions suggested "flight" rather than "death." The private investigator's investigation was not thorough as 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 and 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, some follow-up questions of title to Michael's house and 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.

³⁹ *Ibid*, at para 13.

Puffer v. The Public Guardian and Trustee, 2012 ONSC 3579

The decision *Puffer v. The Public Guardian and Trustee*⁴⁰ details a “reasonable” yet unsuccessful application under the *Declaration of Death Act, 2002, supra*. 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 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, sleeping bag and clothes. It was not locked. The police concluded that with the arrangement of the seats and the shape “of the ark of sand” in the vehicle 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, 2002, supra*, 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 finding that reasonable inquiries were made and that neither the

⁴⁰ *Puffer v The Public Guardian and Trustee, 2012 ONSC 3579 (CanLII) [Puffer]*.

applicant, nor any other person [had] heard of or from Robert,” 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 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 that 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*⁴¹, 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, supra*, 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

⁴¹ *Poole v Poole* 2008 CarswellOnt 4103 (SC) [*Poole*].

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.⁴²

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*,⁴³ and appointed his brother as committee of his property.

***Re Lu*, 2008 CanLII 46130 (ON SC)**

In *Lu (Re)*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. He also missed several important holidays with the family which was atypical for him. In the application, the wife filed a newspaper article as part of her evidence that suggested 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.

Justice Brown (as he then was) was satisfied that "[t]he evidence demonstrates that due and satisfactory inquiry" had been made into Mr. Lu's whereabouts, that he had disappeared, his whereabouts are unknown and there is 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*, *supra*, "is not intended to cover cases in which a man for his own purposes conceals himself."⁴⁵ For example, this was the case of 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

⁴² *Puffer*, *supra* note 40.

⁴³ *Absentees Act*, *supra* note 34.

⁴⁴ *Lu (Re)*, 2008 CanLII 46130 (ON SC) [*Lu*].

⁴⁵ *Re McCarthy*, 5 OLR 482 (CA) at para 10.

names, and were happily living in another country, and did not realize that they had been reported missing.⁴⁶

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

An Estate Trustee may have to consider bringing an application for advice and directions from the Court and obtaining the protection of a court order before distributing the assets of an estate when a beneficiary or beneficiaries cannot be identified or located.

An application to ascertain the 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 sub-Rules 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.

7.5 “Benjamin Orders”

A Benjamin Order is derived from the Chancery decision in, *Neville v. Benjamin*⁴⁸. In that case, the testator had 13 children, 12 of which survived him with one, Philip, having disappeared while on vacation after he was suspected of having embezzled money from his employer. At issue was whether Philip's disappearance was *akin to death* as to allow the Deceased's estate to distribute as if Philip had predeceased the testator. The Court

⁴⁶ See John Gibson, “Two Alberta Sisters Missing for Decades Found in the US” (March 7, 2017), CBC, online: <https://www.cbc.ca/news/canada/calgary/alberta-missing-women-found-lethbridge-hakze-sisters-police-missing-cold-case-1.4006836>.

⁴⁷ *Rules of Civil Procedure* RRO 1990 Reg 194 [*Rules of Civil Procedure*].

⁴⁸ *Neville v Benjamin*, [1902] 1 Ch. 723.

noted that the onus to prove that Philip had *survived* the testator was on Philip's administrator and that this burden had not been discharged in the circumstances. Furthermore, the Court opined that there was no reason why Philip would continue to absent himself in the circumstances. Accordingly, an order was made which permitted the distribution of the estate as if Philip had predeceased the testator.

Neville v. Benjamin, supra, has been followed in other cases including in, *Re Green's Will Trusts*⁴⁹, and in the Canadian decision *Wieckoski (Re)*⁵⁰, discussed below.

***Wieckoski (Re)*, 2013 SKQB 297**

In *Wieckoski, supra*, 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 ground that no such issue now existed. The Court opined that "the sufficiency of enquiries that have been made to ascertain or locate beneficiaries will depend on the facts. The circumstances that may inform that decision may include, but not be limited to, the following:

- 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 in the case of the question as to whether Chester died without issue or whether Ms. Wieckoski was survived by her parents, any sibling or nieces and nephews - 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?

⁴⁹ *Re Green's Will Trusts*, [1985] 3 All ER 455.

⁵⁰ *Wieckoski (Re)*, 2013 SKQB 297 (CanLII) [*Wieckoski*].

- 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

Ultimately, the Court was satisfied that sufficient enquiries had been made to identify the beneficiaries of the estate. A research firm had been retained and there appeared to “be no issues that have not been investigated by well qualified genealogists.”⁵² Enquiries were made in all “appropriate jurisdictions, including extensive searches in Poland.”⁵³ 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 *Re Benjamin*,”⁵⁴ 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*, 2014 ONSC 2355**

The case *Kapousouzian Estate v. Spiak*⁵⁵ involved a motion for the opinion, advice and direction of the court by an estate trustee in the following circumstances: the named beneficiaries, all of whom were siblings, were cousins of the deceased; three of the four beneficiaries predeceased the testator; and the testator’s Will did not provide for a gift over in the event any of the four named beneficiaries predeceased the testator.

⁵¹ *Ibid*, at para 23.

⁵² *Ibid*, at para 24.

⁵³ *Ibid*.

⁵⁴ *Ibid*, at para 25.

⁵⁵ *Kapousouzian Estate v Spiak*, 2014 ONSC 2355 [*Kapousouzian*].

It is a general rule that when a residuary gift lapses, it passes on an intestacy. This rule is subject to two exceptions: (1) when the residuary gift is a class gift; and, (2) when there is a contrary intention found in the Will. In *Kapousouzian, supra*, 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 it 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 *Succession Law Reform Act, supra*, the residue was to be divided “among the next of kin of equal degree of consanguinity to the intestate equally without representation.”⁵⁶

In *Kapousouzian, supra*, 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 results.”⁵⁷

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.”⁵⁸ The Court was also satisfied that this was an appropriate circumstance to make a Benjamin Order permitting a distribution of the

⁵⁶ *Ibid*, at para 28.

⁵⁷ *Ibid*, at para 9.

⁵⁸ *Ibid*, at para 31.

intestate portions of the estate to the Bulgarian cousins equally on the basis that they were the only surviving next of kin.

***Steele v. Smith*, 2018 ONSC 4601**

In *Steele v. Smith*⁵⁹, the Estate Trustee brought 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, *The Principles of Equity and Trusts*⁶⁰, 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.⁶¹

In *Steele v. Smith*, *supra*, the testator left 60% of her estate to be divided equally among her three brothers and, should they pre-decease 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

⁵⁹ *Steele v Smith* 2018 ONSC 4601 [*Steele*].

⁶⁰ Graham Virgo, *The Principles of Equity and Trusts*, 3rd ed (Oxford University Press, Oxford, 2012).

⁶¹ *Steele*, *supra* note 59 at para 7.

included: on-line 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 PGT 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 PGT 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 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."⁶² 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."⁶³

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 ever be claimed."⁶⁴

***Stoyan v. Johnson*, 2021 ONSC 7483**

In *Stoyan v. Johnson*⁶⁵, the applicant Estate Trustee sought, amongst other relief, a Benjamin Order. While this decision does not break new ground in so far as the law of unascertained beneficiaries is concerned it does, however, reiterate the importance of

⁶² *Ibid*, at para 10.

⁶³ *Ibid*, at para 10.

⁶⁴ *Ibid*, at para 11.

⁶⁵ 2021 ONSC 7483 [*Stoyan*].

exhaustive searches for unascertained beneficiaries and the obligations on Estate Trustees to pursue them.

The case concerns locating the heirs of the deceased, Thiodore Moiseas, who died having made a Will. The beneficiaries named in the Will included his spouse and son, both of whom predeceased the testator. In the absence of named heirs, the deceased's brother and sister, Anthony Stoyan and Doris Johnson, came forward and claimed to be the testator's first cousins and only next of kin.

There was a pending power of sale on the deceased's residence, and, as a result, Anthony sought and was granted on an urgent basis, a Certificate of Appointment of Estate Trustee Without a Will. Unfortunately, Anthony died leaving his applicant daughter to seek appointment as succeeding Estate Trustee Without a Will and a Benjamin Order declaring, amongst other relief, that the only beneficiaries were the late Anthony and Doris, and an order that the Estate Trustee may distribute the estate to Anthony's estate and Doris in equal shares. The court declined to grant such relief.

The Court in *Stoyan, supra*, considered that at the time of death it was not known for certain whether the deceased was survived by next of kin for the purpose of distributing his estate. The deceased emigrated from Europe and was thought to have remaining family living in Greece and/or Macedonia. As a result, the Court held that the Estate Trustee ought to have searched abroad.

The applicant was hesitant to advertise abroad and claimed there was no way to verify any response received. The Court held that in this case, the Estate Trustee did not take enough action. That's not to say that the Estate Trustee did not take *any* action, in fact, it was reported that the Estate Trustee undertook the following steps:

- ❖ Placing multiple ads in various local newspapers in Macedonia looking for "information about the family of [the Deceased] ... from Toronto, Canada, who was born in the village of Antarctica, Florina",⁶⁶

⁶⁶ *Ibid*, at para 16.

- ❖ Attempting to retain a genealogy agency to research the deceased's family tree; and,
- ❖ The Estate Trustee "researched family records, and consulted with extended family and relatives"⁶⁷ in order to conclude who she felt were the only beneficiaries. It was noted that the family records include published obituaries and marriage records.

Unfortunately, the searches undertaken by the Estate Trustee did not result in any found or ascertained beneficiaries. When assessing the above, the Court concluded that these steps were in fact insufficient to support the issuance of a Benjamin Order.

The Court concluded:

It would be premature at this point in the proceeding for the court to declare, by way of a Benjamin Order, that any potential heir of the Estate, who would take on an intestacy, has predeceased the Deceased. In my view, there remain many unanswered questions respecting the Deceased's next of kin and rightful heirs to the Estate. This is not surprising given that there has been no proper tracing of the Deceased's genealogy. For example, reasonable efforts will need to be made to ascertain whether the Deceased's son William died leaving issue who survived him; whether the Deceased's father survived the Deceased; who the Deceased's aunts and uncles are and whether any of them survived the Deceased; and who the children of the Deceased's aunts and uncles are and whether any of them survived the Deceased. This information, to the extent it can be found, will be of great assistance in determining the rightful heirs of the Estate.⁶⁸

8. CONCLUSION

The steps that an Estate Trustee must take to identify and locate missing beneficiaries will depend on the facts and circumstances of each individual case. However, the Estate Trustee must clearly establish the steps taken, which means documenting all efforts made in order to prove that reasonable efforts were exhausted and that there was no negligence

⁶⁷ *Ibid*, at para 30(c).

⁶⁸ *Ibid*, at para 74.

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, 2002, supra*, or *Absentees Act, supra*, the Estate Trustee must be able to provide evidence of the searches conducted and investigative tools used.

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

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